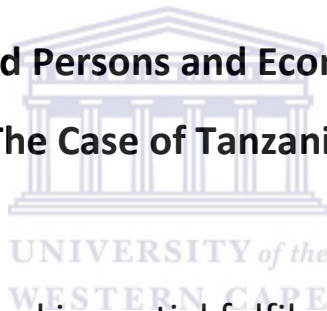


UNIVERSITY OF THE WESTERN CAPE



FACULTY OF LAW

**Politically Exposed Persons and Economic Criminality:
The Case of Tanzania**



Research Paper submitted in partial fulfilment of the requirements
for the LLM

Esther Mlingwa

Student Number: 3569002

Supervisor: Professor Raymond Koen

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Table of Contents

Declaration	iv
Acknowledgments	v
List of Abbreviations and Acronyms	vi
Key Words.....	viii
Chapter One.....	1
General Introduction	1
1.1 Background	1
1.2 Defining a Politically Exposed Person	2
1.2.1 Foreign PEPs	2
1.2.2 Domestic PEPs	2
1.2.3 PEPs of International Organisations.....	3
1.2.4 Family Members and Close Associates	3
1.3 Risks Posed by PEPs	3
1.3.1 PEPs and Corruption.....	4
1.3.2 PEPs and Money Laundering.....	5
1.3.3 Money Laundering Typologies Employed by PEPs.....	6
1.4 Initiatives to Manage PEPs.....	7
1.4.1 International Initiatives.....	7
1.4.2 Domestic Initiatives.....	8
1.5 Statement of the Problem	8
1.6 Research Questions	12
1.7 Scope of the Research	12
1.8 Methodology.....	12
1.9 Chapter outline	13
1.10 Concluding Remarks.....	13
Chapter Two.....	15
International Legal Framework for Managing PEPs	15
2.1 Introduction	15
2.2 United Nations Convention against Corruption	15
2.3 Preventing Corruption	16
2.3.1 PEPs and Public Office.....	16
2.3.2 PEPs and Public Procurement	18
2.3.3 Measures to Strengthen the Judiciary	19
2.4 Criminalisation	20
2.4.1 Bribery	21

2.4.2	Diversion of Property	21
2.4.3	Trading in Influence and Abuse of Functions	22
2.4.4	Illicit Enrichment.....	23
2.4.5	Money Laundering	24
2.5	Enhanced Scrutiny	25
2.6	Financial disclosures	26
2.7	Recovering Stolen Assets	27
2.8	FATF Recommendations	28
2.8.1	Financial Institutions	29
2.8.2	Designated Non-Financial Businesses and Professions.....	29
2.8.3	Other Relevant FATF Requirements	30
2.9	Practical challenges.....	31
2.9.1	Immunities of PEPs.....	31
2.9.2	Bank Secrecy Laws.....	33
2.9.3	Variations in the Definition of PEPs.....	33
2.10	Concluding remarks	34
Chapter Three		35
Domestic Legal Measures for Managing PEPs.....		35
3.1	Introduction	35
3.2	Risks Associated with PEPs in Tanzania	35
3.2.1	Corruption	35
3.2.2	Money Laundering	36
3.3	Legal Measures	37
3.3.1	The PEP Definition	37
3.3.2	Application of PEP Requirements.....	38
3.3.3	Duration of PEP status.....	39
3.3.4	Limitations.....	39
3.4	Other AML Measures.....	40
3.4.1	Legal Persons and Legal Arrangements.....	40
3.4.2	Cash Smuggling.....	42
3.4.3	Shell banks and Corresponding Banks.....	42
3.5	Criminalisation Measures	43
3.5.1	Bribery	43
3.5.2	Embezzlement, Misappropriation and Diversion.....	44
3.5.3	Abuse of Functions	45
3.5.4	Trading in Influence.....	45
3.5.5	Illicit Enrichment.....	46
3.5.6	Money Laundering	47
3.6	Strategies to Promote Ethics	48
3.7	Public Procurement	49
3.8	Assets Forfeiture	50
3.8.1	Proceeds of Crime Act	50
3.8.2	Other Supporting Legislation.....	51

3.9	PEP Measures in the Judicial Services	51
3.10	Enforcement Concerns	52
3.10.1	Bank Secrecy.....	52
3.10.2	Immunities.....	53
3.11	Concluding Remarks.....	54
Chapter Four		55
Institutional Framework for Managing PEPs.....		55
4.1	Introduction	55
4.2	Financial Intelligence Unit.....	55
4.2.1	The FIU and PEP Management.....	55
4.2.2	Limitations of the FIU	56
4.3	Prevention and Combating of Corruption Bureau.....	57
4.3.1	The PCCB and PEP Management.....	58
4.3.2	Limitations of the PCCB.....	59
4.4	Other Complementary Institutions.....	60
4.4.1	Office of the Director of Public Prosecutions.....	60
4.4.2	Attorney General’s Chambers.....	60
4.4.3	Police Force	60
4.4.4	Bank of Tanzania	61
4.4.5	Public Procurement Regulatory Authority	62
4.4.6	National Audit Office.....	62
4.4.7	Permanent Commission of Enquiry and Public Leaders’ Ethics Secretariat.....	63
4.5	Inter-Agency International Co-operation	63
4.6	Concluding Remarks.....	64
Chapter Five		65
Conclusion and Recommendations		65
5.1	General Conclusion	65
5.2	Recommendations	67
5.2.1	Amend Anti-Money Laundering Laws	67
5.2.2	Amend Anti-Corruption Laws.....	67
5.2.3	Civil Forfeiture	67
5.2.4	Enhance the Assets Declaration System	68
5.2.5	Strengthen Supervisory Measures	68
5.2.6	Political Will.....	68
5.2.7	Institutional Co-operation	69
5.2.8	Public Participation.....	69
Bibliography		70

Declaration

I, **Esther Mlingwa**, declare that ***Politically Exposed Persons and Economic Criminality: The Case of Tanzania*** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signature:

Date:

Supervisor: Professor RA Koen

Signature:

Date:



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List of Abbreviations and Acronyms

AML	:	Anti-Money Laundering
AML/CFT	:	Anti-Money Laundering and Combating the Financing of Terrorism
AMLA	:	Anti-Money Laundering Act
AMLD	:	Anti Money Laundering Directive
BFI	:	Banking and Financial Institutions Act
BOT	:	Bank of Tanzania
BRELA	:	Business Registration and Licensing Authority
CAG	:	Controller and Auditor General
CDD	:	Customer Due Diligence
DNFBP	:	Designated Non-Financial Businesses and Professions
DPP	:	Director of Public Prosecutions
EDD	:	Enhanced Due Diligence
ES	:	Ethics Secretariat
ESAAMLG	:	Eastern and Southern Africa Anti-Money Laundering Group
FATF	:	Financial Action Task Force
FIC	:	Financial Intelligence Centre
FinCEN	:	Financial Crimes Enforcement Network
FIU	:	Financial Intelligence Unit
IFF	:	Illicit Financial Flows
KYC	:	Know Your Customer
ML	:	Money Laundering
NGO	:	Non-Governmental Organisation
OECD	:	Organisation for Economic Co-operation and Development
PCCA	:	Prevention and Combating of Corruption Act
PCCB	:	Prevention and Combating of Corruption Bureau
PEP	:	Politically Exposed Person
POCA	:	Proceeds of Crime Act
RES	:	Resolution
SFO	:	Serious Fraud Office
STR	:	Suspicious Transaction Report
UNCAC	:	United Nations Convention against Corruption

UNGA : United Nations General Assembly
UNODC : United Nations Office on Drugs and Crime
URT : United Republic of Tanzania



Key Words

Anti-Corruption

Anti-Money Laundering

Economic Criminality

Enhanced Due Diligence

FATF Recommendations

Know Your Customer

Politically Exposed Persons

Predicate Offence

Proceeds of Crime

Risk-Based Approach



Chapter One

General Introduction

1.1 Background

It is estimated that each year between \$20 billion and \$40 billion are lost from the economies of developing countries as a result of political corruption.¹ In Africa, corrupt practices, mostly by government officials, have facilitated illicit financial flows, which cost the continent more than \$50 billion annually.² This state of affairs raises fundamental questions about the management of senior government officials, also known as politically exposed persons (hereafter referred to as PEPs).

The involvement of public officials in economic crimes comes with high-priced consequences for banks, the citizenry and the country in general. These consequences include economic crises due to bankruptcy, loss of investments, and sometimes civil unrest.³ Banks and other financial institutions which unknowingly facilitate corrupt activity may incur heavy fines and a damaged reputation, and some may end up having to close their doors.⁴ Also, the citizenry may begin to perceive all public officials as criminals.

Various studies indicate that although corrupt PEPs are not the only cause of slow development, they have a significant impact in determining the pace of economic growth of any country.⁵ It is important, then, to understand who PEPs are, what risks they pose, what crimes they commit, and to what extent their criminal behaviour affects development at the domestic and international levels.

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- 1 Report of UN Expert Group Meeting on Asset Tracing and Recovery (2012) 3.
 - 2 See Report of AU High Level Panel (2015).
 - 3 Bartlett (2002) 5.
 - 4 World-Check (2008) 9.
 - 5 World Bank World Development Indicators (2001).

1.2 Defining a Politically Exposed Person

The notion of a PEP was developed by the international financial community in relation to the challenges posed by senior public officials for anti-money laundering laws (AML).⁶ There is no universally agreed definition of a PEP, but for the purposes of this research paper the FATF definition suffices. According to the FATF, the term makes reference to individuals entrusted with prominent public functions, such as former and current senior government officials, their family members, and close associates.⁷ However, this does not include middle-ranking and junior officials.⁸ There are three categories of senior government officials that may be classified as PEPs, as discussed below.

1.2.1 Foreign PEPs

A foreign PEP is an individual who is or has been entrusted with prominent public functions by a foreign country.⁹ This includes a head of a state or of government, a senior political, judicial or military official, a senior executive of a state-owned corporation, or a senior official of a political party.¹⁰ Foreign PEPs pose a high risk of transferring the proceeds of crime from their home states into the financial systems of other states.¹¹ Such transnational transfers are done to avoid law enforcement agencies in their home states.

1.2.2 Domestic PEPs

A domestic PEP is an individual who is or has been entrusted domestically with prominent public functions.¹² This includes a head of state or of government, a government minister, a senior political figure and a senior judicial or military officer.¹³

6 Chaikin & Sharman (2009) 83.

7 See General Glossary to the FATF Recommendations 2012.

8 See General Glossary to the FATF Recommendations 2012.

9 See General Glossary to the FATF Recommendations 2012.

10 See General Glossary to the FATF Recommendations 2012.

11 FATF Guidance on PEPs (2013).

12 See General Glossary to the FATF Recommendations 2012.

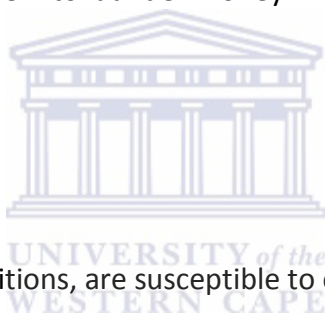
13 See General Glossary to the FATF Recommendations 2012.

1.2.3 PEPs of International Organisations

A PEP of an international organisation is a person who is or has been entrusted with a prominent function by such organisation.¹⁴ Such a person would be part of the management of the organisation, for example, directors, deputy directors and board members.¹⁵

1.2.4 Family Members and Close Associates

The idea of a PEP encompasses family members and close associates. Family members are related to PEPs directly by consanguinity or through marriage or another civil form of partnership.¹⁶ Close associates are not family, but are closely connected to a PEP socially or professionally.¹⁷ Both family members and close associates become persons of concern because PEPs usually make use them to launder money.



1.3 Risks Posed by PEPs

PEPs, by virtue of their public positions, are susceptible to economic criminality in the absence of strict and proper regulations. Their access to public funds and assets creates opportunities for corruption and other crimes, making them potential holders of illicit funds.¹⁸ To avoid drawing the attention of law enforcement agencies and the general public as holders of illicit funds, corrupt PEPs will resort to money laundering in an effort to “clean” the funds.¹⁹

A considerable number of PEPs have been involved in economic crimes such as tax fraud, forgery, election fraud, theft, corruption and money laundering. The quintessential examples include: Ferdinand Marcos, former president of the Philippines, who laundered illicit funds into offshore bank accounts, causing huge losses to the Philippines

14 See General Glossary to the FATF Recommendations 2012.

15 See General Glossary to the FATF Recommendations 2012.

16 FATF Guidance on PEPs (2013) 5.

17 FATF Guidance on PEPs (2013) 5.

18 FATF Report (2003-2004) 19.

19 FATF Report (2003-2004) 19.

government;²⁰ Sani Abacha, former president of Nigeria, who used a state-run vaccination scheme to launder money from Nigeria;²¹ and General Augusto Pinochet, former president of Chile, who hid his illicit funds with Riggs Bank in the United States.²²

The fact that some PEPs engage in criminal activity, however, does not mean that every person holding a prominent government position is a criminal. In fact, the main aim of the PEP concept, as part of AML, is to alert financial institutions to the kind of clients with whom they are dealing, so that they may conduct enhanced scrutiny of such clients and prevent abuse of the financial system.²³ The risk associated with PEPs relates primarily to corruption and laundering of the proceeds of corruption. It is fitting, then, to examine these two crimes.

1.3.1 PEPs and Corruption

There are several definitions of corruption. According to the World Bank corruption is “the abuse of public office for private gain”.²⁴ This definition, however, is criticised for not including private sector corruption.²⁵ A broader definition of corruption has been formulated by Transparency International, namely, “the misuse of entrusted power for private gain”.²⁶ Generally, at the heart of any corruption definition there ought to be an abuse of a position, whether public or private, that gives unfair advantage to an individual.²⁷

PEPs are especially susceptible to corruption because of the possibility that they may abuse their position and influence to carry out such corrupt acts as accepting and extorting bribes, misappropriating state assets and embezzlement.²⁸

20 Chaikin & Sharman (2009a) 27-45.

21 Joyce (2005) 82.

22 Simons (2013) 255-256.

23 Greenberg *et al* (2010) 3.

24 World Bank (1997) 8.

25 Chaikin & Sharman (2009) 8.

26 Transparency International-What is Corruption?, available at <http://www.transparency.org/what-is-corruption> (accessed on 10 May 2015).

27 Johnston (2005) 11-12.

28 FATF (2011) 16.

Damage caused by corrupt PEPs can have a serious socio-economic impact upon a country.²⁹ An act of corruption by a single PEP could result in the loss of millions, or even billions, to the extent of affecting the national budget. For example, the brother of former Mexican president Carlo Salina acquired approximately \$120 million as a result of corruption. The World Bank estimated that this amount was sufficient to pay for the annual health care of more than 594000 Mexican citizens.³⁰ Similarly, the U4 Anti- Corruption Resource Centre reported that 25 per cent of the GDP of African states is lost to corruption every year.³¹ Such losses, damage the economies of these African states significantly.

Moreover, corruption by PEPs affects the global financial system. This is because corruption transcends state borders to distort the world economy.³² Kofi Annan, former United Nations Secretary General, captured the major effects of corruption well in a speech on the adoption of the UNCAC in 2003. An important part of his speech reads as follows:

“Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.”³³

1.3.2 PEPs and Money Laundering

Money laundering is a process of disguising the illicit origin of assets or funds.³⁴ The process involves three stages. First is the placement stage, at which proceeds of crime are placed in the financial system through such avenues as bank deposits, smuggling into safe havens, and trust accounts.³⁵ Second is the layering stage, which involves a series of transactions that move the proceeds of crime within the financial system through legitimate accounts, thus separating them from their illicit origin.³⁶ Third is the integration stage, during which the proceeds of crime are invested in assets or other legitimate businesses.³⁷

29 See UNDOC Global Study on the Transfer of Funds of Illicit Origin (2002).

30 World Development Indicators (2001) 99.

31 U4 Anti-Corruption Resource Centre (2007).

32 Mauro (1998) 12.

33 Speech of the Secretary-General on The adoption of the Convention against Corruption, available at <https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html> (accessed on 11 May 2015).

34 Unger (2007) 15.

35 Unger (2007) 89-91.

36 Unger (2007) 93-100.

37 Unger (2000)101-103.

PEPs are considered to carry a high money laundering risk because of the possibility that they may use the domestic and international financial systems to launder criminal proceeds.³⁸ The Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth points out that the actions of corrupt PEPs are futile without their having the ability to disguise and move the proceeds of the crime.³⁹

1.3.3 Money Laundering Typologies Employed by PEPs

Money laundering patterns among corrupt PEPs are not very different from other money launderers. PEPs also have used the domestic and international financial system to launder criminal proceeds, mainly through banks.⁴⁰ Overtime, however, new methods emerged and these involved using family members and close associates in complex business arrangements such as corporate vehicles and trusts.⁴¹ In some cases, corrupt PEPs have utilised the services of gatekeepers such as lawyers and accountants, and have used real estate, insurance, precious metal, jewels and art to launder corrupt proceeds.⁴² The impact of money laundering is summarised as follows in the Global Study on the Transfer of Funds of Illicit Origin:

“The exporting of funds derived from corruption has a number of severe consequences for the country of origin. It undermines foreign aid, drains currency reserves, reduces the tax base, harms competition, undermines free trade and increases poverty levels. Corruption and laundering can therefore operate in tandem to limit every advance (social, economic or political) of countries, especially developing countries and countries with economies in transition.”⁴³

38 FATF (2012) 8-9.

39 Nyanga Declaration 2001, available at http://www1.transparency.org/pressreleases_archive/2001/nyanga_declaration.html (accessed on 7 April 2015).

40 FATF (2011) 18-19.

41 FATF (2011) 18-19.

42 FATF (2011) 20.

43 See Global Study on The Transfer of Funds of Illicit Origin (2002).

1.4 Initiatives to Manage PEPs

1.4.1 International Initiatives

At the international level, efforts aiming at limiting the risks posed by PEPs include the adoption of the United Nations Convention against Corruption (UNCAC) in 2003.⁴⁴ Similar efforts were undertaken by intergovernmental bodies. For example, the Financial Action Task Force (FATF) issued recommendations on enhanced due diligence for PEPs.⁴⁵ In response to the FATF recommendations, in 2005 the European Union issued the Third Anti-Money Laundering Directive (3rd AMLD) to address the PEP challenge.⁴⁶

Other institutions are concerned actively with PEPs. For example, in 2001 the Basel Committee on Banking Supervision provided guidelines for distinct customer due diligence for PEPs.⁴⁷ In a similar initiative, the Wolfsberg Group of Banks issued a guidance on PEPs in 2003, which was revised in 2008.⁴⁸

These international strategies essentially require states to include PEP management measures in their domestic legal frameworks.⁴⁹ Banks and other financial institutions are required to adopt a risk-based approach when doing business with PEPs.⁵⁰ This approach encompasses the know-your-customer (KYC) procedures, and the application of enhanced due diligence to PEPs as high risk customers.⁵¹ Steps to be taken include identifying the sources of income of such clients as well as seeking senior management approval for establishing a business relationship with them, and conducting on-going monitoring of their accounts.⁵²

44 Articles 2(1), 2(3) & 52 of UNCAC.

45 Recommendations 10, 12 & 22.

46 Chaikin & Sharman (2009) 83.

47 Basel Committee on Banking Supervision Customer Due Diligence for Banks (2001), available at <http://www.bis.org/publ/bcbs85.pdf> (accessed on 31 March 2015).

48 Wolfsberg AML Principles, available at <http://www.wolfsberg-principles.com> (accessed on 31 March 2015).

49 Articles 2(1), 2(3)&52 of UNCAC.

50 See FATF Guidance on PEPs (2013).

51 Choo (2008) 375.

52 Chaikin & Sharman (2009) 105.

1.4.2 Domestic Initiatives

The international efforts were accompanied by measures at the domestic level. Various countries enacted legislation in compliance with the global AML standards. An example of this is the South African Financial Intelligence Centre Act (FICA), which was enacted in 2001.⁵³

Notwithstanding the legal developments at the international and domestic levels, effective implementation of the PEP requirements remains a worldwide challenge. The Stolen Assets Recovery Initiative (StAR) report on compliance with the PEP requirements revealed implementation deficits in many jurisdictions.⁵⁴ This shortfall was due to the lack of an enforceable legal or regulatory framework, lack of political will, variations in international standards, and technical challenges, including the challenge of defining a PEP.⁵⁵ In the light of these findings, further research is needed in this area to find solutions to the PEP challenge.



1.5 Statement of the Problem

Tanzania is a developing country located in East Africa.⁵⁶ Its geographical location makes the country a potential route for human and drug trafficking.⁵⁷ Also, wildlife and natural forest reserves attract illegal activities such as poaching and logging, which generate dirty money.⁵⁸ Proceeds of crime enter the financial system through uncontrolled cash transactions.⁵⁹ This is possible because the country's economy is largely cash-based, as a result of which money laundering activities are difficult to detect.⁶⁰

53 Financial Intelligence Centre Act No 38 of 2001.

54 Greenberg *et al* (2010) 7-8.

55 Greenberg *et al* (2010) 13-19.

56 World Map/Tanzania Map/Where is Tanzania, available at <http://www.mapsofworld.com/tanzania/tanzania-location-map.html> (accessed on 10 May 2015).

57 UNODC (2013) 19-24.

58 Mniwasa (2004) 48.

59 ESAAMLG (2009) 14.

60 ESAAMLG (2009) 14.

To cope with these vulnerabilities, parliament enacted a number of laws. The earliest of these is the Proceeds of Crime Act of 1991,⁶¹ which introduced the term money laundering into the Tanzanian legal system. Following the adoption of the United Nations Convention against Transnational Organised Crimes (UNTOC),⁶² the Bank of Tanzania issued a circular that required banks and financial institutions to report any suspicious transactions to it.⁶³ This was followed by the Anti-Money Laundering Act (AML Act),⁶⁴ enacted in 2006 and revised in 2012.⁶⁵ With regard to corruption, the Prevention and Combating of Corruption Act was enacted in 2007,⁶⁶ in compliance with UNCAC and the African Union Convention on Preventing and Combating Corruption.

These legislative developments are supported by statutory institutions such as the Financial Intelligence Unit (FIU) and the Prevention and Combating of Corruption Bureau (PCCB). Generally, these two regulatory bodies deal with money laundering and corruption respectively. They are complemented by other responsible agencies, including the Bank of Tanzania, the police force, the office of the Director of Public Prosecutions (DPP) and the office of the Controller and Auditor General (CAG).

However, the fight against money laundering and corruption remains challenging. For example, Tanzania has experienced several crimes committed by public officials who fall within the PEP category. Such crimes include illicit enrichment, embezzlement and money laundering.⁶⁷ With regard to AML compliance, the current laws provide for banks and financial institutions as active enforcers of the PEP requirements.⁶⁸ To a large extent, however, they are not successful in dealing with PEPs.⁶⁹ What is more, the applicable legislation is deficient. For example, the Anti-Money Laundering Act recognises only foreign

61 Proceeds of Crime Act No 256 of 1991.

62 Adopted on 15 November 2000.

63 Circular No 8 of 2002.

64 Anti-Money Laundering Act No 423 of 2006.

65 Anti-Money Laundering (Amendment) Act of 2012.

66 Prevention and Combating of Corruption Act No 11 of 2007.

67 Tanzania Overview of Corruption and Anti-corruption (2014), available at http://transparency.org/files/content/corruptionqas/country_profile_Tanzania2014.pdf (accessed on 29 March 2015).

68 Section 15(b) of the AML Act.

69 ESAAMLG (2009) 17.

PEPs, while domestic PEPs continue unchecked.⁷⁰ Needless to say, persons holding senior government posts may be tempted to use these weaknesses to their own advantage.

Over the last few years, several corruption scandals have haunted the Tanzanian government. These include the multi-billion financial scandals facing the Bank of Tanzania, the Radar saga, the Richmond scandal, suspicious mining contracts, and many others.⁷¹ Following such events, citizens, media groups, non-governmental organisations and parliamentarians began to question the fiscal integrity of the government.

Serious allegations have been raised about the involvement of senior state officials in most of these scandals. For example, in 2014 the CAG's report revealed suspicious transactions from several banks involving senior public officials and politicians.⁷² The enhanced due diligence requirement was not adhered to in these transactions. Furthermore, a large amount of cash was paid to these officials, without the FIU being informed about the transaction, as required by the law.⁷³

The prevalence of corrupt activities among state officials has led to the loss of very large amounts of money through capital flight, tax losses, misallocation of resources and investment losses. Such losses undermine the country's development goals. For example, in 2013 it was estimated that twenty per cent of Tanzania development funds were lost to corruption.⁷⁴ With a situation like this, the alleviation of poverty, the provision of sufficient health care and education services, and the development of good infrastructure seem unachievable. This is a tragic misfortune for a country that is blessed with abundant resources and wealth.

70 Section 3 of the AML Act.

71 Onyango Emmanuel 'Bird's eye view of corruption scandals in Tanzania', available at <http://eonyango.blogspot.com/2008/06/birds-eye-view-of-corruption-scandals.html>(accessed on 12 May 2015).

72 See the CAG Report (2014).

73 See the CAG Report (2014).

74 *The Guardian reporter*, 9th June 2013, 'Corruption eats up 20pc of govt budget', available at <http://www.ippmedia.com/frontend/?l=55684>(accessed on 14 May 2015).

Hitherto, the government's response to the crisis has been slow. Only a few public officials have been prosecuted.⁷⁵ Also, there is little success in the tracing of corruption proceeds.⁷⁶ This suggests that most corruption proceeds are laundered successfully, and thus become extremely difficult to recover.

Against this background, it has to be concluded that there remain gaps in the country's legal and institutional anti-corruption framework.⁷⁷ The fact that illegal activities are carried out with the help of senior government officials poses a serious crisis of integrity for the government of Tanzania. It is also a sign that there is a dire need to examine critically the issue of PEPs in Tanzania.

This study, therefore, examines the relevant strategies against corrupt PEPs under the Tanzanian regime and assesses them against the relevant provisions of UNCAC and the relevant FATF recommendations. This is done with a view to understanding how the current domestic framework dealing with PEPs operates, and to suggesting improvements where necessary.

The study relies upon UNCAC because it is the only international convention that directly addresses the PEP problem.⁷⁸ Unlike the other instruments, UNCAC covers not only corruption but also money laundering,⁷⁹ the two crimes usually associated with PEPs. Also, the UNCAC provisions on money laundering are more extensive than those in other anti-corruption conventions.⁸⁰ The FATF recommendations have been chosen because they are considered as the global AML standards.⁸¹

The study addresses both anti-corruption and anti-money laundering measures. In many jurisdictions strategies against corrupt PEPs are failing because they are centred on the AML

75 Corruption, Tanzania – Is the war against Corruption in Tanzania joke? available at <http://dgtlubun2.tumblr.com/post/68744406183/is-the-war-against-corruption-in-tanzania-a-joke>(accessed on 15 May 2015).

76 allAfrica.com: Tanzania: EPA Scandal - No Trace of Tsh 90 Billion, available at <http://allafrica.com/stories/200807310099.html>(accessed 15 May 2015).

77 Bagenda (2003) 51.

78 Article 52 of UNCAC.

79 Para 2 of the Preamble to UNCAC and Articles 14, 23, 52 & 58 of UNCAC.

80 See Comparative Analysis: SADC Protocol against Corruption, AU Convention on Preventing and Combating Corruption, UN Convention on Preventing and Combating Corruption, available at <http://www.issafrika.org/pubs/Other/CorruptHandbookNov04/Contents.html> (accessed on 3 June 2015).

81 Blair & Brent (2008) 88.

regime. This approach fails to acknowledge that the criminality of PEPs goes beyond money laundering. An AML regime will detect and deter laundering activities, but will do little to prevent and fight corruption. An effective PEP control regime, therefore, must combine anti-corruption and anti-money laundering measures.

1.6 Research Questions

The basic research question is whether the Tanzanian laws relevant to PEPs are adequate? If this question is resolved in the negative, what needs to be done to remedy the inadequacies?

1.7 Scope of the Research

The study is focused on Tanzania mainland only. This is because a different legal framework exists in Zanzibar with respect to the research problem. Reference is made sometimes to other jurisdictions such the United States, the United Kingdom and South Africa, because these countries are regarded as having relatively comprehensive PEP regulations as compared to others. However, the study does not constitute a comparative analysis. These countries are mentioned only by way of example.

1.8 Methodology

This research is a qualitative desktop study, which will rely on both primary and secondary sources. It analyses these sources closely and critically in order to develop answers to the research questions.

1.9 Chapter outline

The study consists of five chapters. The content of the remaining chapters is described below.

Chapter Two

This chapter presents a detailed analysis of the international approach to PEPs in relation to economic criminality. It deals with the relationship between international measures to combat corruption under UNCAC and the PEP management regime under the FATF recommendations. This chapter examines these provisions, with the view to seeing how the anti-money laundering and anti-corruption frameworks can work together in dealing with PEPs.

Chapter Three

This chapter addresses the two research questions directly. It examines the legal regime in Tanzania insofar as PEPs are concerned, with a view to assessing its adequacy.

Chapter Four

This chapter examines the role supervisory bodies, regulatory authorities, law enforcement agencies, and other relevant institutions tasked with implementation of legislative measures against corrupt PEPs and the implementation challenges faced by these institutions.

Chapter Five

This chapter includes general concluding comments and recommendations emerging from the research.

1.10 Concluding Remarks

In summary, the evolution of the PEPs concept under the international legal framework was associated largely with anti-money laundering strategies aimed at regulating senior public officials who, from the experience of most countries, were especially susceptible to corruption and money laundering schemes. The economic criminality of PEPs has demonstrated a connection between the offences of corruption and money laundering. Any

PEP management strategy, therefore, must combine both anti-corruption and anti-money laundering measures. With regard to the challenges Tanzania still faces in the fight against money laundering and corruption, one of the most problematic areas is compliance with the PEPs requirements. The following chapter examines international laws and standards regulating PEPs.



Chapter Two

International Legal Framework for Managing PEPs

2.1 Introduction

This chapter explores the relationship between the measures to combat corruption in UNCAC and the PEP requirements in the FATF recommendations. These are examined with a view to understanding how the anti-money laundering framework and the anti-corruption framework can be used in tandem to deal with corrupt PEPs.

2.2 United Nations Convention against Corruption

UNCAC is considered to be the most comprehensive global instrument against corruption.¹ As of April 2015, 177 states had ratified the Convention.² Although UNCAC generally covers international standards for an effective anti-corruption regime, its provisions are also important for an effective AML regime. The Convention calls for domestic measures and international co-operation in preventing PEPs from abusing the international financial systems. This is emphasised in the Preamble which proclaims that states parties to the Convention are “determined to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets”.³

Furthermore, UNCAC includes a wide range of measures that are relevant in formulating strategies for managing PEPs. The Convention includes preventive measures on addressing

1 Lee (2010) 816.

2 Signatories to the United Nations Convention against Corruption, available at <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (accessed on 24 June 2015).

3 Para 8 of the Preamble to UNCAC.

corruption in the public sector,⁴ criminalisation of corruption⁵ and international co-operation in the tracing and recovery of assets.⁶

2.3 Preventing Corruption

Preventive measures form an important dimension of anti-corruption strategies,⁷ since it is more effective to prevent corruption than to enforce reactive measures when it may be too late to mitigate the damage.⁸ UNCAC contains various preventive measures that focus on public officials, including PEPs. These include transparency in public office, public finances and public procurement. All these provide guidance on how to develop an effective PEP management regime.

2.3.1 PEPs and Public Office

UNCAC requires states parties to devise adequate procedures for the selection and training of individuals for public positions that are especially vulnerable to corruption.⁹ In addition, states parties are required to enhance the awareness of such individuals on the risks of corruption inherent in their function.¹⁰ This requirement is relevant to PEPs because their positions are especially vulnerable to corruption.¹¹

A system of training PEPs on the vulnerabilities associated with their positions is important for two reasons. First, the system acknowledges the realities of corruption in the public sector and the amount of power that PEPs hold in controlling the success or failure of mechanisms for preventing corruption in the public sector. Second, understanding the risk creates self-awareness for the PEP involved, motivating him to not to exceed his legitimate activities because he knows how sensitive the system is to corrupt activities.

4 Chapter 2 of UNCAC.

5 Chapter 3 of UNCAC.

6 Chapter 5 of UNCAC.

7 Doig (2012) 3-10.

8 Doig (2012) 3.

9 Article 7(1)(b) of UNCAC.

10 Article 7(1)(d) of UNCAC.

11 FATF (2004) 19.

Furthermore, states parties are required to put in place institutional measures that aim at preventing abuse of powers. To achieve this, UNCAC calls upon states parties to apply codes of conduct for the correct, honourable and proper performance of public functions.¹² Codes of conduct can function as an effective tool for preventing corruption among PEPs.

However, they cannot be effective where they are not embraced by the officials to whom they apply.¹³ It is recommended, therefore, that such codes should be developed through a process of consultation, or they can be attached to the employment contract.¹⁴ Regular awareness initiatives are also essential for implementing codes of conduct.¹⁵ Unfortunately, this provision is not mandatory, giving states parties discretion as to whether to implement it or not.

In addition, it is important for states to put in place measures to address conflicts of interests. In this respect, UNCAC calls upon states parties to establish declaration systems for assets, gifts, benefits, employment and other outside activities.¹⁶ Such a disclosure system preferably should cover officials of a certain level of seniority and officials most vulnerable to corruption.¹⁷

It is ideal for PEPs to disclose their assets because the tradition of gift-giving is part of their everyday functions, but these gifts may be used to camouflage bribes.¹⁸ Also, PEPs may have private interests that may affect their loyalty to their public duties. Moreover, PEPs may conceal illegally obtained assets with the help of their relatives or friends. In this case, states parties should consider applying disclosure requirements to such persons too.¹⁹

A disclosure system acts as a tool for the prevention of corruption and the enforcement of anti-corruption measures.²⁰ It promotes transparency and accountability by providing guidance to officials about the principles of ethical conduct in public office, and serves as a

12 Article 8(2) (a) of UNCAC.

13 UNCAC Legislative Guide (2012) para 14.

14 UNCAC Legislative Guide (2012) para 14.

15 UNCAC Legislative Guide (2012) para 19.

16 Articles 7(4) & 8(5) of UNCAC.

17 UN Anti-Corruption Tool Kit (2004) 251.

18 Nsereko & Kebonang (2005) 92& 110.

19 UN Anti-Corruption Tool Kit (2004) 252.

20 StAR (2012) 1.

reminder that their behaviour is subject to scrutiny.²¹ Furthermore, a disclosure system provides a means for obtaining evidence in the investigation and prosecution of corruption cases.²² Hence, the provision must be considered seriously when states parties develop strategies to manage PEPs.

A practical example of the role of assets disclosure in detecting corruption and money laundering is found in the case of *United States v Randall Cunningham*.²³ Cunningham was a United States congressman and a member of the Appropriations Committee that developed military budgets. His duties gave him significant influence in the budgeting process. On several occasions, the congressman accepted bribes from contractors, which he used to purchase a number of assets. Investigators obtained records from his assets disclosure form that indicated a sudden rise in his income. In this form he had listed also a corporation that he used to accept the bribe money. This enabled the investigators to link the bribe money with the congressman. As a result Cunningham was sentenced to eight years imprisonment and ordered to pay \$1.8 million in restitution for fraud, conspiracy to commit bribery and tax evasion.



2.3.2 PEPs and Public Procurement

Public procurement is an area of concern in any anti-corruption programme because of its complex and bureaucratic nature.²⁴ Public procurement involves several activities, including planning, advertising, bidding, awarding of contracts, and the whole process offers many opportunities for corruption.²⁵ The process may present an opportunity for money laundering through under-pricing and over-pricing, while lack of transparency and high levels of competitiveness can lead to corrupt practices in securing contracts.²⁶ Here, PEPs also come into play, as they hold positions that influence procurement decisions.

21 StAR (2012) 7.

22 FATF Report (2012) 26.

23 *United States v Randall Cunningham* Case No o5-cr-2137 (2006).

24 OECD (2007) 9-19.

25 See UN (2010).

26 FATF (2012) 18.

Some of the high-risk public procurement areas include the defence industry, the extraction industry, the health sector and infrastructure projects.²⁷ Several PEPs have been linked to corruption in respect of the activities mentioned. For example, in the case of *Attorney General of Zambia v Meer Care*,²⁸ the then President of Zambia and the Director of Zambia Security Intelligence Service embezzled in excess of \$70 million from the country's treasury through contracts with a Bulgarian Company for the purchase of military equipment. The purchase was a disguise through which money was siphoned from the state treasury to accounts held by the President and his associates and no arms were delivered ever.

UNCAC recognises the nature of and vulnerabilities in the public procurement process. Thus, it requires states parties to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making that are effective in preventing corruption.²⁹ This is a mandatory requirement, qualified with a reservation in favour of domestic law.

Transparency is also an important factor in fighting illicit financial flows (IFFs). The AU High Level Panel Report notes that non-transparent government procurement and supply chains can provide opportunities for corruption-related IFFs.³⁰ To fight IFFs, therefore, states parties are called upon to domesticate the provisions of UNCAC and other regional instruments.³¹ The Report further recommends that states parties ensure public access to national budget information, budget development and the auditing process.³² These measures are important to avoid abuse of discretionary powers by PEPs who hold political influence in the procurement area.

2.3.3 Measures to Strengthen the Judiciary

UNCAC provides for measures to combat corruption in the judiciary, which measures cover judicial staff and judges. Judges are particularly important because they are considered to

27 FATF (2012) 20.

28 *Attorney General of Zambia v Meer Care* [2007] EWHC 952.

29 Article 9(1) of UNCAC.

30 AU High Level Panel Report (2015) 83.

31 AU High Level Panel Report (2015) 69.

32 AU High Level Panel Report (2015) 83.

be PEPs.³³ Additionally, a corruption-free judiciary plays a crucial role in dealing with cases that involve corrupt PEPs, since said PEPs may seek to exert undue external influence on the judiciary, thereby hampering efforts to combat corruption.³⁴ For example, the former Prime Minister of Italy, Silvio Berlusconi, and his attorney, Cesare Previti, were indicted in 1999 for allegedly bribing judges to obtain judgments in favour of Berlusconi.³⁵ This incident demonstrates how corrupt practices in the judiciary undermine effective PEP management.

UNCAC requires member states to take measures to strengthen the integrity of the judiciary and to prevent opportunities for corruption among members of the judiciary.³⁶ This is a mandatory provision. States parties may take steps such as putting in place rules with respect to the appointment and conduct of members of the judiciary and, where such measures are in place, states parties should assess whether they fulfil the requirements of UNCAC.³⁷ Furthermore, members of the judiciary are required to be independent and accountable to the general public.³⁸ Therefore, transparency measures for the judiciary form an integral part of PEP management.



2.4 Criminalisation

PEPs obtain illicit wealth from various corrupt activities including bribery, embezzlement, and other corruption offences.³⁹ Thus, it is important to examine the types of corruption offences committed by PEPs, so as to identify areas which are vulnerable to corruption.⁴⁰ Furthermore, an examination of the offences sheds light on the sources of proceeds laundered by PEPs. This provides a foundation for the development of a realistic approach to PEPs and economic criminality in the domestic framework.

33 See General Glossary to the FATF Recommendations 2012.

34 Terracino (2012) 153.

35 Nelken (2002) 114.

36 Article 11(1) of UNCAC.

37 UNCAC Legislative Guide (2012) para 103.

38 Schultz (2009) 2.

39 FATF (2003-2004) 19.

40 UNODC (2015) 5.

2.4.1 Bribery

UNCAC obliges states parties to criminalise active and passive bribery of national public officials, foreign public officials and officials of international organisations.⁴¹ The Convention contains a mandatory requirement on criminalising bribery of national public officials,⁴² but uses permissive language in respect of bribery of foreign public officials and officials of public international organisations.⁴³ The variations in the provisions are a result of negotiations over jurisdictional issues and state sovereignty.⁴⁴ Be that as it may, comprehensive criminalisation of bribery is important for regulating PEPs, whether domestic or foreign, because they pose the same risks of corruption.

There are several bribery incidents linked to PEPs. For example, in 2010 Alcatel, a French electronics company, paid bribes to Costa Rican government officials to secure contracts. These bribes were paid also to the President Miguel Rodriguez, prompting legal action against him in 2011, as a result of which he was convicted of receiving a sum of \$800 000 corruptly.⁴⁵ Similarly, Sanjaya Bahel, chief of commodity procurement at the UN procurement division, was found guilty, among other things, of receiving financial benefits to secure contracts for companies owned by the Kholi family in several UN projects.⁴⁶

2.4.2 Diversion of Property

UNCAC requires states parties to criminalise embezzlement, misappropriation or other diversion of property by a public official.⁴⁷ Generally, these offences cover acts of intentionally converting public assets for private advantage, including any third party advantage. An important aspect of these offences is that the property must be entrusted to the public official by virtue of his position.

41 Articles 15 & 16 of UNCAC.

42 Article 15 of UNCAC.

43 Article 16 of UNCAC.

44 UNCAC *Travaux Preparatoires* (2010) 61& 159. See also Article 4 of UNAC.

45 StAR- Stolen Asset Recovery Initiative-Corruption Cases, available at http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Acusacion_Rodriguez.pdf (accessed on 10 August 2015).

46 Docket No. 08-3327-cr.

47 Article 17 of UNCAC.

Most PEPs are entrusted with public assets. Thus, presidents and ministers routinely have access to the national treasury and government accounts which are available for looting. In Equatorial Guinea, for example, President Obiang took full control of the national treasury in 2003, justifying the action as a measure to combat internal corruption, but then used this opportunity to embezzle state funds.⁴⁸

Another example is the former President of the Philippines, Ferdinand Marcos, who embezzled money from the national treasury and government financial institutions, and diverted foreign aid international assistance into his private accounts.⁴⁹ In the light of these examples, it is important for states parties to criminalise such corrupt practices as part of their domestic PEP management regime.

2.4.3 Trading in Influence and Abuse of Functions

Trading in influence refers to a corrupt trilateral relationship in which a person who has real or apparent influence on the decision-making of a public official or body exchanges this influence for a bribe.⁵⁰ UNCAC calls upon states to criminalise this practice.⁵¹ This provision is not mandatory, but it is important in relation to PEPs because they hold prominent public positions that can enable them to act as peddlers of influence. For example, in 2014 the former president of France, Nicolas Sarkozy, was under investigation for peddling influence to a French judge, promising him a prestigious position in exchange for information on the corruption investigation into Sarkozy's 2007 presidential campaign.⁵²

Abuse of functions covers acts and omissions by a public official in breach of duty to secure an undue advantage.⁵³ The relevant UNCAC provision is not mandatory because of the

48 Equatorial Guinea: President Obiang's PR Overhaul, available at <http://pulitzercenter.org/reporting/equatorial-guinea-president-teodoro-obiang-legitimization-corruption-oil-unesco-eiti-dodd-frank> (accessed on 23 August 2015).

49 World Bank case summary Ferdinand Marcos, available at <http://star.worldbank.org/corruption-cases/node/18501> (accessed on 15 August 2015).

50 Terracino (2012) 124.

51 Article 18 of UNCAC.

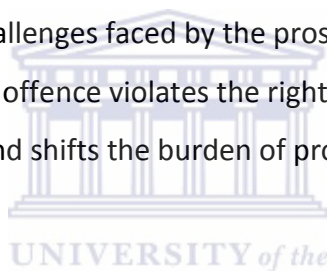
52 France's President Sarkozy put under investigation-BBC News, available at <http://www.bbc.com/news/world-europe-28122473>(accessed on 15 August 2015).

53 Article 19 of UNCAC.

controversy about what constitutes the offence.⁵⁴ The offence is a safety net to cover corrupt practices that do not fall under any other corruption offence.⁵⁵ What is more, the broad scope of this offence will assist in prosecuting PEPs who perform any corrupt act in breach of their duty. States parties, therefore, must consider seriously criminalising abuse of functions in their domestic regimes.

2.4.4 Illicit Enrichment

The offence of illicit enrichment entails the possession of unexplained wealth by a public official.⁵⁶ UNCAC calls upon states parties to consider establishing this offence, subject to the constitutional and fundamental principles of their domestic system.⁵⁷ Criminalising illicit enrichment is a very powerful anti-corruption tool. It considers the clandestine nature of corruption, and the evidential challenges faced by the prosecution.⁵⁸ However, many scholars raise objections that the offence violates the right against self-incrimination, plus the presumption of innocence, and shifts the burden of proof from the prosecution to the accused.⁵⁹



Be that as it may, the crime is especially relevant to corrupt PEPs, who go to great lengths to hide their corrupt activities.⁶⁰ The existence of the offence in domestic legislation will help solve the current challenges in prosecuting PEPs.⁶¹ It should be noted that illicit enrichment works well with assets disclosure systems.⁶² For example, Diepreye Alamiyeseigha, former governor of Bayelsa State in Nigeria, was found guilty of making false assets declarations. Since his disclosed assets did not match the assets which he actually owned, the situation provided evidence of illicit enrichment.⁶³

54 UNCAC Legislative Guide (2012) 270& 292.

55 Terracino (2012) 128.

56 Article 20 of UNCAC.

57 UNCAC Legislative Guide (2012) para 297.

58 Terracino (2012) 116.

59 Babu (2006) 15, Carr (2007) 233, Snider & Kidane (2007) 728-729.

60 FATF (2011) 34.

61 Tayo (2013) 58-60.

62 UNODC (2015) 9.

63 *Federal Republic of Nigeria v Santolina Investment Corporation & Others* [2007] EWHC 3053.

2.4.5 Money Laundering

It is typical for a corrupt PEP to find means to disguise the origin of illicit funds, because such funds attract law enforcement attention. Hence, money laundering is the next step for the PEP who has committed a corruption offence.⁶⁴ Recognising the connection between money laundering and corruption,⁶⁵ it is not surprising that UNCAC contains anti-money laundering provisions.

Money often is laundered by such means as front men and corporate vehicles, usually under the name of close associates and family members.⁶⁶ For example, Joyce Oyebanjo, an associate of former Nigerian Governor Dariye, was convicted in the United Kingdom of assisting Dariye in retaining criminal proceeds.⁶⁷ In the Abacha case, Abubakar Bagudu, a close associate of General Abacha's oldest son, facilitated laundering embezzled funds from the Bank of Nigeria through false security expenditures.⁶⁸

The Convention requires states parties to prevent money laundering by establishing a comprehensive regulatory and supervisory regime for financial institutions and other bodies susceptible to money laundering.⁶⁹ This includes implementing AML standards such as customer due diligence, beneficial owner identification, record keeping, monitoring cash movements and reporting suspicious activities.⁷⁰ Furthermore, UNCAC requires each state party to adopt legislative measures and other measures to criminalise the conversion, transfer, concealing or disguising of illicit property or proceeds of crime.⁷¹

64 FATF (2011) 34.

65 UNGA A/RES/57/244 7 February 2003.

66 De Willeboiset *al* (2011) 62,67 & 208.

67 StAR Stolen Asset Recovery Initiative-Corruption Case- Sani Abacha, available at <http://star.worldbank.org/corruption-cases/node/18574> (accessed on 14 August 2015).

68 See Monfrini (2008).

69 Article 14 of UNCAC.

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

71 Article 23 of UNCAC.

2.5 Enhanced Scrutiny

UNCAC obliges states parties to put in place measures that require financial institutions to conduct enhanced scrutiny of accounts with substantial links to PEPs.⁷² This provision encompasses conducting enhanced due diligence (EDD) as required by AML procedures for individuals identified as PEPs. Likewise, reasonable steps should be taken to determine the identity of beneficial owners of the funds deposited into potential PEP accounts.

The rationale of enhanced scrutiny is to mitigate the risk posed by PEPs by detecting suspicious transactions on their accounts.⁷³ Such suspicious activities must be reported to the competent authorities, such as an FIU.⁷⁴ This not only will intercept the transfer of the proceeds of corruption from the victim state, but also alert the receiving state about the corrupt nature of the particular assets.

In order to implement this PEP requirement, states parties are required to take legislative and administrative measures in their domestic frameworks. These include: Issuing advisories on the type of persons (natural and legal persons) to be subjected to enhanced scrutiny, plus accounts and transactions that require particular attention.⁷⁵ This obligation may be fulfilled by the government itself or through its designated supervisory bodies.⁷⁶ Given the fact that the laundering methods are constantly evolving, advisories may be issued on the basis of identified patterns constructed from suspicious transaction reports, as well as from the expert views of the gatekeepers.⁷⁷ Advisories should be issued by the FIU or any other body dealing with money laundering.

Government plays a key role in helping financial institutions to identify customers who are PEPs, and to apply appropriate regulatory measures.⁷⁸ In this regard, government must notify financial institutions about the identification of persons who fall under the PEP requirements.⁷⁹ Governments have this duty because they are in the best position to

72 Article 52(1) of UNCAC.

73 FATF (2012) 9.

74 UNCAC Technical Guide (2009) 193.

75 Article 52(2)(a) of UNCAC.

76 UNCAC Technical Guide (2009) 193.

77 UNCAC Technical Guide (2009) 193.

78 AU High Level Panel Report (2015) 84.

79 Article 52(2)(b) of UNCAC.

provide financial institutions with a list of PEPs.⁸⁰ Surprisingly, governments are not active in drawing up PEP lists and even where such lists exist they tend to identify foreign PEPs while excluding domestic PEPs. This is contrary to the PEP obligations under UNCAC.

States parties must ensure also that financial institutions maintain records on PEPs and their accounts over time.⁸¹ This applies to information relating to the identity of the customer and the beneficial owner of such accounts.⁸² Furthermore, states parties need to take measures against the establishment of shell banks⁸³ which are used widely to hide assets, especially among PEPs.⁸⁴

2.6 Financial disclosures

Financial disclosures can serve as a mechanism to deter corrupt practices among public officials.⁸⁵ Accordingly, UNCAC calls upon states parties to establish financial disclosure systems for appropriate public officials.⁸⁶ However, this is not a mandatory requirement. With regard to PEPs, financial disclosure plays an essential role as an identification and monitoring process.⁸⁷ For example, transactions that are not in line with what the PEP declared can be used as a starting point for further inquiry as to whether the transaction involves funds from a legitimate source.⁸⁸

Financial disclosures can be used for managing PEPs in various ways. On one hand, disclosure systems can be used to obtain a list of PEPs, their close associates and family members.⁸⁹ On the other hand, regulatory authorities can assess banks on how they use disclosure forms in addressing risk. Additionally, FIUs can use the financial disclosure information for improving the analysis of STRs.⁹⁰

80 UNCAC Technical Guide (2009) 197.

81 Article 52(3) of UNCAC.

82 Article 52(3) of UNCAC.

83 Article 52(4) of UNCAC.

84 FATF (2004) & FATF (2011).

85 Burdescuet *al* (2009) 3.

86 Article 52(5) of UNCAC.

87 See Rossi *et al* (2012).

88 FATF (2012) 26.

89 StAR (2012) 81.

90 StAR (2012) 81.

UNCAC acknowledges that the design and implementation of financial disclosure systems depend on the domestic environment, and thus gives discretion to individual states parties.⁹¹ A UNODC study conducted in 2012, however, notes that the effectiveness of any disclosure system “depends on the right questions being asked and addressed at the right moment”.⁹² The same applies to the design of disclosure systems to be used in regulating PEP criminality. The questions in disclosure forms must address the risk posed by PEPs and when such information is obtained a timely response is needed. In that respect, trained personnel and resources must be in place to use the financial disclosure system effectively as part of a PEP management strategy.

2.7 Recovering Stolen Assets

A PEP management regime is not complete without measures to trace and recover stolen assets. Asset recovery is a necessary response to corrupt PEPs stripping national resources for personal advantage.⁹³ Through asset recovery the victim state is able to retrieve assets lost to corruption and deprive offenders of the profits of their crimes.⁹⁴ Asset recovery is a fundamental principle of UNCAC.⁹⁵ Accordingly, states parties are required to co-operate with and assist one another in the recovery of proceeds of corruption.

UNCAC requires states parties to establish comprehensive asset recovery regimes in their domestic systems.⁹⁶ For instance, states parties must subject to confiscation not only primary but also secondary proceeds of crime, such as bank interest.⁹⁷ In addition, they must provide for confiscation of income and other benefits derived from criminal proceeds.⁹⁸ Furthermore, states parties are to establish a legal apparatus for the identification, tracing and freezing, and seizure of criminal proceeds.⁹⁹

91 UNCAC Legislative Guide (2012) para 700.

92 StAR (2012) 2.

93 Simser (2010) 322.

94 Vlassis & Gottwald (2008) 354.

95 Articles 2(e)(g) & 51 of UNCAC.

96 Article 31(1)& Article 31(4)-(6) of UNCAC.

97 UNCAC Technical Guide (2009) 95-96.

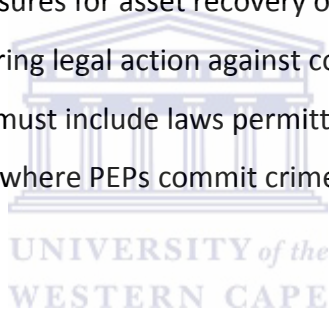
98 Article 31(6) of UNCAC.

99 Article 31(2) of UNCAC.

In most jurisdictions confiscation of assets is based on a criminal conviction.¹⁰⁰ However, there are situations where it is not possible to obtain a criminal conviction.¹⁰¹ For example, immunities can shield corrupt PEPs from prosecution, as in the case of Pinochet.¹⁰² Likewise, the death of the defendant, lack of evidence and the burden of proof in criminal cases undermine the process of recovery of stolen assets.¹⁰³

UNCAC requires states parties to consider establishing civil forfeiture for asset recovery.¹⁰⁴ Civil forfeiture has a number of benefits. First, it only requires evidence of the connection between the property subject to forfeiture and criminal conduct.¹⁰⁵ Second, the standard of evidence is lower (no need to prove the offence beyond reasonable doubt).¹⁰⁶ Third, it is not subject to the requirement of dual criminality in the case of an extradition (offence need not be a crime in both the requesting and receiving state).¹⁰⁷

The benefits of non-criminal measures for asset recovery offer opportunities for recouping stolen assets without having to bring legal action against corrupt PEPs. An effective PEP management regime, therefore, must include laws permitting civil forfeiture. This is especially important in countries where PEPs commit crimes with impunity.



2.8 FATF Recommendations

The Financial Action Task Force (FATF) is an intergovernmental body involved in the fight against money laundering and terrorist financing.¹⁰⁸ Over the past two decades, the FATF has worked with other international stakeholders to protect the international financial system from abuse through its anti-money laundering standards.¹⁰⁹ These standards form an important part of strategies against corrupt PEPs.

100 Smellie (2005) 104.
101 Stepheson *et al* (2011) 71-72.
102 Simser (2010) 324-325.
103 Smith, Pieth & Jorge (2007) 3.
104 Article 54(1)(c) of UNCAC.
105 Smith, Pieth & Jorge (2007) 3.
106 Smith, Pieth & Jorge (2007) 3.
107 Smith, Pieth & Jorge (2007)3.
108 Muller (2007) 69.
109 Blair & Brent (2008) 88.

FATF standards require states to establish AML/CTF measures. However, the main actors in implementing the PEP requirements of these standards are financial institutions and designated non-financial businesses and professions (DNFBPs). These are required to apply AML/CFT preventive measures when establishing a business relationship with PEP.¹¹⁰ Furthermore, on-going monitoring should be conducted throughout the business relationship.¹¹¹ For instance, every transaction made by a foreign PEP should be treated as a high risk transaction.¹¹² It is important, therefore, for financial institutions and DNFBPs to have appropriate measures in place.

2.8.1 Financial Institutions

For foreign PEPs, in addition to conducting normal CDD measures, financial institutions are required to have appropriate risk-management systems to determine whether the customer or the beneficial owner is a PEP; obtain senior management approval for establishing or continuing such business relationship; take reasonable measures to establish the source of wealth and source of funds; and conduct enhanced on-going monitoring of the business relationship. Financial institutions should be required to take reasonable measures to determine whether a customer or beneficial owner is a domestic PEP or a PEP of an international organisation.¹¹³

2.8.2 Designated Non-Financial Businesses and Professions

Recommendation 22 of the FATF recommendations extends the application of the PEP requirements for financial institutions to DNFBPs, which include real estate agents, dealers in precious stones and metals, lawyers, notaries, accountants, and trust and company service providers.¹¹⁴

110 FATF Recommendations 12 & 22.

111 FATF Recommendations 12 & 22.

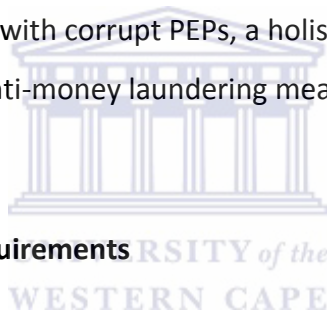
112 FATF (2012) 9.

113 FATF Recommendation 12.

114 Interpretative note to FATF Recommendation 22.

Generally, the FATF recommendations require a reporting entity to have an appropriate risk management system to determine whether a customer or beneficial owner is a PEP. This includes conducting a risk assessment to understand the risk posed by a particular PEP, and the level of enhanced scrutiny needed to mitigate the identified risk.¹¹⁵ Therefore, effective implementation of CDD measures affects the ability to determine whether customers or beneficial owners are PEPs.¹¹⁶ Any errors in the process may affect the PEP identification process and the entire PEP regulation scheme.

Additionally, reporting entities are required to take adequate measures to mitigate the risk of their being used to launder proceeds of corruption and other crimes. One such measure is reporting suspicious transactions to the FIU. In reality, the methods of money laundering used by PEPs are complex and involve a number of intermediaries. The FATF recommendations, therefore, are not sufficient for detecting and deterring corruption. Consequently, to deal effectively with corrupt PEPs, a holistic approach is needed, combining anti-corruption and anti-money laundering measures.



2.8.3 Other Relevant FATF Requirements

The FATF requires countries to undertake domestic assessments of the risk of money laundering and corruption.¹¹⁷ Such risk assessments will provide insight into how PEPs launder their criminal proceeds and the areas vulnerable to corruption. This, in turn, enables the country to establish effective measures to address the risk posed by PEPs relative to their domestic environment. Furthermore, countries are required to criminalise money laundering for the widest range of predicate offences and to include corruption and other related offences as predicate offences for money laundering.¹¹⁸

The FATF expects countries to ensure that the ownership, control and administration of financial institutions do not fall into the hands of corrupt individuals as these easily can assist corrupt PEPs in their criminal activities.¹¹⁹ Moreover, such individuals may be PEPs

115 FATF Report (2012) 4.

116 FATF Guidance on PEPs (2013) 5.

117 FATF Recommendation 1.

118 FATF Recommendation 3.

119 FATF Recommendations 18,23, 26 & 28.

themselves or associates of PEPs. Further, countries must ensure that legal persons and legal arrangements are not used for money laundering purposes by requiring adequate information on corporations and their business, as well as on the controllers and beneficiaries of trusts.¹²⁰

Countries need to take measures to prevent the use of wire transfers and physical cross-border transfers as means of transferring illicit proceeds. These have been used by family members and associates of PEPs to launder proceeds of corruption.¹²¹ Countries must ensure that wire transfers are accompanied by sufficient information on the originator and beneficiary of the transferred money.¹²² Likewise, cash transfers must leave a trail to facilitate tracing any suspicious activities.¹²³ In addition, the FATF requires countries to establish FIUs, report STRs, create legal frameworks for asset recovery, and provide mechanisms for international co-operation, especially in grand corruption cases because such cases usually involve cross-border corruption.¹²⁴



2.9 Practical challenges

Some of the problems which may undermine strategies against corrupt PEPs are discussed below. These include the issue of immunities and judicial privileges, bank secrecy laws and lack of a uniform definition of a PEP.

2.9.1 Immunities of PEPs

The issue of immunities plays a crucial part in devising mechanisms for dealing with PEPs because immunity is a potential obstacle to prosecution of corruption offenders. Immunity, however, is not an unprincipled thing. In fact, the rationale of granting immunities to certain public officials is to enable them to exercise their functions without unfounded

120 FATF Recommendations 24 & 25.

121 See FATF (2011).

122 FATF Recommendation 16.

123 FATF Recommendation 32.

124 FATF Recommendations 20, 29 & 36-40.

interference.¹²⁵ For instance, it is established firmly under international law that heads of state, heads of government, and ministers of foreign affairs enjoy personal immunity from the jurisdiction of foreign courts.¹²⁶

Unfortunately, immunities are abused by corrupt PEPs.¹²⁷ For example, Joshua Dariye, former governor of Plateau State and Nigeria state senator, used his constitutional immunity to avoid criminal charges on various corruption offences.¹²⁸ Immunities also delay prosecution efforts. For instance, most PEPs are prosecuted only after leaving office,¹²⁹ because they enjoy constitutional immunities that hinder law enforcement agencies in their own states from investigating and prosecuting them while in office.¹³⁰

Furthermore, immunities may influence foreign law enforcement agencies, including FIUs, which have evidence against a PEP but decide not to share such information with authorities in the PEP's country.¹³¹ What is more, immunity may cause delays in asset recovery where it protects PEPs from assets confiscation.¹³²

UNCAC is very clear that states parties should establish and maintain an appropriate balance between immunities accorded to public officials¹³³ and the public interest in combating corruption.¹³⁴ In practice, most states have failed to strike this balance,¹³⁵ most likely because UNCAC does not prevent states parties from granting excessive immunities, instead according them a wide measure of discretion on how to regulate immunities.¹³⁶

In addition, PEPs have influence over the adoption of laws that restrict immunities and a corrupt PEP is likely to resist any law that ultimately could lead to his prosecution. For example, the President of Equatorial Guinea appointed his son as second vice-president, thereby granting him immunity, after French authorities opened an investigation against

125 Terracino (2012) 195-204.

126 See Arrest Warrant Case (*Democratic Republic of Congo v Belgium*) ICJ Rep 2000.

127 Chaikin & Sharman (2009) 89.

128 StAR-Stolen Asset Recovery-Corruption Cases-Joshua Dariye, available at <http://star.worldbank.org/corruption-cases/node/18521> (accessed on 21 August 2015).

129 See FATF (2004).

130 Stephenson *et al* (2011) 71.

131 FATF (2012).

132 Terracino (2012) 200.

133 Article 30(2) of UNCAC.

134 Stephenson *et al* (2011) 73.

135 Chaikin & Sharman (2009) 89.

136 Article 30(2)(9) of UNCAC.

him on corruption allegations.¹³⁷ Without political will, therefore, immunity will continue to facilitate impunity.

2.9.2 Bank Secrecy Laws

Bank secrecy laws are relevant in managing PEPs, especially when it comes to investigating and tracing of criminal proceeds. Although bank secrecy laws are aimed at protecting the right to privacy, where these are not well regulated they may hamper anti-corruption efforts.¹³⁸ For example, bank secrecy laws prevented the US Riggs Bank from obtaining information on the beneficial ownership of a suspicious account held by the President of Equatorial Guinea and his ministers.¹³⁹

Hence, PEP management strategies should consider the role of bank secrecy laws. UNCAC calls upon states parties to ensure that appropriate measures are available to overcome obstacles arising from bank secrecy laws during domestic criminal investigations.¹⁴⁰ This includes designating what authorities can access bank information, and the circumstances and procedures for accessing the information.¹⁴¹ Furthermore, bank secrecy laws ought not to undermine asset recovery efforts.¹⁴²

2.9.3 Variations in the Definition of PEPs

When dealing with PEPs, countries must ensure that their domestic regimes have a specific definition for PEPs. This definition should be in line with the definition contained in the FATF recommendations. Many states, however, have included only foreign PEPs under their

137 StAR Stolen Asset Recovery Initiative-Corruption Case-Teodore Nguema Obiang, available at <http://star.worldbank.org/corruption-cases/node/18586> (accessed on 21 August 2015).

138 Stephenson *et al* (2011) 58.

139 *Washington Post*, 9 September 2004, available at <https://www.globalpolicy.org/component/content/article/172/30265.html> (accessed on 21 August 2015).

140 Article 40 of UNCAC.

141 UNCAC Technical Guide (2004) 124-129.

142 Article 31(7) of UNCAC.

domestic regimes. For example, the EU Directives require EDD to be carried out on foreign PEPs and PEPs in other European Union member; the same applies to the United States.¹⁴³

Allowing states to adopt a narrow PEP definition has a detriment. It creates uneven regulation of PEPs internationally which becomes an obstacle to creating a global policy on PEPs. Therefore, effective international management of PEPs should begin in their home states, because a foreign PEP is actually a domestic PEP in his or her home states. Foreign PEPs first use their domestic financial system to export proceeds of crime. Thus, states parties to UNCAC and FATF members should adopt a broad definition of PEPs.

2.10 Concluding remarks

Both UNCAC and the FATF recommendations form an important part of a state's PEP management regime. For years now, the two have operated separately. However, as observed, the combined effect of the two could raise the effectiveness of anti-corruption and anti-money laundering measures and, in the long run, produce better results than the current individualised approach. Therefore, any effective PEPs management strategy should begin with preventing corrupt acts, detecting the movement of corrupt proceeds, and asset recovery. This draws attention to measures for managing PEPs and the effectiveness of such measures in Tanzanian laws and policies, in the light of the UNCAC obligations and FATF recommendations.

143 See the EU Directives (2005) and Section 312 of the US Patriot Act, 2001.

Chapter Three

Domestic Legal Measures for Managing PEPs

3.1 Introduction

Tanzania has taken various measures to combat corruption and money laundering. These include: domesticating relevant UN Conventions through legislation; implementing the FATF recommendations; joining regional anti-money laundering and anti-corruption groups; and co-operation with other countries. This chapter analyses the adequacy of the Tanzania's anti-corruption and anti-money laundering regime in relation to UNCAC and FATF standards, with specific focus on the country's legal strategies against corrupt PEPs. In doing so, the chapter begins with a risk assessment of the criminality of PEPs in Tanzania, and then proceeds to assess how such risks are addressed.



3.2 Risks Associated with PEPs in Tanzania

3.2.1 Corruption

Corruption is among the major sources of criminal proceeds in the country.¹ Affected areas include public procurement, foreign aid assistance, public finance and the mining industry.² In the last decade, high ranking government officials, senior politicians, heads of public institutions and judges have been identified in a number of corruption incidents.³ There are no reports of foreign PEP involvement in domestic corruption scandals, but this does not mean that such individuals pose no risk to the country.

1 Bagenda (2003) 52.

2 Bagenda (2003) 53.

3 Gray (2015) 1.

3.2.2 Money Laundering

Money laundering activities are divided into two patterns: money laundering outside the financial system and money laundering through the financial system. PEPs use the same channels as those used by other money launderers, but in many cases seek the assistance of their family members and associates.

Laundering money outside the financial system involves direct channelling of criminal proceeds into real estate, insurance, *hawala* money transfers and cash intensive businesses such as foreign currency exchange bureaux and casinos.⁴ Money laundering through the financial system involves the use of intermediaries, banks, formal money transfer services, shell corporations, religious channels and other financial institutions to transfer money within the domestic financial system or the international financial system.⁵

The Tanzanian economy is dominated by cash transactions. Hence, proceeds of crime are mostly in cash form. The dominance of cash in the economy means that it is difficult to identify the money trail and, therefore, it is challenging to combat internal laundering activities. It is, however, possible to detect and trace illicit money received from other jurisdictions or exported to other jurisdictions as these utilise the country's weakly regulated financial system. In any case, there are no reports of foreign PEPs or PEPs of international organisations using the Tanzanian financial system to launder money.

The Bank of Tanzania corruption scandal demonstrates well the criminality of PEPs in Tanzania. The former governor of the Central Bank orchestrated a money laundering scheme that cost the country a lot of money.⁶ The laundered proceeds were obtained from embezzled state accounts. One of the companies implicated in this scheme was an offshore shell company called TANGOLD. Its management was composed entirely of Tanzanian cabinet ministers and the Central Bank senior staff. They were alleged to be the beneficial owners of illicit money. Money transferred from the Central Bank went through multiple jurisdictions in numerous bank accounts held in different jurisdictions. The former governor

4 Bagenda (2003) 52.

5 Bagenda (2003) 52.

6 StAR-Stolen Assets Recovery Initiative-Corruption Cases, available at <http://star.worldbank.org/corruption-cases/node/18612> (accessed on 25 September 2015).

was removed from office pending investigation of the case. Only a handful people have been prosecuted thus far, but none of the PEPs implicated has faced any kind of charges.

3.3 Legal Measures

3.3.1 The PEP Definition

The AML Act defines a PEP as a “foreign individual entrusted with prominent public functions”.⁷ This definition means that a PEP is somebody who holds a high-level public function, but is not a citizen or resident of Tanzania. In other words, only foreign PEPs are regulated under the national laws.

The exclusion domestic PEPs means that the scope of domestic measures is narrow compared to what is required under UNCAC and the FATF recommendations. UNCAC makes no distinction between domestic and foreign public officials. Furthermore, in 2012 the FATF required financial institutions to apply risk mitigation measures to both domestic and foreign PEPs.⁸

There is clearly an implementation gap. Indeed, in the Tanzanian context, domestic PEPs can be considered riskier than their international counterparts, as evidenced in the grand corruption incidents experienced in the country. What is more, Tanzania has made no reservation to article 52 of UNCAC, thus the country is violating its international obligations.

It is illogical to exclude domestic PEPs from the risk mitigation measures. Accordingly, the government ought to enact legislation that applies the PEP requirements to domestic PEPs, their family members and close associates. Lessons can be drawn from South Africa, where the PEP requirements apply to both domestic and foreign PEPs.⁹

Likewise, the law makes no specific reference to the application of the PEP requirement to family and close associates. It should be assumed that they are included in the definition as

7 Section 3 of the AML Act.

8 See FATF Guidance on PEP (2013).

9 Financial Intelligence Centre, Guidance Note 3A para 25.

required by the FATF recommendations, even though they are not mentioned specially in the law. There is a need, however, to deal with such persons expressly so as to avoid ambiguity. Again, South Africa law is instructive in making specific reference to family members and close associate, with an elaborate explanation of what kind of persons fall within this category.¹⁰

3.3.2 Application of PEP Requirements

The PEP requirements are contained in the AML Act, the AML regulations and the FIU guidelines. The legal obligation to implement the PEP requirements lies on the reporting persons. These include financial institutions and DNFBPs such as legal professionals, insurers, accountants, real estate agents and operators of gaming activities.¹¹

The AML Act provides that reporting persons are required to have an appropriate risk management system to determine whether a customer is a PEP.¹² This includes putting in place customer acceptance policies and procedures for customers holding public and high profile positions.¹³ However, this provision does not apply to beneficial owners and thus is contrary to UNCAC which requires reasonable steps to be taken to determine the identity of the beneficial owners of funds deposited into accounts held by persons in prominent public positions and those associated with them.¹⁴

Furthermore, there is a specific obligation on financial institutions to obtain senior management approval to establish a business relationship with a PEP.¹⁵ However, there is no requirement to obtain senior management approval to continue a business relationship where a customer or beneficial owner becomes a PEP at later stage.

In addition, reporting persons are required to take reasonable steps to establish the source of wealth and funds of customers identified as PEPs. A specific guideline requires banking

10 Financial Intelligence Centre, Guidance Note 3A para 25.

11 Section 3 of the AML Act.

12 Section 15(1)(b)(i) of the AML Act.

13 FIU Guideline No 1 para 1.9(c).

14 Article 52(1) of UNCAC .

15 Section 15(1)(b)(ii) of the AML Act. See also FIU Guideline No 2 para 3.10.

institutions to have policies that require EDD for transactions with PEPs.¹⁶ Here, again, the requirement does not apply to beneficial owners identified as PEPs.

It is mandatory for reporting persons to conduct on-going monitoring of customers identified as PEPs.¹⁷ The purpose of such monitoring is to identify when the client has made a transaction that might include proceeds from corruption and other predicate offences. This is done in order to block the possible use of that bank for money laundering. Furthermore, banking institutions must create their own internal procedures to detect and report potential money laundering activities.¹⁸

Where a bank considers that a PEP account is suspicious, it is required to file a STR with the FIU.¹⁹ What is more, the law provides sanctions for non-compliance with the PEP requirements.²⁰ This is in line with the FATF Recommendations. However, the available sanctions are not followed in practice and compliance remains a huge challenge.



3.3.3 Duration of PEP status

The FATF has made no provision for a time limit for the PEP status.²¹ It is impractical to put a time limit on the PEP status because, in reality, the criminality of PEPs can continue years after they have left office.²² Likewise, the law in Tanzania is silent on time limits for the PEP status. This means that reporting persons are required to apply a risk-based approach to determine whether the PEP requirements should be applied to a former PEP.

3.3.4 Limitations

Generally, the PEP requirements under Tanzanian law are inadequate because they exclude beneficial owners, domestic PEPs and family members and close associates. What is more,

16 FIU Guideline No 2 para 2.4.

17 FIU Guideline No 2 para 3.2.

18 Guideline No 2 para 2.

19 Section 17 of the AML Act.

20 Sections 17(4) & 19A of the AML Act.

21 FATF Guidance on PEPs (2013) 12.

22 Greenberg *et al* (2010) 31.

even the provisions on foreign PEPs are insufficient and vague due to the lack of elaborate guidelines. The danger of this is that variations arise in the extent of applicability of the PEP requirements. Tanzania can learn from the South African approach in dealing with PEPs. Guidance Note 3A of the FIC has three paragraphs dedicated to defining PEPs and describing measures to deal with them.²³

The PEP requirements are limited to a number of institutions. There are no guidelines addressing AML/CFT measures in most of DNFBPs. Although various DNFBPs are regulated by different bodies relevant to the specific industry, there is no designated authority to monitor and supervise DNFBPs for AML/CFT purposes. Consequently, there is no designated supervisory or regulatory authority to ensure that DNFBPs comply with their obligation to apply the PEP requirements as provided under the AML Act. What is more, real estate agents are not regulated and thus are attractive for corrupt PEPs to launder money through purchasing property.

Furthermore, there are no sanctions for non-compliance with the PEP requirements. For example, although the FIU has issued guidelines that specifically require financial institutions to implement the PEP requirements these guidelines have no legal force because they are not enforceable in court. Sanctions, however, may be imposed for failure to file STRs.

3.4 Other AML Measures

3.4.1 Legal Persons and Legal Arrangements

The Companies Act is the main statute that governs the creation of companies and the registration foreign companies in Tanzania.²⁴ For a company to be registered in Tanzania, certain basic information must be submitted to the Business Registration and Licencing Agency (BRELA). This includes the name and address of the company and its shareholders, and particulars of the directors.²⁵ Also, companies are required to keep a record of

23 Financial Intelligence Centre, Guidance Note 3A para 25-27.

24 See Companies Act No 12 of 2002.

25 Section 14(2) & (3) of the Companies Act.

shareholders and the number of shares they hold.²⁶ Company information is available to the public to facilitate easy accessibility in case of investigation.²⁷ While these legal provisions indirectly aim at defeating the misuse of legal persons for criminal activities, they are not adequate in terms of the FATF standards.²⁸

The Companies Act allows holding of shares through a nominee.²⁹ Such shares can be held on behalf of a person without the need to disclose the identity of the true holder of the shares or the number of shares. This provision can be utilised by corrupt PEPs to hide criminal proceeds in the names of their family members and close associates. In addition, companies may issue share warrants for bearer shares.³⁰ Unfortunately, PEPs can misuse bearer shares for money laundering as there are no measures to prevent such misuse.

The law of trusts is based on the common law, but there are no legal measures to prevent the use of trusts for money laundering.³¹ As a result, there are no measures that require the disclosure of beneficial owners of trusts or that require the registration of trusts.³² This weakness may provide opportunities for corrupt PEPs to use trusts as vehicles for money laundering and corruption.

Generally, there are no express measures under Tanzanian law to ensure that corrupt PEPs do not use corporate vehicles and legal arrangements for money laundering purposes. The legal obligation is placed on reporting persons, such as lawyers and accountants, to ensure that they apply the PEP requirements as their services are used widely in the establishment of companies and trusts.³³

26 Section 115 of the Companies Act.

27 Sections 118, 210(6) & 458 of the Companies Act.

28 FATF Recommendation 24.

29 Section 20 of the Companies Act.

30 Section 85 of the Companies Act.

31 ESAAMLG (2009) 36.

32 Section 122 of the Companies Act.

33 Section 15(1)(b)(i) of the AML Act.

3.4.2 Cash Smuggling

Persons entering or leaving Tanzania must declare all cash to the custom authority.³⁴ Failure to declare attracts a sanction.³⁵ However, insufficient controls at airports, ports and border check points provide loop-holes for smuggling cash in and out of Tanzania. Corrupt PEPs may utilise this weakness for money laundering purposes.

3.4.3 Shell banks and Corresponding Banks

Tanzanian laws require that all banks and financial institutions be licensed by the Central Bank.³⁶ The process of licensing involves a number of checks conducted by the Central Bank to satisfy itself of the legitimacy of the requesting entity and to prevent the establishment of shell banks in Tanzania. A licence may be revoked where it is discovered that the institution used misleading information in its application.³⁷

Banks are prohibited from establishing a relationship with correspondent banks until the Bank of Tanzania gives approval, after having satisfied itself that the entity is a reputable institution.³⁸ This requirement minimises the possibility of transacting with a shell bank. This measure notwithstanding, FBME, a bank headquartered in Tanzania but conducting ninety per cent of its business in Cyprus, in 2014 was declared an institution of money laundering concern in the United States.³⁹ A report by FinCEN revealed that the bank's client base was composed largely of offshore businesses and high net worth individuals, including PEPs.⁴⁰ This case poses concerns about shell banks operating in Tanzania.

34 Section 23(1) of the AML Act.

35 Sections 23(5) & 28B of the AML Act.

36 Sections 6 & 7 of the Banking and Financial Institutions Act No 5 of 2006.

37 Section 11(3)(d) of the BFI Act.

38 Regulation 26 of the Banking and Financial Institutions Regulations of 1997.

39 FinCEN Takes Action to Protect U.S Financial System, available at http://www.fincen.gov/news_room/nr/html/20140716.html (accessed on 28 September 2015).

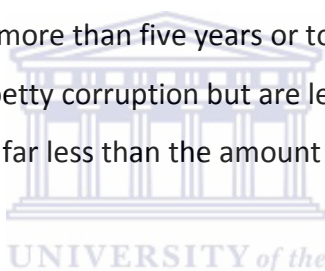
40 The downfall of FBME Bank, available at <http://www.legalfloris.com/the-downfall-of-fbme-bank>(accessed on 28 September 2015).

3.5 Criminalisation Measures

3.5.1 Bribery

Tanzania has criminalised the active bribery of national public officials in full and passive bribery in part.⁴¹ The law adopts a strict approach by prohibiting the offering and receiving of any advantage undue advantage.⁴² The undue advantage, however, must be accompanied by a corrupt intention. The law also criminalises active and passive bribery of foreign public officials and officials of public international organisations.⁴³ There are no reports of bribery involving foreign public officials or officials of public international organisations.⁴⁴

A person convicted of bribery may be sentenced to “a fine of not less than five hundred thousand shillings, but not more than one million shillings or to imprisonment for a term of not less than three years but not more than five years or to both”⁴⁵ The monetary penalties for bribery may be sufficient for petty corruption but are lenient for grand corruption. This is because usually the penalties are far less than the amount of money stolen by a corrupt PEP.



The following example illustrates bribery of national public officials in public procurement. British Aerospace Engineering (BAE) sold radar for an inflated price. An investigation by the British Serious Fraud Office (SFO) revealed that bribes were paid to senior government officials, including the then Attorney General and governor of the Central Bank.⁴⁶ The government took administrative action, but no legal action was taken against the implicated PEPs.

41 Section 15 of the PCCA; Sections 21-23 of the Election Expenses Act No 6 of 2010.

42 Section 15 of the PCCA.

43 Section 21(1)(2) of the PCCA.

44 UNCAC Tanzania Self-Assessment Report (2012) 6.

45 Section 15(2) of the PCCA.

46 StAR-Stolen Assets Recovery Initiative-Corruption Cases, available at <https://star.worldbank.org/corruption-cases/node/18605> (accessed on 25 September 2015).

3.5.2 Embezzlement, Misappropriation and Diversion

Acts of embezzlement, misappropriation and diversion of public funds or property are criminalised under Tanzanian law.⁴⁷ In the case of embezzlement, however, the law is only partially compliant with UNCAC as it does not include embezzlement for the purpose of benefiting a third party.⁴⁸ The penalties for embezzlement are a fine of not more than ten million shillings or a prison term not exceeding seven years or both.⁴⁹ The penalties for diversion are a fine not exceeding two million shillings and a prison term not exceeding two years or both.⁵⁰ The court also may order the confiscation of property or payment of embezzled or diverted funds.⁵¹

Incidents of embezzlement are worse where a corrupt PEP has influence or control over a financial institution or public entity. The following incident demonstrates how corrupt PEPs have exerted their influence to commit crimes. The former governor of the Central Bank used his official position to embezzle money from state accounts into various entities. On one occasion the governor added extra costs for the construction of the Bank's office that increased the construction budget from \$73 million to \$357 million. These extra costs were never explained.⁵² Also, the governor channelled funds from the Central Bank into several off-shore shell companies,⁵³ and he was involved in the illicit transfer of 133 billion shillings from the External Arrears Account into twenty two fictitious companies.⁵⁴ Five cases are currently in court relating to these allegations of embezzlement.⁵⁵

47 Sections 28 & 29 of the PCCA; Sections 120 & 319 of the Penal Code.

48 Sections 28(1) of the PCCA.

49 Sections 28(1) of the PCCA.

50 Sections 29 of the PCCA.

51 Sections 28(3) of the PCCA.

52 Tanzania Affairs-Corruption Cases-The Latest, available at <http://www.tzaffairs.org/2010/01/corruption-cases-%E2%80%93-the-latest> (accessed on 27 September 2015).

53 StAR-Stolen Assets Recovery Initiative-Corruption Cases, available at <http://star.worldbank.org/corruption-cases/node/18612> (accessed on 27 September 2015).

54 CAG Report (2005/2006) 8.

55 Tanzania: Five 'High-Profile' Embezzlement Cases Pending in Court, available at <http://allafrica.com/stories/201501301517.html> (accessed on 27 September 2015).

3.5.3 Abuse of Functions

The offence of abuse of position covers any person, whether a public official or not.⁵⁶ For that reason, the Tanzanian legal provision is broader than that in UNCAC. The penalties for the offence include a fine not exceeding ten million shillings or imprisonment for a term not exceeding seven years or both.⁵⁷

This provision has been put into practice in the case of *Republic v Basil Mramba*.⁵⁸ Basil Mramba and his co-accused Daniel Yona were Minister of Finance and Minister for Energy and Minerals respectively. By virtue of their positions, they granted a tender to an auditing firm called Alex Stewart Assayers in violation with section 123 of the Public Procurement Act of 2004. Furthermore, they granted an unlawful tax exemption to the said corporation. As a result the government lost 11752350148 shillings. The two were convicted and sentenced to three years imprisonment and a fine of five million shillings.



3.5.4 Trading in Influence

Both active and passive trading in influence are criminalised under Tanzanian law.⁵⁹ In addition, trading in influence is prohibited specifically in public procurement.⁶⁰ This is compliant with the UNCAC provision. The penalty for active peddling and passive peddling is a fine not exceeding three million shillings or a prison term not exceeding two years or both.⁶¹ The penalties are lenient compared to the large sums of money PEPs receive as bribes to influence decisions.

However, no cases have been filed under this provision. For that reason, it has never been put into practice.⁶² The following incident demonstrates how corrupt PEPs have exerted their influence in public procurement decisions. In 2006, the Richmond Development Company was awarded a tender to supply electricity under direct instruction of the Prime

56 Section 31 of the PCCA.

57 Section 31 of the PCCA.

58 Case No1200/2008.

59 Section 33(1)(2) of the PCCA.

60 Section 73 of the Public Procurement Act.

61 Section 33(1)(2) of the PCCA.

62 UNCAC Tanzania Self-Assessment Report (2012) 9.

Minister and two cabinet ministers, despite the company's failure in the bidding process. It was discovered later that the tendering process was irregular and corrupt. No legal action was taken against the officials implicated in the scandal, despite allegations of their using their influence to secure the tender.

3.5.5 Illicit Enrichment

Certain public officials cannot own property without giving an account of how he acquired that property. The rationale of this requirement is to prevent such public officials from using their office to enrich themselves. Accordingly, the government has enacted various laws to deal with unexplained wealth.

The PCCB may require a public official to give a full and true account of property in his possession or in the possession of his agent.⁶³ Agents of a public official include family members, close associates and any other person acting on behalf of that public official.⁶⁴ The PCCB may require further that the public official disclose how he acquired the properties in question.⁶⁵ If the public official fails to comply with this requirement or provides a false account, he may face a fine of five million shillings or a prison term not exceeding three years both.⁶⁶ In addition, the Constitution requires members of parliament to provide statements of their property and the property of their spouses.⁶⁷

The crime of possessing unexplained wealth covers previous and present public officials.⁶⁸ This approach is wider than UNCAC's and takes account of the fact that the criminality of public officials does not end when they leave office. Furthermore, the provision covers properties held by third parties, including gifts that third parties acquired from the public official where there is a close relationship between the official and the third party.⁶⁹ This takes account of how corrupt PEPs use third parties to conceal the true ownership of their properties.

63 Section 26(1) of the PCCA.

64 Section 26(5) of the PCCA.

65 Section 26(1) of the PCCA.

66 Section 26(3) of the PCCA.

67 Art 70(1) Constitution of the United Republic of Tanzania, 1977.

68 Sections 26 & 27 of the PCCA.

69 Section 27(2) of the PCCA.

The penalty for this offence is a fine not exceeding ten million shillings or imprisonment for a term not exceeding seven years or both.⁷⁰ In addition, the court may order the confiscation of the property.⁷¹ These penalties reflect the gravity of the offence. Currently there are several cases on possession of unexplained wealth under investigation.⁷² The following incident illustrates a case of illicit enrichment involving domestic PEPs and their family members. The former president, his family and associates, together with a cabinet minister, were accused of purchasing Kiwira coal mine at an astonishingly low price. Furthermore, none of public officials disclosed ownership of the mine in their assets disclosure forms. This prompted concerns about illicit enrichment.⁷³ No legal action was taken against the implicated parties. However in 2009, the government cunningly settled the issue by reporting that the former president had withdrawn his shares from the mine.⁷⁴ It is not known what happened to the shares held by his family and close associates.

3.5.6 Money Laundering

Anti-money-laundering provisions are contained in a number of laws in Tanzania.⁷⁵ However, the offence of money laundering is provided for specifically under the Anti-Money Laundering Act.⁷⁶ The PCCA also includes a provision that deals with the laundering of proceeds of corruption and concealment of proceeds of corruption.⁷⁷ What is more, this provision allows the AG to prevent transfer of corruptly acquired property or advantage, by requesting a person who has received or acquired the property or undue advantage not to transfer, dispose or part possession with the proceeds of crime.⁷⁸ A person convicted of

70 Section 27(3) of the PCCA.

71 Section 27(4) of the PCCA.

72 UNCAC Country Report (2014).

73 StAR-Stolen Assets Recovery Initiative-Corruption Cases, available at <http://star.worldbank.org/corruption-cases/node/18606> (accessed on 27 September 2015).

74 *This Day Reporter*, available at <http://www.thisday.co.tz/?l=10444> (accessed on 27 September 2015).

75 See section 311 of the Penal Code, sections 71 & 72 of POCA, section 12 of the AML Act and section 34 of the PCCA.

76 Section 12 of the AML Act.

77 Section 34(1)(a)(b) of the PCCA.

78 Section 34(2) of the PCCA.

transferring proceeds of corruption is liable to a fine not exceeding ten million shillings or a prison term not exceeding seven years or both.⁷⁹

Tanzanian law recognises a wide range of predicate offences for money laundering.⁸⁰ Additionally, the Minister of Finance may declare any other offence a predicate offence for money laundering.⁸¹ Moreover, all corruption offences under UNCAC constitute predicate offences for money laundering. This is because all corruption and related offences under the PCCA constitute predicate offences for money laundering and the PCCA has criminalised all corruption offences under UNCAC.⁸² Questions, however, arise with regard to the offence of embezzlement, as this is criminalised partially under the PCCA. Nevertheless, the criminalisation of money laundering is largely compliant with UNCAC and the FATF recommendations.

3.6 Strategies to Promote Ethics

As part of the domestic effort to promote transparency, accountability and avoid conflicts of interests among PEPs, the government enacted the Public Leadership Ethics Code Act.⁸³ This law applies to certain public leaders, including the president, ministers, judges and other high-ranking officials, as listed in the Act.⁸⁴ Essentially, the Act is a code of ethics for PEPs.

The law requires public officials to provide assets declarations.⁸⁵ This covers all property or assets owned and liabilities borne by the officials, their spouses and unmarried minor children.⁸⁶ Such declarations are made to the Commissioner of Ethics within thirty days after taking office and from then on at the end of each year and when the official leaves the public office.⁸⁷ Furthermore, the Ethics Secretariat conducts physical verification of assets declared by PEPs.

79 Section 34(1) & Section 34(5) of the PCCA.

80 Section 3 of the AML Act.

81 Section 3 of the AML Act.

82 Section 3(c) of the AML Act.

83 Public Leadership Code of Ethics Act No 13 of 1995.

84 Section 4 of the Public Leadership Code of Ethics Act.

85 Section 6(b)(ii) of the Public Leadership Code of Ethics Act.

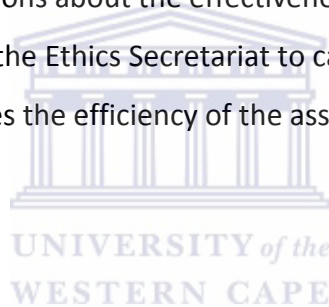
86 Section 6(b)(ii) of the Public Leadership Code of Ethics Act.

87 Section 9(1)(c) of the Public Leadership Code of Ethics Act.

Public leaders are prohibited from soliciting or accepting economic benefit except for incidental gifts, customary hospitality or other benefits of nominal value.⁸⁸ Allowing incidental gift and customary hospitality is essential for maintaining good relations, but these benefits are vulnerable to being used to disguise bribes.⁸⁹ Even so, this provision serves the objective of preventing bribery among PEPs and other public officials.⁹⁰

In general, the ethics code is consistent with UNCAC,⁹¹ as it also addresses conflicts of interests, nepotism and other corrupt behaviour.⁹² Moreover, the code is not a toothless text, as it provides sanctions for non-compliance, including warnings, cautions, demotions, suspensions, dismissals and resignations from office.⁹³

There is a problem, however, in that some leaders abuse the standards provided under the code, as evidenced in scandals involving some PEPs. Furthermore, the lack of prosecutions for illicit enrichment raises questions about the effectiveness of the assets disclosure requirement. Also, the failure of the Ethics Secretariat to carry out prompt verification of the declared property undermines the efficiency of the assets declaration system.



3.7 Public Procurement

The vulnerability of procurement activities to corruption has influenced the government to apply specific measures in the area. The law criminalises corrupt transactions in the procurement process.⁹⁴ Furthermore, to enhance transparency and accountability in the procurement process the government requires the procurement to be open.⁹⁵ These include public advertisement of the qualifications of bidders, the selection procedure and the code

88 Section 6(f) of the Public Leadership Code of Ethics Act.

89 Nsereko & Kebonang (2005) 110.

90 See Tenga (2010).

91 Article 8 of UNCAC.

92 Sections 5 & 6 Public Leadership Code of Ethics Act.

93 Section 8 of the Public Leadership Code of Ethics Act.

94 Sections 16(1)(2) & 17(1)(a)(b) of the PCCA.

95 See part V of the Public Procurement Act No 21 of 2004.

of conduct to which public officials must adhere,⁹⁶ and the express prohibition of fraud and corruption in procurement activities.⁹⁷

3.8 Assets Forfeiture

An assets forfeiture regime determines the ability promptly to freeze assets during on-going investigations and recover proceeds after prosecution. In this regard, the government has instituted laws on forfeiture of criminal proceeds. The provisions on the confiscation, freezing and seizing of proceeds of corruption are contained in various laws, including the Prevention and Combating of Corruption Bureau Act, the Economic and Organised Crime Control and the Civil Procedure Act (CPA). However, the Proceeds of Crime Act (POCA) is the principal statute when it comes to asset recovery.



3.8.1 Proceeds of Crime Act

POCA provides for confiscation of property in relation to a wide range of offences. These include serious offences such as money laundering and its predicate offences.⁹⁸ The Act covers both instrumentalities and proceeds of crime.⁹⁹ In addition, foreign forfeiture orders can be registered in Tanzania.¹⁰⁰ The law requires the return of recovered property to the true owner.¹⁰¹

POCA is therefore in line with UNCAC and the FATF standards.¹⁰² The scope of asset recovery, however, does not include instrumentalities and properties derived from the benefits of the crime. This goes against best practice under UNCAC. In addition, forfeiture is

96 Section 86(1) of the Public Procurement Act.

97 Sections 72 & 87 of the Public Procurement Act.

98 Section 3 of POCA.

99 Section 3 of POCA.

100 Section 18 of POCA.

101 Section 36 of POCA.

102 Article 56 of UNCAC & FATF Recommendation 38.

based on a conviction, and thus the court must satisfy itself of the criminal nature of the property.¹⁰³

3.8.2 Other Supporting Legislation

The PCCA provides for forfeiture of proceeds of corruption,¹⁰⁴ but this is subject to a conviction.¹⁰⁵ Where proceeds cannot be traced, the PCCB may file a request for a pecuniary penalty.¹⁰⁶ This provision, however, does not state how such order is to be enforced and the circumstances in which the order may be filed or obtained. The Director of the PCCB may order immediate freezing illicit property.¹⁰⁷ This accords with best practice under UNCAC.¹⁰⁸ There is no civil forfeiture regime for confiscation and forfeiture of proceeds of crime in Tanzania, with the exception of property associated with a terrorist group.¹⁰⁹

The Mutual Assistance in Criminal Matters Act includes provisions for mutual legal assistance in the enforcement of external forfeiture orders, and penalties.¹¹⁰ Furthermore, the Economic and Organised Crime Control Act includes provisions on forfeiture of instrumentalities of crime.¹¹¹



3.9 PEP Measures in the Judicial Services

The Tanzanian judicial services are perceived as the second most corrupt sector in the country.¹¹² Such perceptions about the protector of the rule of law threaten the independence and impartiality of the judiciary. Moreover, the presence of corrupt officials in the judiciary undermines the role of courts in combating corruption.

103 Section 9(1) & 14(1) of POCA.

104 Section 40(1) of the PCCA.

105 Section 40(2) of the PCCA.

106 Section 40 of the PCCA.

107 Section 12 of the PCCA.

108 Article 31(2) of UNCAC.

109 Section 43(1) of the PTA.

110 Section 30 of the Mutual Assistance in Criminal Matters Act No 24 of 1991.

111 Section 23 Economic and Organised Crime Control Act No 13 of 1984.

112 TI East Africa Bribery Index (2014) 38.

The government has taken several measures to deal with this problem. These include transparent and merit-based selection of judges,¹¹³ conducted in consultation with the Judicial Services Commission.¹¹⁴ Additionally, as part of the measures to promote ethics and institutional integrity, judges undergo training on adherence to judicial ethics and professionalism. For example, 11 high court judges were trained in 2009.¹¹⁵ Judges are subject to the Public Leadership Code Act and the Code of Conduct for Judicial Officers. However, the judiciary is yet to free itself from corruption. For example, in 2014, two high court judges were implicated in the escrow scandal for receiving over four hundred million shillings.¹¹⁶

3.10 Enforcement Concerns

3.10.1 Bank Secrecy

Banks and financial institutions are obliged to keep customer information a secret, unless the opposite is required by law.¹¹⁷ Breach of confidentiality and secrecy may result in a fine not exceeding twenty million shillings or imprisonment for three years or both.¹¹⁸ Several laws provide for circumstances under which the duty of secrecy may be waived. For instance, banks and financial institution may share information with law enforcement agencies on matters related to money laundering and corruption investigations.¹¹⁹

With regard to asset recovery, the law requires financial institutions to co-operate with law enforcement agencies. For that reason, confidentiality is ruled out as a ground for refusing to provide information relating to illicit property. The Inspector General of Police is empowered to authorise police officers to investigate suspicious accounts.¹²⁰ Also, the DPP

113 Article 109(7) of the Constitution.

114 Section 22 of Judicial Services Act No 2 of 2005.

115 NACSAP II Implementation Report (2009) 43.

116 PAC Report (2014) 25.

117 Section 48(4) of the Banking and Financial Institution Act No 5 Of 2006.

118 Section 48 (6) of the BFI Act.

119 Section 12 of the PCCA; Section 21 of the AML Act.

120 Section 63A(1) of POCA.

may apply for a court order to compel the financial institution to provide information about an account, including transactions conducted through that account.¹²¹

Failure to co-operate with the police officer may result in a fine not exceeding one million shilling or imprisonment not exceeding two years or both.¹²² A financial institution is subject to a penalty where it provides false or misleading information.¹²³ The bank secrecy laws therefore are consistent with UNCAC,¹²⁴ for these laws do not prejudice measures against corrupt PEPs.

3.10.2 Immunities

Domestic PEPs do not enjoy any immunity from criminal prosecution. However, a sitting president enjoys absolute immunity for any act or omission committed in the scope of his or her official duties.¹²⁵ This constitutional immunity is a potential legal impediment to prosecutions. The president can rely on his or her constitutional immunities to object to any proceedings, whether civil or criminal. Nonetheless, the immunity provision complies with UNCAC.

Gaps still exist as regards diplomatic immunities for foreign PEPs and PEPs of international organisations. These PEPs may abuse their immunities, for example, by using a diplomatic bag to smuggle money.¹²⁶ Tanzanian laws are silent on this vulnerability. Reports that Chinese officials used the president's plane to smuggle ivory disguised as diplomatic bags¹²⁷ raises concerns about the possibility of transferring the proceeds of corruption through similar means.

121 Section 65(1) of POCA.

122 Section 63A(3) of POCA.

123 Section 65(5) of POCA.

124 Article 30 of UNCAC.

125 Section 50 of the PCCA, Section 16 of the Penal Code, Article 46 of the Constitution.

126 Mwenda (2011) 48.

127 Tanzania Ivory: Chinese Officials 'Went on buying Spree'-BBC News, available at <http://www.bbc.com/news/world-asia-china-29929423> (accessed on 28 September 2015).

3.11 Concluding Remarks

Tanzania has made considerable efforts to establish a legal framework that is compliant with UNCAC and the FATF standards. To a large extent these laws are adequate. The problem, however, is that most of the legal provisions remain theoretical because there is little effort made to implement the law. This enforcement gap undermines the overall objective of the legal measures against corrupt PEPs. Furthermore, there is a notable selectivity in the treatment of corrupt PEPs implicated in grand corruption incidents. Even though the government has taken considerable action, including cabinet reshuffles and administrative measures, these measures have not been effective in deterring corrupt PEPs from criminal activities.



Chapter Four

Institutional Framework for Managing PEPs

4.1 Introduction

UNCAC and the FATF emphasise the need for an effective institutional framework to support legal measures and facilitate international co-operation. This includes law enforcement agencies, supervisory bodies and sector regulators. Accordingly, this chapter endeavours to assess the institutions established under the Tanzanian anti-money laundering and anti-corruption regime, with specific focus on the FIU, the PCCB and other complementary bodies.



4.2 Financial Intelligence Unit

The Tanzanian financial intelligence unit (FIU) was established under section 4 of the Anti-Money Laundering Act. It began operating in 2007 under the Ministry of Finance.¹ The FIU is the central body in the fight against money laundering and the financing of terrorism.

4.2.1 The FIU and PEP Management

The FIU works closely with regulators, law enforcement agencies, and reporting persons in preventing money laundering. It is empowered to supervise reporting persons for AML/CFT compliance.² This is done through either on-site or off-site supervision. The FIU may request the relevant regulators to conduct supervision in their respective sectors.

1 FIU Report (2012/2013) 4.

2 Section 6(d) of the AML Act.

Furthermore, the FIU works with regulators to ensure that reporting persons comply with AML laws and the FIU guidelines. For example, in June 2012 the FIU, in collaboration with the Directorate of Banking Supervision of the Bank of Tanzania, conducted on-site examinations of banking institutions for AML/CFT compliance.³ The process revealed that several banks lack comprehensive AML systems, including risk mitigation measures for PEPs.⁴ Subsequently, the FIU obliged them to take quick steps to comply with the law. The FIU continues to conduct follow-up in this respect.⁵

The FIU is empowered to receive, analyse and disseminate reports and other information regarding potential money laundering activities by reporting persons and other sources.⁶ These include STRs on suspected money laundering activities. Where the report suggests that there are grounds to suspect money laundering, terrorist financing or any other criminal activities, the FIU sends an intelligence report to law enforcement agencies such as the police and the PCCB.⁷ Similarly, the law enforcement agencies may request access to information collected by FIU when conducting their own investigations.

The FIU receives STRs primarily from the banking sector⁸ because this sector is relatively well-regulated as compared to other economic sectors. However, less reporting from other sectors does not mean that money laundering activities are not present in those sectors. In fact, criminals are likely to resort to operating in these poorly regulated sectors. The lack of reports, therefore, suggests that money laundering activities go undetected in many areas.

4.2.2 Limitations of the FIU

The FIU acknowledges that the revision of the FATF recommendations in 2012, which included a mandatory obligation to apply the PEP requirements to domestic PEPs, has created new challenges.⁹ This is because reporting persons have not implemented effectively yet the previous standards that applied to foreign PEPs. What is more, the FIU

3 FIU Report (2011/2012) 12.

4 FIU Report (2011/2012) 14.

5 FIU Report (2012/2013) 10.

6 Section 4(2) of the AML Act.

7 FIU Report (2012/2013) 8

8 FIU Report (2012/2013) 8.

9 FIU Report (2012/2013) 17.

itself is still in the process of revising its action plan so as to comply with the new standards.¹⁰

Supervision of some reporting persons for AML compliance is difficult because in some sectors there are no designated regulators.¹¹ Even where there is a designated regulator its mandate might not include anti-money laundering measures. There are also several shortcomings with providing feedback on the outcome of STRs to reporting persons and the FIU cannot request information from other law enforcement agencies because there are no mechanisms for institutional co-operation and co-ordination.

The FIU also faces investigation difficulties due to the complex methods and technology used in the money laundering process. Moreover, Tanzania's cash based economy makes investigation even more difficult as the laundering process leaves no trail that the FIU can follow.¹² Other practical challenges include limited resources, lack of expertise and difficulties in the exchange of information with other financial intelligence units.¹³ These limitations hinder the effective enforcement of the PEP requirements.

Lastly, the FIU offices are located in the Ministry of Finance. This close link between the FIU and the executive arm of the government undermines its independence and impartiality because there are no adequate provisions to safeguard operational autonomy. While a certain Chinese wall may exist between the FIU and the ministry, on the face of it such close ties undermine the credibility of the FIU in the public eye. This is crucial, especially in a country where the executive, although constantly under attack for being corrupt, continues with impunity.

4.3 Prevention and Combating of Corruption Bureau

The PCCB was established under Section 5 of the Prevention of Corruption Act. The Bureau is the central body in preventing and combating corruption in the public and private sectors

10 FIU Report (2012/2013) 17.

11 FIU Report (2012/2013) 17.

12 FIU Report (2012/2013) 16.

13 FIU Report (2012/2013) 16.

in Tanzania.¹⁴ Its mandate includes investigating and prosecuting corruption cases, promoting understanding of corruption through public awareness programmes, and co-operation with domestic and international stakeholders.

4.3.1 The PCCB and PEP Management

The PCCB is in the front-line of the fight against corruption in Tanzania. Since its establishment in 1973, the Bureau has investigated several top-ranking officials and their associates, and has initiated proceedings against them on various corruption charges.¹⁵ In recent years, the PCCB has seen a rise in the number of successful prosecutions.¹⁶ For example, in July 2015 the PCCB successfully prosecuted two former ministers for abuse of power.¹⁷

The PCCB has launched a number of prevention initiatives as part of its implementation of the National Anti-Corruption Strategy and Action Plan (NACSAP). One such initiative is the PCCB Annual Anti-Corruption Forum that brings together interested parties to discuss anti-corruption strategies, challenges and solutions.¹⁸

The PCCB offers training to persons from sectors that are vulnerable to corruption, as part of its corruption awareness programme. For example, in 2013 training was conducted for members of tender boards from different ministries. The PCCB is also dedicated to research on issues of corruption, including ethics, good governance and transparency in the public sector. Lastly, the PCCB takes part in international anti-corruption initiatives. For example, in 2015 it partnered with the UK in work on asset recovery.¹⁹

14 Section 46 of the PCCA.

15 See Tanzania Country Self-Assessment (2011).

16 Statistics, available at http://pccb.go.tz/images/stories/case_statistics/STATISTICS-2018-JUNE2015.png (accessed on 28 September 2015).

17 PCCB-List of Shame, available at <http://pccb.go.tz/index.php/list-of-shame> (accessed on 28 September 2015).

18 Training-NACSAP-Phase II, available at <http://www.pccb.go.tz> (accessed on 28 September 2015).

19 UK Partners with PCCB on Asset Recovery, available at <http://www.pccb.go.tz> (accessed on 28 September 2015).

4.3.2 Limitations of the PCCB

The PCCB has no power to prosecute corruption crimes, except bribery, without the consent of the DPP.²⁰ In practice the process of securing consent to prosecute may be difficult.²¹ For example, from 2005 to 2013 only 894 of the 50733 reported cases of corruption were taken to court after the PCCB had obtained the consent of the DPP.²²

The PCCB has been blamed often for reluctance to pursue cases of grand corruption and for targeting only the “minor fish”. Furthermore, a number of studies conducted by NGOs indicate that the PCCB lacks independence.²³ There is a danger of political interference in practice because the PCCB’s Director General and the Deputy Director General are presidential appointees.²⁴ Regrettably, this affects the Bureau's ability and willingness to take corrupt officials to court.

Like other institutions in Tanzania, the PCCB lacks the resources and skilled staff to pursue complex corruption cases.²⁵ These deficiencies affect the ability of the Bureau to deal with corruption involving PEPs. Even the Director General of the PCCB acknowledges that such grand corruption cases are costly because most of the evidence is scattered across different jurisdictions and so the Bureau needs to mobilise resources first.²⁶ The inevitable delays lead the public to assume that the Bureau is doing nothing.

20 Section 57 of the PCCA.

21 Why PCCB fails to prosecute grand corruption, available at http://www.businesstimes.co.tz/index.php?option=com_content&id=2465:why-pccb-fails-to-prosecute-grand-corruption&Itemid=57 (accessed on 29 September 2015).

22 See LHRC Corruption Report (2014).

23 LHRC Corruption Report (2014).

24 Global Integrity (2010).

25 LHRC Corruption Report (2014).

26 Tanzania: PCCB saves sh7.6 billion, available at <http://allafrica.com/stories/201002260440.html> (accessed on 29 September 2015).

4.4 Other Complementary Institutions

4.4.1 Office of the Director of Public Prosecutions

The office of the DPP is a constitutional office with exclusive powers over public prosecutions,²⁷ and thus is a key actor in the prosecution of grand corruption cases. To safeguard its independence, the office is constitutionally protected from interference.²⁸ Nevertheless, the dangers of being compromised persist, considering that the DPP is part of the executive and works under the Ministry of Justice. Moreover, the DPP is a presidential appointee and thus likely to avoid a case that will jeopardise his or her position. Consequently, corrupt PEPs carry on with impunity.

4.4.2 Attorney General's Chambers

As the main actor in asset recovery, the Attorney General's Chambers established the Asset Forfeiture and Recovery Unit under the Division of Public Prosecutions in 2011. Its sole function is to deal with assets forfeiture in Tanzania. The Unit currently is implementing the Strategic Plan for Asset Forfeiture and Recovery, as part of the attempt to improve the domestic asset recovery regime.²⁹ As noted, the Tanzanian asset management and recovery regime takes a conviction-based approach and thus the Unit cannot target property without securing a conviction. Then, again, most corrupt PEPs have never faced prosecution for their actions, undermining the recovery of assets.

4.4.3 Police Force

The Tanzanian police force serves its traditional function of investigating crimes. Several laws provide a wide range powers to the police, including powers to search and seize property, powers to investigate accounts and powers to access confidential information. The Tanzanian police force also works with Interpol to curb transnational organised crime.

27 Article 59B of the Constitution.

28 Article 59B(4) of the Constitution.

29 Strategic Plan for Asset Forfeiture & Recovery (2012-2017).

However, practical challenges such as inadequate AML skills and limited technical and monetary resources undermine the operational capacity of the police force. What is more, the Tanzanian police force has been named as the most corrupt institution in the country.³⁰ This questions the ability of the police to deal with corrupt PEPs, as such individuals can bribe law enforcement officers easily to avoid proper investigation into their criminal activities.

4.4.4 Bank of Tanzania

The Bank of Tanzania is the regulator of the banking industry.³¹ It formulates and implements policies to protect the integrity of the domestic financial system.³² These include policies against money laundering. The Bank has the power to issue regulations, directions and other related guidelines to financial institutions.³³ These are legally enforceable and non-compliance attracts penalties and fines.³⁴ The Bank conducts on-site inspections to access the internal AML controls of banks. Also, the Bank, in collaboration with a foreign supervisory body, may exercise cross-border supervision over a corresponding bank relationship between a Tanzanian bank and a foreign financial institution.³⁵

The Bank of Tanzania has been a target for corrupt PEPs.³⁶ A number of corruption and money laundering incidents were facilitated by Bank officials.³⁷ This situation calls into question the Bank's supervisory ability and sends a wrong message to other banks. Indeed, it is inauspicious that the Bank itself is failing to implement AML/CTF requirements, including CDD. Hence, there is a need for serious efforts to strengthen the internal governance of the Bank of Tanzania to ensure compliance with AML/CTF standards and, especially, the PEP requirements.

30 LHRC Corruption Report (2014) 235.

31 Section 5(1) of the Bank of Tanzania Act No 4 of 2006.

32 Section 7 of the Bank of Tanzania Act.

33 Section 70(3) of the Bank of Tanzania Act; Sections 33 & 71 of the BFI Act.

34 Sections 66 & 67 of the BFI Act.

35 Section 35 of the BFI Act.

36 See Assad (2011).

37 Tanzanian Affairs-Corruption Cases, available at <http://www.tzaffairs.org/2011/05/corruption-the-latest> (accessed on 29 September 2015).

4.4.5 Public Procurement Regulatory Authority

The PPRA is a regulator of procurement activities in the public sector.³⁸ It is empowered to launch investigations on allegations of corrupt practices in the procurement process.³⁹ In addition, it can take appropriate disciplinary measures where, after investigation, it concludes that there has been a breach of duty, misconduct or a criminal offence on the part of the public official.⁴⁰ It is doubtful, however, whether the PPRA can enforce disciplinary measures against high-ranking PEPs such as cabinet ministers.

4.4.6 National Audit Office

The National Audit Office is a constitutional office headed by the Controller and Auditor General (CAG).⁴¹ It conducts audits in ministries, government departments, state-owned corporations, institutes and public agencies.⁴² Through its auditing work, the office has identified flaws in internal controls that provide opportunities for corruption and economic misconduct, such as diversion, misappropriation of state funds and embezzlement.

CAG reports have played a central role in unmasking corrupt PEPs. These reports have led to the dismissal of several cabinet ministers and have been used as a starting point for further investigation and as evidence in courts of law. However, the success, of auditing as a tool against corruption depends on the existence of a supportive anti-corruption environment.⁴³ Therefore, it is important that the government demonstrate full commitment to fighting corruption so that the office of the CAG can play its role effectively in implementing the strategies against corrupt PEPs.

38 Section 5 of the Public Procurement Act.

39 Section 8 of the Public Procurement Act.

40 Section 14 of the Public Procurement Act.

41 Article 143 of the Constitution.

42 Sections 11 & 12 of the Public Audit Act.

43 Otalor & Eiya (2013) 124.

4.4.7 Permanent Commission of Enquiry and Public Leaders' Ethics Secretariat

The Permanent Commission of Enquiry (hereafter PCE) is a constitutionally established commission with the mandate to inquire into allegations of abuse or misuse of office by public officials, including PEPs.⁴⁴ After investigating a situation, the PCE makes recommendations to the president on appropriate measures to be taken against the implicated public official.⁴⁵ Unfortunately, most of the recommendations made by PCE usually are ignored.

The Public Leaders' Ethics Secretariat is the body with the mandate to inquire into the behaviour and conduct of PEPs governed by the Public Leadership Ethics Act.⁴⁶ Additionally, the Ethics Secretariat is the administrative body for the assets disclosures required by the Act.⁴⁷ It faces several challenges linked to its capacity and independence. One of these is the inability promptly to verify assets disclosure information and the slow response in dealing with unethical public officials.



4.5 Inter-Agency International Co-operation

In addition to implementing domestic measures against corrupt PEPs, Tanzania is also co-operating with foreign law enforcement agencies to ensure that the international financial system is not abused by PEPs and to facilitate asset recovery. The country, however, is not able to participate fully in the international arena due to number practical challenges, including the lack of skilled personnel and limited resources and technology, which have hampered its ability to assist others.⁴⁸ Nonetheless, the country has managed to provide considerable assistance in the global AML/ACL efforts.

44 Article 129(2) & (4) of the Constitution.

45 Article 129(3) of the Constitution.

46 Article 132(1) of the Constitution.

47 Section 19(2)(a) of the Public Leadership Ethics Act.

48 See UNCAC Country Report (2014).

4.6 Concluding Remarks

The institutional arrangements to implement various legal measures against corrupt PEPs are adequate generally. Their overall effectiveness and capacity to deal with the risks posed by corrupt PEPs, however, are affected by a number of common challenges. These include the lack of resources and skilled staff, as well as political interference. Further, some institutions have not made proper use of their potential to combat money laundering and corruption. What is more, there is no mechanism in place to enable co-ordination and co-operation among the relevant institutions and, as a result, there is a lack of coherence in the implementation of the PEP requirements.



Chapter Five

Conclusion and Recommendations

5.1 General Conclusion

The key concept of this study is the need to approach the economic criminality of PEPs by using a holistic approach that combines anti-corruption and anti-money laundering measures under UNCAC and the FATF standards. Such an approach engenders appropriate responses that cover both corruption and money laundering, unlike previous PEP strategies that focused on implementing anti-money laundering measures only.

UNCAC requires states parties to implement measures to prevent and combat corruption, including preventive measures, the criminalisation of corruption,¹ and asset recovery.² The FATF requires financial institutions and DNFBPs to conduct CDD and EDD when dealing with PEPs and persons affiliated to them.³

This study has observed that the strategies to manage PEPs in Tanzania are partially compliant with UNCAC and the FATF standards. An analysis in the legal framework revealed that anti-corruption measures are relatively satisfactory. However, several legal gaps give corrupt PEPs opportunities to circumvent the law. Additionally, several laws fail to achieve their objectives because of serious enforcement gaps. This situation casts doubt on the government's seriousness to fight grand corruption.

What is more, the fact that the PEP definition does not include domestic PEPs gives senior public officials an advantage, as they are not subjected to any enhanced scrutiny. Corrupt PEPs use this loophole to launder proceeds of corruption. Domestic PEPs pose more risk than the other PEPs and thus should not be exempted from the PEP requirements.

1 Chapters 2 & 3 of UNCAC.

2 Chapter 4 of UNCAC.

3 FATF Recommendations (2012).

Although the PEP requirements apply to foreign PEPs, they are not well articulated in the AML Act, its regulations and relevant guidelines. Reporting persons have used this weakness as an excuse for not applying appropriate measures when dealing with PEPs. It is important, therefore, that laws clearly define the PEP requirements as contained in UNCAC and the FATF standards.

The analysis of the institutional framework has shown that there exist a considerable number of institutions relevant to the fight against corruption and money laundering. Unfortunately, these institutions face many challenges, including lack of resources, shortage of skilled staff and political interference. Hence the institutional capacity to deal with corrupt PEPs is undermined. In order to function effectively, the relevant institutions need to be autonomous, free from political interference and provided with enough financial resources and skilled staff.

Regrettably, the study has revealed that there is no coherence among the relevant anti-corruption and AML/CFT institutions. For example, the PCCB and the FIU exist in an environment in which the anti-corruption regime and anti-money laundering regime are separate. Corrupt PEPs take advantage of this lack of co-ordination and even play one side off against the other. In fact, where the institutions established for implementing and enforcing the law are at odds, the effectiveness of applicable legislation is impaired.

There have been many grand corruption scandals but few prosecutions of PEPs implicated in these scandals. The government focuses on administrative sanctions which have no deterrent effect. Indeed, such sanctions imply that PEPs are too valuable to prosecute, and represent double standards in the implementation of anti-corruption measures, by targeting the “small fish” and leaving the kingpins untouched.

Tanzania should develop a comprehensive, integrated strategy as a tool against corrupt PEPs. This encompasses taking measures to identify the underlying dynamics of economic criminality of PEPs and sector vulnerability, so as to determine the strategy that is most effective in mitigating the particular risk posed by PEPs. Several recommendations in this regard are made below.

5.2 Recommendations

5.2.1 Amend Anti-Money Laundering Laws

It is proposed that section 3 of AML Act be amended to include domestic PEPs, their family members and close associates. Tanzania should consider learning from other jurisdictions, such as South Africa, which include domestic public office holders in their PEP definition. Also, the PEP requirements should apply not only to customers, but also to beneficial owners.

AML guidelines should be drafted in a comprehensive manner. Lessons can be drawn from the South African and the UK guidelines. This will allow reporting persons to understand what is required of them when applying the PEP requirements. The guidelines should include sanctions for non-compliance to give them the force and weight they currently lack. Also, guidelines should be issued to all DNFBPs.



5.2.2 Amend Anti-Corruption Laws

There is a need to reconsider the penalties and fines under the Prevention and Combating of Corruption Act (PCCA). Some are too lenient to deter corrupt PEPs from criminal activities. It is important to ensure that anti-corruption laws are punitive enough and have a deterrent effect. Also, the provision on embezzlement in the PCCA should be amended to reflect article 17 of UNCAC. The law should do away with the agency-principal criterion in the definition of bribery. To limit presidential influence on the PCCB, the provisions on the appointment and removal of PCCB officials should be amended to specify the term of office.

5.2.3 Civil Forfeiture

Tanzania should consider the adoption of a civil forfeiture regime for asset recovery. As observed, conviction-based asset recovery has produced little result because there have been few prosecutions of PEPs. A civil forfeiture regime is therefore essential to recover proceeds of crime from PEPs without the need for a conviction.

5.2.4 Enhance the Assets Declaration System

To make assets declarations effective, government should consider developing a well-structured system of review and verification of assets to ensure that any controlling or beneficial interests are detected, so as to account for assets owned by family members and close associates on behalf of a PEP. The law should include reasonable procedures on how assets declaration information is made available to the public. The assets declaration system should be used also in PEP identification.

5.2.5 Strengthen Supervisory Measures

The Central Bank should strengthen its supervisory functions to ensure that financial institutions are implementing the FATF recommendations fully. The Central Bank must impose appropriate sanctions on non-compliant institutions. More importantly, the Central Bank should strengthen its own internal governance and control measures.

The FIU should construct and periodically revise a list of PEPs that includes current and potential PEPs. This list should be distributed to all reporting persons, the PCCB and other relevant institutions. It is recommended that the capacity of the FIU be improved as regards staff, financial resources, technological support and training.

The government should consider establishing designated authorities to monitor and supervise DNFPs for AML/CFT purposes. At this juncture, priority should be given to real estate because the industry is booming and it poses the risk of being used by money launderers to pursue their trade via property purchases.

5.2.6 Political Will

Measures against corrupt PEPs will be of no account if there is no political commitment to enforce them. Successful law needs sustained political will. In this regard, the government must commit fully to implementing the measures it has devised against corrupt PEPs. This includes senior government officials conducting themselves with integrity, honesty and accountability.

The government should enact laws that are in line with UNCAC and the FATF and other relevant international standards. It should ensure also that domestic legislation is sufficiently stringent, retributive and deterrent. Further, it should make certain that relevant institutions are well staffed, adequately resourced and independent.

5.2.7 Institutional Co-operation

The government should consider establishing means for facilitating co-ordination between the PCCB, the FIU and other complementary bodies. This involves integrating various institutions to operate in a cohesive manner. For example, STRs filed with the FIU can be used to found investigations into possession of unexplained wealth. This will enhance the operation of each institution in implementing its obligations. It is important, therefore, that an effective communication mechanism is in place to enable such co-operation in the implementation of the PEP requirements.



5.2.8 Public Participation

The public needs to participate in the strategies against corrupt PEPs, who know the power that the public wields in unmasking their criminality. After all, it is the public that is the victim of their crimes. It is important to make assets declaration forms available for public scrutiny. While it is necessary to prescribe procedures for accessing such forms so as to safeguard the privacy of public officials, such procedures should not be so cumbersome as to undermine the underlying objective of fighting crime. Public access is a way for the government to identify undeclared assets and false declarations. Also, members of the public may be key witnesses in grand corruption cases. However, where there are no comprehensive witnesses protection programmes, such witnesses will be discouraged from testifying against PEPs.

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