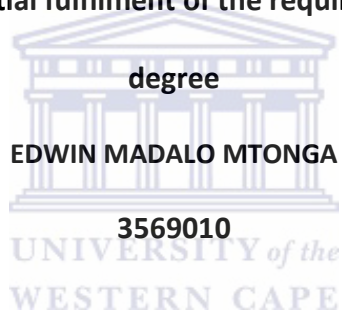


**THE UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**A Critical Appraisal of the Current Anti-Money Laundering Laws of Malawi with Specific Focus  
on Trusts**

**Research paper submitted in partial fulfilment of the requirements for the award of the LLM**



**Supervisor**

**Prof Lovell Fernandez**

**2015**

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## Declaration

I, Edwin Madalo Mtonga, declare that '*A Critical Appraisal of the Current Anti-Money Laundering Laws of Malawi with Specific Focus on Trusts*' 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 Lovell Fernandez

Signature:.....

Date:.....

## Acknowledgements

Firstly, I thank the Almighty God for bringing me this far and for making everything possible in realising my goals.

Secondly, my profound gratitude should go to my supervisor, Professor Lovell Fernandez for his guidance and support. I have been very blessed to have a supervisor who was patient, kind and willing to assist.

Special appreciation also goes to the generous people of Germany through DAAD for the scholarship afforded to complete my LLM.

I am also grateful to Professor Werle, Dr. Vormbaum and Professor Koen for their kindness in sharing their knowledge in their respective areas of expertise.

Lastly, I must express my gratitude to my classmates, the DAAD class of 2015. This journey would have been all the more difficult were it not for the support and friendship you provided.

*“vielen Dank”*

## List of Acronyms and Abbreviations

AML : Anti-Money Laundering

CDD : Customer Due Diligence

CFT : Combating of Terrorist Financing

DNFBPs : Designated Non-Financial Businesses and Professions

DEWIPA: Deceased Estates (Wills, Inheritance and Protection) Act

ESAAMLG : Eastern Southern African Anti-Money Laundering Group

EU : European Union

FATF : Financial Action Task Force

FIU : Financial Intelligence Unit



G 20 : Group of 20

MER : Mutual Evaluation Report

MLA : Money Laundering, Proceeds of Serious Crimes and Terrorist Financing Act

OECD : Organisation for Economic Cooperation and Development

STR : Suspicious transaction report



## Key Words

Beneficial ownership

Corruption

FATF Recommendations

Illicit purposes

Implementation of FATF Recommendations

Legal arrangements

Malawi

Money Laundering

Obstacles

Terrorist Financing

Trusts

Property

Vehicle for money laundering



## Chapter One

### The Impact of Money Laundering and Other Illicit Financial Flows on the Economy of Malawi

#### 1.1 Introduction

Money laundering is a global phenomenon that has terrorised the economies of the world. It has been described as the process through which people attempt to legitimise illegally obtained money by disguising its true nature or source.<sup>1</sup> The term 'laundering' literally means 'washing' or 'removing dirt'.<sup>2</sup> The anti-money laundering legal regime, hence, concerns the prevention, detection and deterrence of illicit financial flows that have crippled the world economies and continue to do so.

Illicit financial flows have posed a particularly big challenge for the economies of developing countries, especially African countries. The African Union – United Nations Economic Commission for Africa High-level Panel on Illicit Financial Flows recently released a report which estimates that the continent of Africa loses about \$50 billion to \$148 billion annually through illicit financial flows.<sup>3</sup> Resources that could have been put to better use, for example, for socio-economic development, are diverted and laundered elsewhere for the private gain of a few

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<sup>1</sup> Serafini J 'Money Laundering' 41 *American Criminal Law Review* 887 (2004) available at <http://www.lexisnexis.com.ezproxy.uwc.ac.za/hottopics/lnacademic/?shr=t&csi=168966&sr=TITLE%28Money+Laundering%29+and+DATE+IS+2004> (accessed on 31 March 2015).

<sup>2</sup> See also Unger B (2007) "Implementing Money Laundering" in Masciandaro D *et al Black Finance: The Economics of Money Laundering* Cheltenham: Edward Elgar Publishing 103-148.

<sup>3</sup> See United Nations Economic Commission for Africa and The African Union Commission High level Panel on Illicit Financial Flows from Africa Report (2015) *Illicit financial flow: why Africa needs to "track it, stop it and get it"* (26 February 2015). Available at [http://www.uneca.org/sites/default/files/PublicationFiles/iff\\_main\\_report\\_26feb\\_en.pdf](http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf) (accessed on 6 June 2015).

selfish individuals. This situation is exacerbated by the reality that most of the developing countries lack sufficient capacity to regulate the financial flows in their economies.

Money laundering, being a global problem, has prompted the international community to respond to it seriously. The first international efforts to combat money laundering were directed at outlawing the proceeds of the illicit trade in narcotic drugs and psychotropic substances.<sup>4</sup> Today the range of offences targeted by the anti-money laundering regime has expanded to include the most common serious criminal offences recognised by the international community, including tax evasion, corruption and bribery.<sup>5</sup>

Financial institutions such as banks have been the most commonly-used vehicles to launder ill-gotten money. As a result, over the years, various mechanisms have been put in place to detect and report unusual transactions within banks and other financial institutions. The imposition of preventive and regulatory measures on financial institutions has forced money launderers to explore other means of accumulating and investing the proceeds of crime.

There is a growing tendency among corrupt state officials and other individuals who engage in illicit activities for gainful purposes to use so-called corporate vehicles, including trusts, to obscure the trail of dirty money and to conceal the proceeds of crime.<sup>6</sup>

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<sup>4</sup> See the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

<sup>5</sup> See Articles 14 and 23 of the United Nations Convention against Corruption (2003).

<sup>6</sup> See FATF Typologies Report on Money Laundering Using Trusts and Company and Company Service Providers (October 2010). Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Money%20Laundering%20Using%20Trust%20and%20Company%20Service%20Providers.pdf> (accessed on 2 March 2015). See also Van der Does de Willebois E et al. *The Puppet Masters: How the Corrupt use the legal structures to Hide Stolen Assets and What to do About it* (2011) The World Bank: Washington. Available at <https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf> (accessed on 31 March 2015).

The central challenge for the global anti-money laundering effort has been to adapt to the rapid changes in the techniques by which money is laundered.

Most countries in the world now have anti-money laundering laws and regulations in their domestic legal systems. This paper seeks to analyse the efficacy of Malawi's anti-money laundering regime, especially insofar as it concerns combating the use of the trust as a vehicle for money laundering.

## 1.2 Development of the anti-money laundering regime in Malawi

Malawi is one of the African countries that has been struggling with the scourge of money laundering and other related economic crimes. Public corruption is the most common source of illicit profits, besides tax evasion<sup>7</sup> and the growing of and dealing in *Cannabis Sativa* (Indian hemp).<sup>8</sup>

The uncovering in October 2013 of massive looting by Malawian public officials of public funds illustrates the extent of corruption and theft within the Malawi civil service. This widely-publicised theft has now become known as the 'Cashgate scandal'. It involved the treasury being swindled out of 13, 671, 396, 751.00 Malawi Kwachas (MK) (Approximately \$32 million)<sup>9</sup> within a period of six months. About 53 criminal case files were opened in respect of suspects who, at the time of writing, are facing criminal charges of theft and money laundering.<sup>10</sup> Most

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<sup>7</sup> See S Yikona, B Slot, M Geller *et al Ill-gotten Money and the Economy: Experiences from Malawi and Namibia* (2011) 25.

<sup>8</sup> See The FATF Mutual Evaluation Report on Malawi Para. 53.

<sup>9</sup> See Baker Tilly *Report on Fraud and Mismanagement of Malawi Government Finances: Covering transactions and controls in the six month period 1 April 2013 – 30 September 2013* (21 February 2014). Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/285877/20140221\\_National\\_Audit\\_Office\\_Malawi\\_-\\_Forensic\\_Audit\\_Report\\_-\\_FINAL\\_ISSUED.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285877/20140221_National_Audit_Office_Malawi_-_Forensic_Audit_Report_-_FINAL_ISSUED.pdf) (accessed on 6 June 2015).

<sup>10</sup> IMF (2015) 6.

of the cases involve public officials who are alleged to have stolen public funds, using companies of which they are the beneficial owners to make bogus payments.

The former president, Bakili Muluzi, too, is accused of diverting to his personal accounts government money amounting to MK1.4 billion (approximately \$10 million)<sup>11</sup> during his tenure as president. These two examples show the vulnerability of the Malawian treasury to corruption and embezzlement. As a debt-ridden country, heavily dependent on foreign aid for development, Malawi can ill-afford to ignore the repercussions that such scandals attract from the side of the donor community.

Malawi is a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG), a regional grouping, the aim of which is to promote the international anti-money laundering standards set by the Financial Action Task Force (FATF).<sup>12</sup> The FATF is an inter-governmental body set up in 1989 at the initiative of the Group of Seven (G7) countries and is mandated to set worldwide standards in the combating of money laundering, and to monitor how they are implemented by countries across the world.<sup>13</sup> ESAAMLG, as an associate member of the FATF, has the role of overseeing the implementation of the FATF's Recommendations in Eastern and Southern Africa.

In honouring its international obligations to combat money laundering, Malawi has made considerable progress. It is a state party to various international and regional anti-money

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<sup>11</sup> See The case of *The Republic v. Elson Bakili Muluzi* High Court Criminal Case Number 1 of 2009 (Pending).

<sup>12</sup> See Memorandum of understanding among member governments of ESAAMLG. Available at [http://www.esaamlg.org/documents\\_storage/ESAAMLG\\_MEMORANDUM\\_OF\\_UNDERSTANDING.pdf](http://www.esaamlg.org/documents_storage/ESAAMLG_MEMORANDUM_OF_UNDERSTANDING.pdf) (accessed on 11 May 2015).

<sup>13</sup> See the introductory note to The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (16 February 2012). Available at [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 11 May 2015).

laundering (AML) instruments, including those aimed against corruption and the financing of terrorism. It has ratified the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Other Psychotropic Substances (the Vienna Convention, 1988), the United Nations Convention against Transnational Organised Crime (the Palermo Convention, 2000) and the United Nations Convention Against Corruption (UNCAC, 2003). In further fulfilment of its obligations under the stated Conventions, Malawi enacted the Money Laundering, Proceeds of Serious Crimes and Terrorist Financing Act in 2006 to domesticate the anti-money laundering regime.<sup>14</sup> The Act criminalises money laundering and expresses Malawi's commitment to combat money laundering and the financing of terrorism by imposing obligations on financial institutions and other non-designated financial businesses and professions (NDFBPs), in line with international AML/CFT standards.

However, corruption continues to remain a major challenge to development in Malawi,<sup>15</sup> despite the establishment of the Anti-Corruption Bureau (ACB) under the Corrupt Practices Act soon after the country became a multi-party democracy in 1995.<sup>16</sup>

A recent World Bank study revealed that in Malawi corruption comes second to tax evasion as the largest source of ill-gotten money.<sup>17</sup> The study found that the amount of money involved in corrupt practices in the country is approximately five per cent of the national gross domestic product (GDP), while in the case of tax fraud it is about eight to twelve per cent of the GDP.<sup>18</sup>

Such enormous embezzled amounts could have been put to proper use in developing the

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<sup>14</sup>FATF Mutual Evaluation Report on Malawi (2008) available at [http://www.esaamlg.org/evaluationreports/Malawi\\_Report.pdf](http://www.esaamlg.org/evaluationreports/Malawi_Report.pdf) (accessed 2 March 2015).

<sup>15</sup>The Republic of Malawi, *National Anti-Corruption Strategy* 2008.

<sup>16</sup>Chapter 7:04 of the Laws of Malawi.

<sup>17</sup>Yikona, Slot, Geller *et al* (2011) 81.

<sup>18</sup>Yikona, Slot, Geller *et al* (2011) 29.

economy and alleviating poverty. The culprits are hard to catch, for they resort to crafty schemes to disguise and hide their illicit gains.

This research paper focuses on trusts as a vehicle for money laundering. The FATF Mutual Evaluation Report on Malawi is critical of the fact that Malawi's laws regulating trusts do not require the registration of private trusts.<sup>19</sup> In effect, it boils down to the fact that the beneficial owner of the trust remains unknown. The Report bemoans furthermore the lack of transparency regarding how public trusts are funded and the way their assets are managed. Most public trusts are set up as charities and associations.<sup>20</sup> The absence of a strict regulatory legal framework exposes the pitfalls in Malawi's law relating to trusts, but it also shows what still has to be done to strengthen the fight against money laundering and terrorist financing.

### 1.3 The concept of the trust

The legal concept of trust was developed in the medieval period by the English Court of Equity, particularly in the field of property law. The concept was developed to circumvent the restrictions of the English common law of property on the transfer of legal title to land during one's lifetime (*inter vivos*) and after death (*post mortem*).<sup>21</sup> Two types of trusts existed: a general trust and a special trust.<sup>22</sup> In a general trust, legal title would be transferred to a third party for the benefit of another (*cestui que* trust).<sup>23</sup> In a special trust, a trustee would hold the property temporarily for some special purpose, either to look after it while the real owner was

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<sup>19</sup> (2008) Paras. 37, 75, 494, 501 and 504.

<sup>20</sup> (2008) Paras. 38, 518.

<sup>21</sup> Avin A 'The Origins of the Modern English Trust Revisited' 70 *Tulane Law Review* 1139 (1996) 1143 available at [http://www.lexisnexis.com.ezproxy.uwc.ac.za/lnacui2api/results/listview/delPrep.do?cisb=&risb=21\\_T22102757122&mode=delivery\\_DnldRender](http://www.lexisnexis.com.ezproxy.uwc.ac.za/lnacui2api/results/listview/delPrep.do?cisb=&risb=21_T22102757122&mode=delivery_DnldRender) (accessed 27 May 2015).

<sup>22</sup> See Avin (1996) 1139.

<sup>23</sup> Avin (1996) 1143.

away, or to manage it in his absence.<sup>24</sup> As a result of this arrangement, the third party became the title holder, as opposed to the person who transferred the property (the settlor) and the beneficiary. The beneficiary had no interests enforceable by the court or at common law. This gap was filled by the English ecclesiastical courts, which appointed an officer to investigate the matter and recommend a remedy. Later on, with the increased usage of this kind of this legal arrangement, the Court of Chancery developed rules that were later known as Equity to regulate the trustee and beneficiary relationship. These rules operated separately from the common law until they were merged with the common law by the Judicature Acts of 1875.

#### **1.4 The history of trust law in Malawi**

The concept of trust was incorporated into the laws of Malawi as part of the received law by virtue of the British Central Africa Order in Council of 1902, when Malawi was a British Protectorate, then known as the British Central Africa Protectorate.<sup>25</sup> By virtue of Article 15 (2) of the Order in Council, the English common law, statutes of general application, and the doctrine of equity became applicable law in the protectorate of Malawi. Malawi's independence constitution of 1966, as well as the current republican, democratic constitution of 1994, has maintained the received laws to the extent that they are not repugnant to the constitution.<sup>26</sup> However, as long back as 1962, Parliament enacted the Trustees Incorporation Act to provide for the incorporation of charities and associations, and subsequently, in 1967, it passed the Trustees Act, which regulates the position of trustees generally. These Acts have

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<sup>24</sup> Avin (1996) 1143.

<sup>25</sup> F von Benda-Beckmann, *Legal Pluralism in Malawi: Historical development 1858-1970 and Emerging Issues* (2007) 37.

<sup>26</sup> Section 200.



since been applied alongside the common law and the law relating to equity, which were received by virtue of the 1902 Order in Council.

At present, public or charitable trusts are created under the Trustees Incorporation Act [*Capitulus* (Chapter or Cap) 5:02 of the Laws of Malawi] while private trusts are created under the common law, either by way of deed or will.

The Trustees Incorporation Act requires public trusts to be registered with the Registrar General on Incorporation.<sup>27</sup> The Registrar General keeps all the records of the trusts, including particulars of the trustees, but is not required to inquire into or investigate the sources of trust funds, and there is no requirements to inspect the accounts of the trust. Private trusts are prepared by way of a trust deed or will and are not required to be registered. Information on private trusts is, therefore, not available for inspection, nor is information regarding control and beneficial ownership. Such loopholes in the law have made trusts vehicles for concealing the identity of the grantor (settlor) and the beneficiaries, thus making the institution of trusts a standard part of the money laundering toolkit.

### **1.5 Significance of the study**

Criminals who are involved in illicit activities for monetary gain go to great lengths to conceal their involvement in such activities. Usually, these criminals do not keep these ill-gotten gains in their own names. Trusts constitute one of the avenues used to hide the ill-gotten gains, particularly because of their confidential nature. The international legal framework against

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<sup>27</sup> See Section 3 of the Trustees Incorporation Act (Cap 5:02 of the Laws of Malawi).

economic crimes obligates national jurisdictions to implement measures to improve transparency of legal persons and legal arrangements.<sup>28</sup>

The purpose of this study is to identify the lacunae in the law and to suggest ways of filling them. As Jonathan Turner states:

“Understanding why something is done, how it is accomplished, often provides the best path for defending against it.”<sup>29</sup>

The study aims at identifying also the complementary measures to root out means of laundering the proceeds of crime. Denying criminals the enjoyment their ill-gotten assets, reduces their incentive to commit crime. An elaborate anti-money laundering regime that covers all the loopholes, thus immobilising all the vehicles for money laundering, will make a positive contribution to the economic development of Malawi.

### **1.6 Theoretical premise of the study**

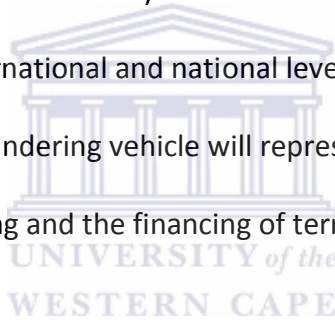
The theoretical basis from which the study proceeds is that, given the complex nature of the crime of money laundering, the money launderer will resort to whatever means possible to give the proceeds of crime the appearance of legality. In order to achieve this end, the money launderer will even risk using well-established, lawful institutions to integrate the proceeds of crime into the lawful economy. The author’s assumption is that lawful institutions, whether created by statute or developed by the common law, are less likely to attract the suspicion of the criminal justice authorities as instruments of money laundering. The trust, for example, is

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<sup>28</sup> Recommendations 33 and 34 of the FATF Recommendations.

<sup>29</sup> Turner J E *Money Laundering Prevention: Deterring, Detecting. And Resolving Financial Fraud* (2011) 2.

an ancient creation that continues to serve many legitimate purposes today. Its use or abuse as a means of serving illicit ends has, therefore, never been questioned throughout the ages. It is only very recently that bodies such as the FATF have drawn attention to the fact that countries need to ensure that their laws regulating trusts include clauses which make the creation of a trust more transparent. The FATF made this call after it became evident that enormous sums of money deriving from crimes were being channelled through trusts. Trusts are particularly vulnerable due to their confidential nature and the fact that many jurisdictions, including Malawi, have no strict requirements regarding the steps that should be followed before a trust is registered. The study will endeavour to explore how the trust is used to launder money at both the international and national level. The writer's assumption is that closing off the trust as a money laundering vehicle will represent a significant step in Malawi's efforts to combat money laundering and the financing of terrorism.



### **1.7 Research methodology**

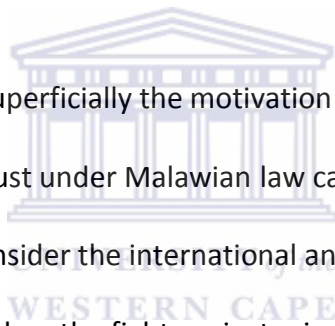
The method used to address the issue in this study will be a straight-forward depiction of the scale of the abuse of the trust in Malawi, and how the courts have dealt with the problem. The discussion will then turn to examine the law regulating trusts to find out if it has any weaknesses, how they are exploitable or have been exploited by launderers, and what needs to be done to make the law more effective as an AML device. The study will use as its benchmark the standards laid down by the FATF and other initiatives aimed at blocking off the mischievous use of corporate vehicles for sinister purposes.

While this research paper focuses on the situation in Malawi, the writer is well aware of the fact that, given the transnational nature of money laundering, it would make sense to know the

extent to which the ESAAMLG countries are aware of the abuse of trusts by economic delinquents and what measures they are contemplating putting in place at a regional level to prevent the manipulation of the law by launderers. It is equally important to gain a sense of how the public in general is apprised of the potential misuse of trusts. Media reports usually describe scandals, which are but symptoms of a much deeper malaise, the cure of which can come partly by way of legislative intervention, and partly in the observance and enforcement of the law. This study will address these aspects too, for in the end much depends on the preparedness of politicians to tackle the problem head-on.

### **1.8 Concluding remarks**

This chapter outlined briefly and superficially the motivation to conduct the study and the need to have a closer look at how the trust under Malawian law can lend itself as a tool for economic criminals. The next chapter will consider the international anti-money laundering legal framework, and how it has affected on the fight against misuse of trusts as vehicles for money laundering.



## Chapter Two

### **The International Legal Framework for Countering the Use of Trusts or Similar Legal Arrangements for Illicit Purposes**

#### **2.1 Introduction**

The international community is working hard to minimise the risks and impact of money laundering. This chapter discusses the current international AML/CFT efforts to combat the use of trusts and similar legal arrangements for illicit purposes. Money laundering has become a global challenge that requires a collective response. The global fight against money laundering began with the UN's adoption of the Convention against Illicit Traffic in Narcotic Drugs and Psychotic Substances (the Vienna Convention of 1988). The chapter discusses how this step was significant in the fight against money laundering. It examines also other anti-money laundering initiatives and measures taken by the UN subsequently, including the UN Convention against Transnational Organised Crime in 2003 (The Palermo Convention) and the UN Convention against Corruption (UNCAC, 2003). This chapter examines, too, the standards and guidelines set by inter-governmental bodies, such as the FATF Recommendations and the Group of 20 nations (G 20).

Included in the overview are also other initiatives taken at the international level to expose and prevent the misuse of trusts and similar legal arrangements for money laundering purposes and terrorist financing. Examples of such initiatives are the Council of Europe Convention on Laundering, Search and Seizure of Proceeds of Crime and the African Union Convention on Preventing and Combating Corruption (2003). Both these instruments contain some anti-money

laundering provisions of general applicability to states parties' anti money laundering initiatives.

The above-mentioned international standard-setting agreements have been ratified or adopted by most countries throughout the world.

The chapter will explore further whether there are provisions in the above-mentioned initiatives from which we can deduce obligations or calls for states parties to implement measures to combat the use of legal arrangements, including trusts, as vehicles for money laundering.

## **2.2 The United Nations anti-money laundering initiatives**

The UN leads the global fight against money laundering. It has adopted three Conventions to ensure that criminals do not gain from their crimes. The Conventions are the Vienna Convention of 1988, the Palermo Convention of 2003 and the United Nations Convention against Corruption (UNCAC).

### **2.2.1 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (The Vienna Convention, 1988)**

The Vienna Convention is the first international legal instrument to address money laundering, but without using the word 'money laundering'. As the title suggests, the rationale for the Convention was to curtail the illicit drug trade by, among others, identifying and confiscating the proceeds of drug crime.<sup>30</sup> The Convention addresses drug-related money laundering only.<sup>31</sup>

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<sup>30</sup> Art 5.

<sup>31</sup> Art 3(1).

Article 3(1)(b) of the Convention obligates states parties to criminalise the conversion or transfer of property with knowledge that such property was derived from the illicit drug trade. The article criminalises furthermore the concealing or disguising of the illicit origins of the said property and the rendering of assistance to any person involved in such acts to evade the legal consequences of his actions.<sup>32</sup>

The Convention provides further for the confiscation and seizure of the tainted assets by the competent authorities.<sup>33</sup>

Under Article 7, parties may enter into mutual legal assistance treaties (MLA) for ease of investigations, prosecutions and judicial proceedings in relation to illicit drug trade offences.<sup>34</sup>

This is besides the fact that Article 5(4) calls upon states parties to enter into bilateral and multilateral treaties to enhance their efforts to combat the illicit drug trade.<sup>35</sup>

The Vienna Convention broke new ground by promulgating the criminalisation of money laundering, as we know it today, and the seizure and confiscation of illicit gains from the drug trade. In the meantime, the FATF has added a list of other predicate crimes of money laundering, besides illicit drug trafficking. Predicate crimes are actions underlying the crime of money laundering or the financing of terrorism.

The Convention is further hailed for obligating states to empower their courts to override bank secrecy laws and to order financial institutions to make their records available to investigating

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<sup>32</sup> Art 3(1)(b)(ii).

<sup>33</sup> Art 5 provides that parties may themselves seize the assets or ask another party to co-operate in the seizure and confiscation.

<sup>34</sup> Art 7(1).

<sup>35</sup> Art 5(4)(g).

authorities for the purposes of tracing and confiscating unlawful assets.<sup>36</sup> Stringent bank secrecy laws are convenient and friendlier to money launderers in that they protect them from detection, which makes such laws counterproductive to the efforts to combat money laundering.

### **2.2.2 UN Convention against Transnational Organised Crime (The Palermo Convention, 2000)**

The Palermo Convention is the first legally binding UN instrument dealing with transnational organised crime and other serious offences.<sup>37</sup> This Convention obligates states parties to criminalise money laundering, not only as it relates to the drug trade, but also insofar as it is predicated on other serious offences, including participation in organised crime, corruption and obstruction of justice.<sup>38</sup>

As regards prevention or regulation, the Palermo Convention calls upon states parties to implement strict anti-money laundering measures, in line with international standards and practice.<sup>39</sup> The Convention addresses also the issue of asset recovery by requiring states parties to establish procedures for enabling the identification, tracing, freezing, seizure and confiscation of proceeds of crime.<sup>40</sup>

The Convention does not dictate to countries how to act; it simply urges them to criminalise the acts of money laundering. It is up to the states parties themselves to identify the areas and institutions that are vulnerable to money laundering and to draft the necessary counteractive regulations.

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<sup>36</sup> Art 5(3).

<sup>37</sup> Houghton D (2009) *Money laundering: A Concise Guide for all Businesses* 2<sup>nd</sup> ed 10.

<sup>38</sup> Art 6(1)(a) and (b).

<sup>39</sup> Art 7.

<sup>40</sup> Art 12.



### 2.2.3 UN Convention against Corruption (UNCAC, 2003)

UNCAC is one of the most comprehensive anti-corruption instruments.<sup>41</sup> It provides an important link between efforts to curb corruption and the fight against money laundering. Corrupt activities are aimed ultimately at enjoying the illicit proceeds when laundered successfully. Corruption and money laundering thus stand in a symbiotic relationship to each other.<sup>42</sup> The laundered assets could be proceeds of corruption, or the laundering process itself could be made possible by bribing some responsible officials.<sup>43</sup> UNCAC has thus identified corruption as a serious offence and makes it one of the predicate crimes of money laundering under Article 23.<sup>44</sup>

UNCAC imposes a general obligation on member states to implement obligations that they have assumed under UNCAC and which are in accordance with their national principles.<sup>45</sup> The latter qualifying clause, unfortunately a characteristic of several international anti-money laundering instruments, is a typical 'claw-back' provision that a number of money laundering-friendly countries use as a pretext not to introduce laws that conflict with national laws.

Article 23 covers both the person who converts or transfers property to disguise its illicit origin and the person who assists a person who committed the predicate offence.<sup>46</sup> This implies that the person who aids a criminal to hide his proceeds of corrupt practices is regarded equally as

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<sup>41</sup> Carr I & Goldby M (2008) *The UN anti-corruption convention and money laundering*. International Conference of the Institute of the International Economic Relations, Athens, Greece 6-7 September 2008 1 available at [idec.gr/iier/new/CORRUPTION\\_CONFERENCE/The\\_UN\\_Anti-corruption\\_convention\\_and\\_money\\_laundering-INDIRA\\_CARR.pdf](http://idec.gr/iier/new/CORRUPTION_CONFERENCE/The_UN_Anti-corruption_convention_and_money_laundering-INDIRA_CARR.pdf) (accessed 26 July 2015).

<sup>42</sup> Chaikin D & Sharman JC (2009) *Corruption and Money Laundering: A Symbiotic Relationship*.

<sup>43</sup> Mugarura N (2012) *The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries* 124.

<sup>44</sup> Art 23.

<sup>45</sup> Art 65.

<sup>46</sup> Art 23(1)(a)(i).

culpable as the criminal himself. Arguably, a person who creates a trust for purposes of converting, transferring or concealing the proceeds of corruption could be captured by this provision. Furthermore, a trustee who manages such funds, knowing that they are the proceeds of crime, would fall under the provision too. Lawyers and financial advisers who give advice to clients on how to launder the proceeds of their corrupt activities might be covered also by the wide-ranging definition in Article 23.

A big chunk of the UNCAC text is dedicated to asset recovery.<sup>47</sup> Article 51 asserts specifically that asset recovery is a fundamental principle of the Convention. Asset recovery is an important tool in the fight against financial crime, as the confiscation of criminally-obtained assets signals a clear message to potential economic delinquents that ‘crime does not pay’. Asset recovery is even more important for developing countries, where criminal money siphoned out of the national economy unlawfully can be recovered to address pressing national wants.



### **2.3 The FATF Recommendations**

The FATF has a set of 50 Recommendations that set the international, soft-law standards that countries need to adopt to counteract money laundering and the financing of terrorism. The Recommendations are not legally binding, yet they have become global standards against money laundering and the financing of terrorism.<sup>48</sup> Even if non-compliance has no legal consequences for the member states, it can result in a number of economic sanctions, since the

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<sup>47</sup> Chapter V of the Convention is dedicated to Asset Recovery.

<sup>48</sup> Durrieu R *Rethinking Money laundering and Financing of Terrorism: Towards a New Global Legal Order* (2013) 121.

Recommendations have been adopted as world standards by economic bodies like the International Monetary Fund and the World Bank.<sup>49</sup>

The European Union (EU) has issued Directives based on the FATF Recommendations which constitute a common legal basis for implementing these standards within the EU. Furthermore, a number of countries have incorporated the FATF Recommendations into their domestic laws making them legally enforceable at the national level.

The typology studies conducted by the FATF provide useful information about how money launderers have been reacting to the introduction of new money laundering regulations, especially by using alternatives to banks. The FATF typologies reports of 2006 exposed the risk of the misuse of corporate vehicles, including trusts as vehicles for money laundering.<sup>50</sup> The specific report noted the ease with which corporate vehicles, including trusts, could be established anonymously and be used to conceal the proceeds of crime and its sources in some jurisdictions.<sup>51</sup> The typology study is significant for the fact that it highlights the importance of knowing the beneficial owner of a trust, as such information is key to uncovering the source of the funds used to capitalise the trust.

In 2010 the FATF released a typology entitled *Money Laundering Using Trust and Company Service Providers* as a follow-up to the 2006 study. The report found that jurisdictions with

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<sup>49</sup> IMF 'IMF Advances Efforts to Combat Money laundering and Terrorist Finance' *IMF Public Information Notice No. 02/87* 8 August 8 2002 available at <http://www.imf.org/external/np/sec/pn/2002/PN0287.HTM> (accessed 9 August 2015).

<sup>50</sup> FATF *Typologies Report on Misuse of Corporate Vehicles, including Trust and Company Service Providers* (13 October 2006).

<sup>51</sup> FATF (2006) 1.

unregulated trust and company service providers are at great risk of being used as platforms to launder money and to finance terrorism.<sup>52</sup>

Aware of the potential risk of criminals resorting to trusts to disguise the origin of their illicit gains and converting them while maintaining their anonymity, the FATF extended the scope of Recommendations 24 and 25.<sup>53</sup> These two Recommendations concern the transparency and beneficial ownership of legal persons and arrangements, which includes trusts.

Recommendation 24 calls upon member countries to adopt measures to prevent the unlawful usage by money launderers of legal persons.<sup>54</sup> Recommendation 25 specifically addresses the issue of trusts. Member countries are requested to implement laws to ensure that there is adequate, accurate and timely information on express trusts.<sup>55</sup> An express trust is a trust which is created by the settlor, either by way of a document or orally, for the express purpose of creating a valid trust. The FATF requires that the document establishing the trust include the details of the settlor, trustee and beneficiary. The information must be accessible or obtainable readily and timeously by the competent authorities.

Neither the Vienna Convention nor the Palermo Convention deals with beneficial ownership. It is, therefore, a crucial development that today the personal details of the settlor of a trust must be disclosed when the trust is registered.

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<sup>52</sup> FATF (2010) 50.

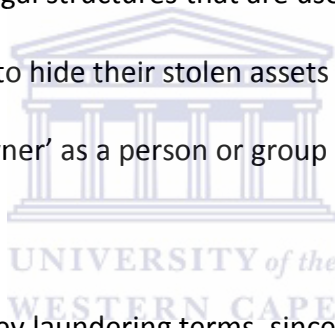
<sup>53</sup> FATF (2006) 1.

<sup>54</sup> FATF Recommendation 24.

<sup>55</sup> FATF Recommendation 25.

### 2.3.1 Definition of 'beneficial owner'

Although FATF Recommendations 24 and 25 refer to beneficial ownership of legal persons and arrangements, they do not define the concept 'beneficial ownership'. However, in its glossary of terminology used in the Recommendations, the FATF gives the most comprehensive definition of the term. It defines a beneficial owner as a 'natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted ... [and] also incorporates those persons who exercise ultimate effective control over a legal person or arrangement'.<sup>56</sup> The *Puppet Masters Report*, a Stolen Asset Recovery Initiative (StAR) report dealing with financial and legal structures that are used to hide dirty money, shows how corrupt persons use legal vehicles to hide their stolen assets and how to go about counteracting this vice. It defines a 'beneficial owner' as a person or group of persons who ultimately controls an asset and can benefit from it.<sup>57</sup>



This arrangement is crucial in money laundering terms, since most criminals will try their very best to distance themselves from their criminal activities. In the case of a trust, it may appear as though the property is meant for the benefit of a third party whereas, in fact, it is the settlor who is the ultimate controller and beneficiary of the trust.

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<sup>56</sup> FATF 40 Recommendations 15 available at [www.fatf-gafi.org/media/fatf/documents/FATF Standard - 40 Recommendations rc.pdf](http://www.fatf-gafi.org/media/fatf/documents/FATF_Standard_-_40_Recommendations_rc.pdf) (accessed 7 July 2015).

<sup>57</sup> De Willebois *et al* (2011) *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* available at <https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf> (accessed 31 March 2015). See also the definition by Bownet *The Final Report of Project Bownet on Identifying the beneficial owners in the fight against money laundering* (2013) 14 available at [www.bownet.eu](http://www.bownet.eu) (accessed 5 August 2015).

## 2.4 The European Convention and Directives

The EU has taken an active part in the prevention and combating of money laundering amongst its member states.<sup>58</sup> There are various instruments that have been promulgated to this effect.

The most influential ones are the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (the EC Convention) and the three Directives on the prevention of the use of financial systems for the purpose of money laundering.

### 2.4.1 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (CoE Convention, 1990)<sup>59</sup>

This CoE Convention is a regional treaty within the EU that seeks to deal with money laundering and related issues. It was adopted to harmonise the anti-money practice and policy, including the seizure and confiscation of illicit proceeds within the EU.<sup>60</sup>

Article 6 of the Convention provides for the money laundering offences and compels states parties to criminalise the conversion, concealment and acquisition of the proceeds of crime, as well as the participation in and aiding and abetting of such malpractices. Predicate offences have been defined very broadly to include 'any criminal offence as a result of which proceeds were generated that may become the subject of laundering'.<sup>61</sup>

The Convention further calls upon states parties to co-operate with one another in the investigation, tracing and confiscation of proceeds, instrumentalities and other property liable

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<sup>58</sup> Mugarura (2012) 71.

<sup>59</sup> Available at <http://conventions.coe.int/treaty/en/Treaties/Html/141.htm> (accessed 6 August 2015).

<sup>60</sup> Mugarura(2012) 71.

<sup>61</sup> Art 1, CoE Convention (1990).

to confiscation.<sup>62</sup> Co-operation among EU states has been given much more emphasis, considering that money laundering has become an international problem, hence the call for concerted efforts on an international scale.<sup>63</sup>

Articles 2 and 3 require of states, in general terms, to introduce laws and other necessary measures to enable them to identify and trace the proceeds of crime.<sup>64</sup> Arguably, addressing the misuse of trusts for purposes of money laundering falls within the ambit of 'legislative and other measures as may be necessary'.

#### **2.4.2 First Directive: Council Directive 91/308 ECC on Prevention of the Use of the Financial System for the Purpose of Money Laundering**

This was the First Directive issued by the EU in 1991, making it an international legal instrument in the fight against money laundering within the EU.<sup>65</sup> Just like the CoE Convention, the Directive was adopted in a drive to harmonise the anti-money laundering regime within the EU.<sup>66</sup> The Directive is an expression also of a desire to bring EU law within the international standards set by the FATF and giving them the binding force among EU member states.<sup>67</sup> The Directive recognises that banks and other financial institutions are the most common vehicles for money laundering, hence the need to impose the burden of detection of money launderers on the banks themselves.<sup>68</sup>

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<sup>62</sup> Arts 7 and 8, CoE Convention (1990). See also Article 13.

<sup>63</sup> Preamble, Directive 91/308 ECC.

<sup>64</sup> Arts 2 and 3 CoE Convention (1990).

<sup>65</sup> Preamble, Directive 91/308 ECC.

<sup>66</sup> Unger B & Busuioc EM *The scale and impacts of money laundering* (2007) 21.

<sup>67</sup> Unger & Busuioc (2007) 21.

<sup>68</sup> Preamble.

The definition of money laundering in the Directive includes the conversion or transfer of property derived from 'criminal activity' for the purpose of concealing or disguising the illicit origins of such property.<sup>69</sup> As in the CoE Convention, the First Directive targets not only drug-related money laundering but other criminal activities as well. In the same vein as the Vienna Convention and the CoE Convention, the First Directive calls upon states to put in place measures to confiscate the proceeds as well as the instrumentalities of the crime in question.<sup>70</sup>

The Directive does not, however, require the criminalisation of money laundering specifically.<sup>71</sup> This might be because the Council of Europe, which issues the Directives, lacks legislative powers to lay down criminal sanctions.<sup>72</sup> The Directive was, however, adopted having regard to the CoE Convention, which calls upon all member states to criminalise money laundering.<sup>73</sup>

Article 3 requires that persons who open bank accounts or who engage in business transactions must identify themselves and produce evidence of the asserted identity.<sup>74</sup> The bank or any other entity which is required by law to require such information must keep that information for five years.<sup>75</sup> But the Directive does not go as far as to require financial institutions to be as punctilious about personal details of beneficial owners of corporate vehicles such as trusts. All the Directive requires of states is that they put in place regulatory and preventive measures in general terms, as the CoE Convention does. However, in 2001 the European Parliament and Council adopted the Second Directive to remedy the flaws in the First Directive.

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<sup>69</sup> Art 1, Directive 91/308 ECC.

<sup>70</sup> Art 2(1), Directive 91/308 ECC.

<sup>71</sup> There is no provision that obligates the state parties to criminalize money laundering. Article 2 rather requires that money laundering be prohibited.

<sup>72</sup> Stessens (2000) 26.

<sup>73</sup> Preamble, Directive 91/308 ECC.

<sup>74</sup> Art 3(1), Directive 91/308 ECC.

<sup>75</sup> Art 4, Directive 91/308 ECC.



### **2.4.3 Second Directive: Directive 2001/97 EC of the European Parliament and of the Council of 4 December 2001 Amending Council Directive 91/308 ECC on Prevention of the Use of the Financial System for the Purpose of Money Laundering**

As the title suggests, the Second Directive was adopted to amend the First Directive. It was aimed to reflect the prevailing international standards so as to protect the financial sector from the harmful effects of illicit financial flows.<sup>76</sup> It sought furthermore to broaden the definition of money laundering by extending predicate offences to all serious crimes, unlike the First Directive which covered only drug-related offences.<sup>77</sup>

The Second Directive widened further the institutions and professions covered by the directives to include designated non-financial businesses and professions (DNFBPs), such as lawyers and notaries, when they act in their respective professional capacities and are involved in financial or corporate transactions.<sup>78</sup> The widening of reporting entities to include DNFBPs was in response to the revised FATF Recommendations of 1996.

There were no significant changes in the Second Directive that were aimed specifically at removing the anonymity of trusts. But the inclusion of DNFBPs as obligated bodies represented a crucial step forward in combating the misuse of trusts and similar legal arrangements for money laundering. The argument is that DNFBPs such as lawyers, estate agents and accountants are involved frequently in setting up trusts.<sup>79</sup>

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<sup>76</sup> Preamble Para 1, Directive 2001/97 EC.

<sup>77</sup> Preamble Paras 7, 8, 9 and 10, Directive 2001/97 EC.

<sup>78</sup> Art 12 read with Art 1.

<sup>79</sup> FATF Recommendation 22(e) includes trusts and company service providers as DNFBPs requiring customer due diligence in carrying out financial transactions.

#### **2.4.4 Third Directive: Council Directive 2005/60/EC on the Prevention of the Use of the Financial Systems for the Purposes of Money Laundering and Terrorist Financing**

The Third Directive was adopted in October 2005 and replaced the First and Second Directives.<sup>80</sup> It is aimed at achieving consistency in the fight against money laundering within the EU, as well as uniformity in the EU with regard to upholding the international standards set by the FATF.<sup>81</sup> This instrument emphasises the serious nature of the crime of money laundering and the need for increased, concerted efforts among states to reduce the incidence of money laundering by making it a less seductive enterprise economically.<sup>82</sup>

The Third Directive's significance lies in its inclusion of the need to combat the financing of terrorism. The preamble states categorically that massive amounts of dirty money have been used to finance acts of terrorism, which threaten the very foundations of society.<sup>83</sup> This Directive is of especial relevance to this study in that it makes it compulsory for financial institutions to identify their customers in detail, including beneficial owners.<sup>84</sup>

Importantly, Article 3(6), which is based largely on the FATF Recommendations, defines a 'beneficial owner' as a 'natural person who ultimately owns or controls the customer (corporate entities and trusts) and/or the natural person on whose behalf the transaction or

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<sup>80</sup> Art 44, Directive 2005/60/60/EC.

<sup>81</sup> Preamble Para 5.

<sup>82</sup> Preamble.

<sup>83</sup> Preamble.

<sup>84</sup> Preamble Para 9, Directive 2005/60/EC.

the activity is being conducted'.<sup>85</sup> This definition has been transplanted into the national laws of most EU member states, with minor variations here and there.<sup>86</sup>

## **2.5 The African Union (AU) Convention on Prevention and Combating Corruption (AU Convention, 2003)**

The AU Convention provides a comprehensive anti-corruption framework for the community of African states. It covers a wide range of offences bordering on corruption and related offences.<sup>87</sup> The Convention, which was adopted in 2003 and which came into force on 5 August 2005, besides dealing mainly with corruption, has provisions that address the question of laundering the proceeds of corruption.<sup>88</sup>

Article 6 requires states to criminalise the conversion, transfer and knowing disposal of the proceeds of corruption or related offences.<sup>89</sup> It requires the criminalisation of the concealment or disguise of the nature as well as the whereabouts of the proceeds of crime to the extent that the acquisition of such property by a third party, with knowledge of its true nature and origin, must be criminalised also.<sup>90</sup>

The AU Convention could, arguably, be said to be calling on member states to adopt all measures to fight corruption and the abuse of trusts for money laundering purposes. It addresses, too, the question of asset recovery, but unlike UNCAC, it does not stipulate the *modus operandi* of going about recovering the criminal assets.

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<sup>85</sup> Arts 3(6)(a) and (b), Directive 2005/60/EC.

<sup>86</sup> Bownet Report (2013) 14-15.

<sup>87</sup> Preamble, AU Convention (2003).

<sup>88</sup> Art 6 AU Convention (2003).

<sup>89</sup> Arts 4 and 6 of the AU Convention.

<sup>90</sup> Art 6.

## 2.6 The G20 High-level Principles on Beneficial Ownership Transparency

The G20 is a group of 20 of the most economically developed countries in the world which seek to stabilise the global economy and to avoid economic crises.<sup>91</sup> The G20 was born as a response to the Global Financial Crisis of 2007-08. Its main purpose is to strengthen the global economy and reform international financial institutions. For some time now, this grouping of countries has expressed its concern about the anonymity of beneficial owners of corporate vehicles and how they are able to misuse such legal arrangements to give effect to their criminal purposes. This concern came to the fore at its summit in Pittsburg, USA, in 2009.<sup>92</sup> Representing the world's most industrialised countries, the leaders of the G20 decided to take the lead by incorporating FATF Recommendations 24 and 25 in their respective domestic laws.<sup>93</sup> This step was prompted by the initiative of the G20 Anti-Corruption Working Group (ACWG),<sup>94</sup> whose tasks it is to come up with recommendations on how the G20 could implement and sustain efforts aimed at fighting.<sup>95</sup> The G 20 agreed to develop principles that will set out measures to prevent the misuse of legal arrangements like trusts for illicit purposes and ensure their transparency.<sup>96</sup>

The G20 has laid down 10 principles which its members must implement in order to protect the integrity of their financial systems, thus protecting the integrity and transparency of the global

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<sup>91</sup> Buckeley RP 'The G 20's Performance in Global Financial Regulation' 37 *UNSWLJ* (2004) 65.

<sup>92</sup> G 20 *Leaders' Statement: The Pittsburgh Summit* (September, 2009) Para 42.

<sup>93</sup> G 20 *High-Level Principles on Beneficial Ownership Transparency* (2014) available at [http://www.g20.utoronto.ca/2014/g20\\_high-level\\_principles\\_beneficial\\_ownership\\_transparency.pdf](http://www.g20.utoronto.ca/2014/g20_high-level_principles_beneficial_ownership_transparency.pdf) (accessed 7 August 2015).

<sup>94</sup> Available at <https://g20.org/first-g20-anti-corruption-working-group-meeting-held-in-istanbul/> (accessed 30 July 2015).

<sup>95</sup> G 20 *Anti-Corruption Action Plan* (2010) available at [https://star.worldbank.org/star/sites/star/files/g20\\_aacwg\\_seoul\\_2010\\_action\\_plan.pdf](https://star.worldbank.org/star/sites/star/files/g20_aacwg_seoul_2010_action_plan.pdf) (accessed 30 July 2015).

<sup>96</sup> G 20 *High-Level Principles on Beneficial Ownership Transparency* (2015).

financial system.<sup>97</sup> The principles include the definition of ‘beneficial ownership’, maintenance of central registries on beneficial ownership, including information on the settlor, trustees and beneficiaries, and measures against the misuse of legal persons and legal arrangements intended to obstruct transparency.<sup>98</sup> These principles have no binding legal force, but seek merely to encourage member countries to abide by international legal standards in the fight against money laundering set by UNCAC, the FATF and the Organisation for Economic Co-operation and Development (OECD).

## 2.7 Conclusion

Various international agreements discussed above have set standards aimed at preventing and detecting, as well as investigating and prosecuting money laundering. Contracting states under the Vienna Convention, the Palermo Convention, UNCAC and regional instruments, such as the EU and the AU Conventions, have an obligation to criminalise the laundering of proceeds of crime within their respective jurisdictions. Besides the FATF detailed recommendations on what measures to put in place, most of the instruments described above simply call upon states to adopt legislative and other necessary measures to prevent the conversion, transfer concealment and conversion of illicit gains as well as investigate and prosecute the offenders. The FATF’s Recommendations 24 and 25 put in place standards regarding the identification and regulation of the beneficial owners of legal arrangements such as trusts. Identifying beneficial owners is not only important for uncovering the money laundering offences, but also for asset recovery.

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<sup>97</sup> G 20 *High-Level Principles on Beneficial Ownership Transparency* (2015).

<sup>98</sup> Principle Nos 1,4,5.6 and 10.

The FATF has left it to each jurisdiction to make its own rules on the registration of trusts and the identification of the beneficial owner. The onus is now on individual member states to adapt the standards to suit their own respective national laws and needs. Most of the above-mentioned instruments and initiatives have left the issue of identification of beneficial ownership largely to financial institutions. At present, states do not require full disclosure of information on all parties to a trust.

The next chapter examines the extent to which trusts are abused in Malawi for money laundering purposes and it shows what *lacunae* exist in the law that make the institution of the trust vulnerable to economic criminality.



## Chapter Three

### **Appraising the Trusts and Anti-Money Laundering/Counter-Financing of Terrorism Regime in Malawi**

#### **3.1 Introduction**

This chapter discusses the current law regulating trusts in Malawi and the parts of AML/CFT law that addresses trusts directly or indirectly. It discusses furthermore how trusts registered in

Malawi are susceptible to abuse by potential money launderers. The discussion will consider also the extent to which the Malawian law adheres to international AML/CFT standards.

Malawi has an anti-money laundering legal regime to prevent criminals from enjoying their ill-gotten gains, especially from corruption and tax fraud. Malawian courts have not dealt with many money laundering cases, let alone those involving the misuse of trusts. This does not mean that such legal arrangements have not or cannot be used as vehicles for money laundering. The discussion below focuses on instances which have elicited allegations of the misuse use of trusts for nefarious purposes, and it describes the facts surrounding the ongoing case of *The Republic v Thandizo Mphwiyo* in which the accused is facing charges of using a trust to launder money.<sup>99</sup>

### 3.2 The law of trusts in Malawi

As noted above, Malawi distinguishes between public trusts and private trusts. The Malawi Supreme Court of Appeal (MSCA) has adopted the definition of this distinction as set out in *Snell's Principles of Equity*, according to which:

‘a trust is private if it is for the benefit of an individual or class irrespective of any benefit which may be conferred thereby on the public at large; it is public or charitable if the object thereof is to promote the public welfare, even if incidentally it confers a benefit on an individual or class.’<sup>100</sup>

Public trusts are generally regulated by the Trustees Act and the Trustees Incorporation Act.

The Act does not require verification of the identities of the trustees or the beneficiaries. The

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<sup>99</sup> Criminal Case No. 953 of 2014 at Senior Resident Magistrate’s Court, Lilongwe (pending).

<sup>100</sup> *The Attorney General v. Malawi Congress Party et al* [1997] 2 MLR 181 at 202.

bare personal details suffice. What is not transparent is how the Minister goes about evaluating the application to register a trust and the criteria upon which his judgment rests ultimately. In practice, the Minister simply looks to see whether all documents required are before him and are in order, and whether the objectives of the trust contemplated are in the public interest.

Public trusts include charities and foundations.<sup>101</sup> The Malawi Supreme Court of Appeal has held that charitable trusts are public trusts, although not all public trusts are charitable trusts.<sup>102</sup> In Malawi, charities and foundations may be registered as trusts, non-profit organisations (NPOs) or companies limited by guarantee. As NPOs have no formal legal structure, they need only to register with the Registrar General and the Council for Non-Governmental Organisations (CONGOMA).<sup>103</sup> Charities and foundations registered as companies limited by guarantee are regulated under the Companies Act.

Private trusts in Malawi are governed by common law. There is no statute regulating the registration and conduct of private trusts in Malawi. The state of the private trusts currently makes it easy to create and to dissolve a trust. Financial institutions are therefore not in a position to verify the details of the trustees and the beneficial ownership of the trusts, or even to ascertain whether the trust exists at all. There is no requirement that the beneficiaries be named under the trust deed. And since there is no oversight over the activities of private trusts, it may be difficult and almost impossible to identify the beneficial owner, who may not be mentioned specifically by the trust deed, although he maintains effective control over it.

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<sup>101</sup> Section 3 TIA.

<sup>102</sup> *The Attorney General v. Malawi Congress Party et al* (1997) 204.

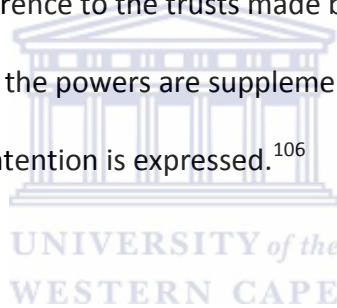
<sup>103</sup> See Section 24 of the Non-Governmental Organisations Act (2000).



The distinction between public and private trusts is further critical in respect of enforcement. Private trusts are enforceable by any of the named or purported beneficiaries, whereas the Attorney-General of Malawi enforces the public trust.<sup>104</sup>

### 3.2.1 Trustees Act

The Trustees Act does not repeal the common law notion of trust in Malawi. What it does, though, is to clarify the common law powers and duties of trustees, including powers of investment under Part II. Unlike the Trustees Incorporation Act, it relates to both public and private trusts. Section 3 states that the Act applies to trusts, including executorship and administratorship.<sup>105</sup> This is in reference to the trusts made by way of wills and deeds under common law. It states further that the powers are supplementary to the powers conferred by the trust deed, unless a contrary intention is expressed.<sup>106</sup>



### 3.2.2 Trustees Incorporation Act

As stated in Chapter One, this Act deals only with the incorporation of public trusts or charities.<sup>107</sup> Public trusts are required to be registered under the Act. Section 3 provides that trustees of 'any charity for religious, educational, literary, artistic, scientific or public charitable purposes may apply for incorporation to the Minister responsible'.<sup>108</sup> The Minister may also

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<sup>104</sup> Megarry SRE (1960) *Snell's Principles of Equity* at 110.

<sup>105</sup> Section 3(1) TIA.

<sup>106</sup> Section 3(2) TIA.

<sup>107</sup> See Chapter 1 pages 7 – 8.

<sup>108</sup> Section 3(1) TIA.

receive applications from trustees of any charity which or part of which, in his or her opinion, is for the benefit or welfare of the people of Malawi.<sup>109</sup> The application must include the will or deed, or the instrument creating the trust, and a proposed seal.<sup>110</sup> The application must be accompanied too by the minutes of the meeting at which the decision to form a trust was made, and the names of the people who were present.<sup>111</sup> Furthermore, the trustees must provide their personal particulars, which means their full names, address and occupation.<sup>112</sup> The trust becomes a body corporate once the Minister issues a certificate.<sup>113</sup> The certification enables the trust to own and to transfer property.<sup>114</sup> However, the Trustees Incorporation Act is silent on the registration of private trusts or trust deeds.

The Act gives the Registrar General limited powers to regulate trusts. Whatever powers he enjoys are co-extensive with the existence of the trust.<sup>115</sup> He has power to strike off the list any dormant trusts. Surprisingly, he has no obligation to investigate whether or not a trust is dormant. The Minister has powers to issue rules with regard to the number and forms of registers to be kept by the Registrar General, and he can determine as well what the functions of the Registrar or any supervisor should be.<sup>116</sup>

Section 14 of the Act requires the Registrar General to maintain a register of all incorporated trusts. This register is open for inspection to the public upon payment of a prescribed fee.<sup>117</sup>

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<sup>109</sup> Section 3(1) TIA.

<sup>110</sup> Rule 2 TIA Rules.

<sup>111</sup> Rule 2 TIA Rules.

<sup>112</sup> Rule 2 TIA Rules.

<sup>113</sup> Section 3(3) TIA.

<sup>114</sup> Section 3(4) TIA.

<sup>115</sup> Section 12 TIA.

<sup>116</sup> Section 15(1) TIA.

<sup>117</sup> Rule 12 TIR.

The fee is meant essentially as an administrative fee which is used to pay for administrative expenses, as the government is stretched for resources. The fact that the public can gain access to the register gives the incorporation of public trusts or charities a measure of transparency. However, the challenge is with respect to the kind of personal details that are collected and kept.

According to the subsidiary legislation made under this Act, the Trustees Incorporation Rules (TIR),<sup>118</sup> the Registrar General handles the documentation, which is then forwarded to the Minister once the requirements are met.<sup>119</sup> The Registrar General's duty is to check whether the objectives of the trust are for the public benefit, as required by Section 3, whether the trustees have been duly authorised, whether the provisions relating to the property of the trust are in line with the Act, and whether the name suggested is not already taken.<sup>120</sup> There is no duty on the Registrar General to collect or investigate information on the beneficial ownership of the trust.

Clearly, the office of the Registrar General is crucial to the incorporation and operations of a trust. The lack of a requirement under the Trustees Incorporation Act that due diligence be conducted in respect of settlors, trustees and beneficiaries, makes it more difficult to regulate trusts that are established for anti-money laundering purposes. It is often difficult for law enforcement officials to identify the natural person exercising management and control over these legal arrangements. The anonymity of beneficial ownership makes it more attractive to criminals to hide their identities, the sources of their funds, and the purposes for which the

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<sup>118</sup> Rules made pursuant to Section 15 TIA.

<sup>119</sup> Rule 3 TIR.

<sup>120</sup> Rule 3 TIR.

funds are used. A worrying loophole in the law is that the Registrar General is not obligated to verify the personal details of the trustees and the beneficiaries and other details that are required. He takes the information on good faith and accepts it 'as is', without even enquiring about the sources of funds. The Act does not provide for a system of regulating the financial resources or funding activities relating to public trusts or charities.

### **3.2.3 Deceased Estates (Wills, Inheritance and Protection) Act (DEWIPA)**

Most private trusts in Malawi are created by wills (testamentary trusts or trusts under a will).

This Act provides for the making of wills and transfer of property under wills and where a person dies intestate. The Act requires wills to be in writing and to be witnessed by two

independent people.<sup>121</sup> As is the case under common law, the intention of the testator

prevails.<sup>122</sup> The High Court has jurisdiction relating to all matters of granting probate of wills

and letters of administration of estates of deceased persons.<sup>123</sup> The High Court does not inquire

into the origin of the deceased person's assets, nor is it required to verify whether the listed

property belonged to the deceased person indeed. As a result, any other assets can be added to

the inheritance property. The problem with this practice is that even property that did not

belong to the deceased could, theoretically, be added to the list of property in the deceased

estate as a way of laundering such added assets.

The finer details of applications are regulated by the Probate (Non-Contentious) Rules

promulgated by the Minister.<sup>124</sup> The rules require an estate duty affidavit to be filed on an

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<sup>121</sup> Section 6 DEWIPA.

<sup>122</sup> Section 11 DEWIPA.

<sup>123</sup> Section 20(1) DEWIPA.

<sup>124</sup> Section 86 DEWIPA.

application for letters of administration, which must set out the nature and extent of the testator's estate. The court will accept the listed assets as property belonging to the testator without inquiring into the sources or the title deeds. DEWIPA imposes a duty on the executors or administrators to account regularly to the beneficiaries.<sup>125</sup> Since the settlor is deceased, the trustees and the beneficiaries are the persons who are likely to misuse the trust for illicit purposes.

As regards testamentary trusts, the concern is more how to protect the interests of the beneficiaries than to consider the possible illicit purposes to which the money may be put.

#### **3.2.4 Tax authorities and trusts**

The Malawi Revenue Authority (MRA) is one of the key pillars supporting the AML/CFT framework.<sup>126</sup> It is required to collect information on the assets and income, as well as on the beneficiaries of trusts.<sup>127</sup> Furthermore, the MRA must obtain information on the settlors, trustees and any beneficiaries of a trust who derive a taxable income from the trust, or who have a vested right to the future enjoyment of trust property. The Taxation Act states specifically that the Trustee Act applies to all executors and administrators of deceased estates.<sup>128</sup> Public trusts are required to be registered for purposes of income tax, which is 25 per cent of their taxable income.<sup>129</sup>

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<sup>125</sup> Section 87 DEWIPA.

<sup>126</sup> The MRA is a member of the National AML/CFT Committee. Other members are the Ministry of Finance, Financial Intelligence Unit, the Reserve Bank of Malawi, the Malawi Police Service, the Anti-Corruption Bureau, the Ministry of Justice and National Intelligence Service, and the Director of Public Prosecutions.

<sup>127</sup> 11<sup>th</sup> Schedule to Taxation Act (Cap 41:01) of the Laws of Malawi.

<sup>128</sup> Section 75 Taxation Act.

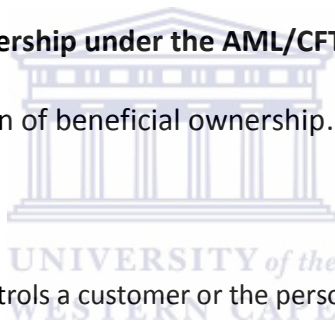
<sup>129</sup> Section 76 Taxation Act read with the Eleventh Schedule to the Act.

Individuals named as beneficiaries in a will are subject to taxation if the value of the bequest that they receive is within the threshold of assessable income.<sup>130</sup> A bequest received by a predetermined beneficiary under a will is assessable as the income of the beneficiary and not of the estate.<sup>131</sup>

Given their close knowledge of trusts and of the beneficiaries of trusts, the revenue authorities are better placed than anyone to know who the beneficial owners of the trusts are. The tax records could provide useful details about a trust which could be useful for investigative purposes and for the identification of the beneficial owners of the trust.

### **3.3 The concept of beneficial ownership under the AML/CFT laws of Malawi**

The MLA adopts the FATF definition of beneficial ownership.<sup>132</sup> Section 2 defines a ‘beneficial owner’ as



‘a person who ultimately owns or controls a customer or the person on whose behalf a transaction is being conducted, and includes any person who exercises effective control over a legal person or arrangement.’

The issue of beneficial ownership also arises under Section 66, which deals with confiscation orders. Courts are empowered to consider for confiscation any property that is subject to the effective control of the person concerned.<sup>133</sup> The section proceeds to include any trust that may be connected to the property in question.<sup>134</sup> The MLA recognises that not only can trusts be used to camouflage stolen assets, but they can be used, too, as an obstacle to asset recovery.

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<sup>130</sup> Section 75 Taxation Act.

<sup>131</sup> Section 75(2) Taxation Act.

<sup>132</sup> See the FATF Recommendations General Glossary of definitions.

<sup>133</sup> Section 66(1) MLA.

<sup>134</sup> Section 66(2) MLA.

Section 24(1) requires every financial institution to identify its customers, including beneficial owners, before entering into a business relationship. The identification of the beneficial owner is not only necessary prior to entering into a business relationship or before registration, as in the case of trusts, but during the period of the business relationship or the duration of the trust. The real beneficial owner may hide behind the apparent beneficial owner to conceal the true ownership of the structure concerned. It may be requiring too much of the financial institutions or any reporting institution to be expected to know the person behind the person whose name appears nowhere in the documents.

Apart from the duty to conduct on-going CDD, financial institutions are required to understand the corporate structure and the legal arrangements to which they provide services. In the case of trusts, understanding the ownership and control structure could become apparent from studying the trust deed or by interviewing the trustees.<sup>135</sup> Financial institutions and DNFBPs are required to collect information on the settlor, the trustees and the beneficiaries. This requirement is commendable because all the three parties are relevant and must be considered as potential beneficial owners. *The Puppet Masters* note that, at the beginning of the business relationship, it may not be possible for the compliance officer to know what the relationship will involve in practice, hence the need for him to collate all information required on an on-going basis. The wise decision is to collect information on all parties.<sup>136</sup>

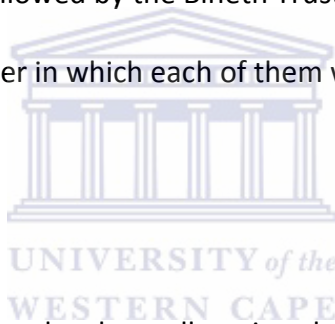
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<sup>135</sup> Interpretive note to Recommendation 10, par. 5 and 5 (b) (ii).

<sup>136</sup> De Willebois *et al* (2011) 21.

### **3.4 Malawi's experience with the misuse of trusts for purposes of money laundering and for other criminal reasons**

Starting with Hasting Kamuzu Banda, the first post-independence president of Malawi, every Malawian head of state since has created a trust that has been purportedly meant for charitable purposes, meaning in this context 'for the benefit of the people of Malawi'.<sup>137</sup> These trusts have always been controlled by the presidents themselves and have enjoyed a special, privileged status, thus making them susceptible to being used as vehicles for diverting public funds into private pockets. The Press Trust is the first trust that was created by a politician for the benefit of Malawians. It was followed by the Bineth Trust and the Beautify Malawi Trust. Each of these trusts, and the manner in which each of them was misused for illicit purposes, is discussed below.



#### **3.4.1 The Press Trust case**

The Press Trust case is a classic example where allegations have been leveled against senior public officials for misusing trusts to divert public funds.<sup>138</sup> In 1969 the then President Hastings Kamuzu Banda and his Malawi Congress Party (MCP) created a business empire called Press Holdings Limited, which ventured into various businesses such as cattle ranching, tobacco farming, furniture making, the selling of pharmaceuticals, insurance, transport and banking.<sup>139</sup> Press Holdings was started with money contributions made by members of the MCP from money derived from the sale of party membership cards. Press Holdings had two shareholders,

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<sup>137</sup> Hastings Kamuzu Banda was the first president of Malawi after independence.

<sup>138</sup> *The Attorney General v. Malawi Congress Party et al* (1997).

<sup>139</sup> See Meredith M (2006) *The State of Africa: A History of Fifty Years of Independence*.



namely, President Banda, with 499 999 shares, and Aleke Banda, with only one share. Both held shares 'as nominees of the people of Malawi'.

In 1982 President Banda settled the shares that he had in Press Holdings into the Press Trust, which was subsequently incorporated as a charitable trust under the Press Trust Deed, for the benefit of the Malawi nation. But the trust remained under Banda's ultimate control, enjoying privileges such as government-guaranteed loans from local and international banks.<sup>140</sup> Even though the trust had been registered as a public charitable trust, President Banda and the MCP maintained effective control over it. It became a quasi-public body and enjoyed preferential treatment since it was regarded as a development vehicle for the Malawi nation.<sup>141</sup> President Banda was the beneficial owner of the trust. At the time of his death in 1997, President Banda was estimated to be worth in excess of \$400 million, an amount believed to have been bankrolled largely by public funds.<sup>142</sup> Efforts to prosecute him on charges of fraud were not successful and charges were dropped because of his unfitness to stand trial due to old age.

After President Banda lost the 1993 multiparty democratic elections, the incoming government sought to reconstruct the Press Trust in order to benefit the people of Malawi, using the Press Trust (Reconstruction) Act of 1995 to gain maximum benefit. Former President Banda's MCP tried to intervene legally to stop the new government's initiative, arguing that the trust was a private entity and that the government's removal of the then existing trustees and their replacement with new trustees amounted to an appropriation of private property interests. The

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<sup>140</sup> See The history of Press Trust available at [http://www.presstrust.mw/history\\_more.html#.VqgY1JqPIU](http://www.presstrust.mw/history_more.html#.VqgY1JqPIU) (accessed on 29 September 2015).

<sup>141</sup> Chirwa DM (2005) 'A Full Loaf is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi,' *Journal of African Law*, Vol. 49, 207.

<sup>142</sup> Tenthani R 'Mystery of the Banda Millions' *BBC News* 17 May 2000 available at <http://news.bbc.co.uk/2/hi/africa/752462.stm> accessed on 25 August 2015.

High Court held that the trustees are owners of the trust property and the Press Trust (Reconstruction) Act infringed the right of property of the existing trustees by attempting to deny them their property.<sup>143</sup> The Malawi Supreme Court of Appeal, overturning the High Court decision, upheld the validity of the Act.<sup>144</sup> The result was that the trust property was transferred from the existing trustees to new trustees, with Banda and the MCP no longer in control.

The Press Trust remains one of the most successful Malawian conglomerates to date, with one of its successful investments being the largest industrial corporate in Malawi, Press Corporation Limited (PCL), which controls the National Bank of Malawi.<sup>145</sup> It is not surprising that when Parliament sought to reconstruct the trust, this move was opposed by the MCP.

### 3.4.2 The Bineth Trust Case

During his tenure as President of Malawi, Bingu wa Muntharika created the Bineth Trust, together with his wife, Ethel.<sup>146</sup> When he took over the reins of power in the year 2004, Muntharika had declared assets worth MK150 million (\$1 million). At the time of his death in 2012 he was worth approximately MK 61 billion (approximately \$141 billion).<sup>147</sup> Within a period of eight years he moved from being a millionaire to becoming billionaire, and this feat for someone who earned a monthly salary of about \$12, 000.00.

Soon after Muntharika's death in April 2012, his Democratic Progressive Party (DPP)-led government was replaced by Joyce Banda's People's Party (PP)-led government. The successor

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<sup>143</sup> *Malawi Congress party and Others v. Attorney General* High Court Civil Cause No. 2074 of 1995 (Unreported).

<sup>144</sup> *The Attorney General v Malawi Congress Party et al* (1997)

<sup>145</sup> *World Bank Corporate Governance Country Assessment* (Malawi) June 2007 at 2.

<sup>146</sup> Bingu wa Muntharika was president of Malawi from 2004 – 2012.

<sup>147</sup> See the case of *Francis Nyarai Ndende t/a Francis Franklin & Co. v Duwa Mubaira Muntharika & Others* (2013).

government, in the case of *Attorney General v Prof Arthur Peter Muntharika and Others*, instituted legal action to turn Bineth Trust into a public trust.<sup>148</sup> Bineth Trust has properties worth billions of Malawi Kwachas, including Ndata Farm, a multimillion dollar mansion in Muntharika's home district in Thyolo, and other residential properties. According to a suit brought by the Attorney-General, the Bineth Trust is a public trust which has been created for the benefit of Malawians. The Attorney-General therefore sought a declaration from the High Court in Lilongwe that the Bineth Trust is a charitable trust and an order to remove the trustees who were deemed to be holding office improperly and to be administering the trust as a private trust for the benefit of Muntharika's family. This was going to be a repeat of the Press Trust case. Following the general election in May 2014, the DPP, led by Bingu's brother Peter, the first defendant in the case, regained power. Soon after the DPP regained power, the incoming Attorney-General dropped the suit, to the dismay of ordinary Malawians.<sup>149</sup> Even though the reason for dropping the case was not disclosed, the author suspects strongly that it has everything to do with the fact that the president is the defendant in the case and the trust is his brother's property. The fact that the Attorney-General is appointed by the president supports this suspicion.

### **3.4.3 Foundations and trusts created by the incumbent President Peter Muntharika**

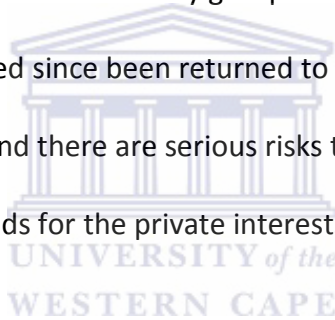
Beautify Malawi Trust (BEAM) is a charitable trust incorporated by the wife of President Peter Muntharika. The trust has been created for the purpose of refuse management and waste

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<sup>148</sup> Commercial Cause No. 106 of 2013.

<sup>149</sup> *Nyasa Times* 1 February 2015 at available at <http://www.nyasatimes.com/2015/02/01/bineth-trust-wont-be-declared-public-malawi-govt-drops-case/> (accessed on 12 October 2015).

recycling in an effort to keep the country clean.<sup>150</sup> There are suspicions that such charities are used to siphon money out of the state's coffers. Once again, this charitable trust is purportedly for the benefit of Malawians. There is neither oversight over the functions of this trust, nor do the trustees have to account to anyone on the source of the trust funds or how they are used. Given the fact that the wife of the president is involved in the trust, no clear distinction can be drawn between the activities of the trust and the state. When the trust was launched in September 2015, it was reported that the trust asked for and received funds from government departments and the National Aids Commission (NAC).<sup>151</sup> The use of funds earmarked for other purposes elicited strong protests from civil society groups that demanded that the funds be returned, and the funds have indeed since been returned to the state. What is apparent is that such a trust is politically exposed and there are serious risks that it is susceptible to being used as a vehicle for diverting public funds for the private interests of those who ultimately control its operations.



#### **3.4.4 The case of *The Republic v Thandizo Mphwiyo***

This is one of the Cashgate cases involving the wife of the former Director of Budget in the Office of the President and Cabinet (OPC) of Malawi.<sup>152</sup> At the time of writing, the accused, Thandizo Mphwiyo, is facing money laundering charges for having infringed Section 35 of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (hereafter the MLA). The charges allege that Mphwiyo has laundered money worth MK50 million through a fictitious

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<sup>150</sup> Mana, 'First Lady's Beautify Malawi Trust Registered' *Malawi News Agency Online* 4 September 2014 available at [www.manaonline.gov.mw](http://www.manaonline.gov.mw) (accessed on 25 August 2015).

<sup>151</sup> See <http://www.faceofmalawi.com/2014/12/first-ladys-beam-trust-pays-back-nac-money/> (accessed on 6 October 2015).

<sup>152</sup> The Cashgate scandal is discussed in chapter one section 2.

trust known as Good Deeds Trust. The allegations state that Mphwiyo used the fictitious trust to buy a house in the alleged amount, knowing or having reason to believe that such money was the proceeds of crime. The particulars of the charge are that Thandizo Mphwiyo and others are trustees of the trust. Thandizo's husband, Paul Mphwiyo, is not a trustee, but is answering charges in another matter. Both cases are still in progress.

### **3.5 Recent developments in AML/CFT in Malawi**

This section deals with the AML/CFT developments that have taken place in Malawi since the enactment of the MLA in 2006. The focus is on the regulations to the AML legislation and, in particular, what they say about trusts and beneficial ownership. The section below discusses also the process of amending the MLA which started soon after the FATF revised its Recommendations and subsequent to ESAAMLG's conducting a mutual evaluation of the effectiveness of Malawi's AML measures in 2008. The discussion relates only to matters connected to trusts and beneficial ownership.

#### **3.5.1 Anti-money laundering regulations (2011)**

The AML Regulations provide specifically for a risk-based approach to CDD. By risk-based approach is meant that financial institutions dedicate most of their resources to conducting more rigorous due diligence on the higher risk customers or accounts. Regulation 3(4) requires a risk-based CDD approach when dealing with non-resident customers, private banking customers, legal entities, public officials, customers who have been refused a service by another institution, and other specified categories of customers, including beneficial owners of corporate structures or legal arrangements, and business relationships.

The regulations require further that financial institutions take reasonable measures to identify the beneficial owners of legal persons and trusts.<sup>153</sup> The term ‘beneficial owner’ is defined as the person who ultimately owns, controls, manages the customer,<sup>154</sup> or who benefits from the customer.<sup>155</sup> However, the regulations do not say how the financial institution must find out the information relating to such persons or entities. But they stipulate that where the financial institution fails to identify the beneficial owner, it must not proceed to enter into a business relationship, and where such relationship already exists it must terminate it, and must file a suspicious transaction report (STR) with the Financial Intelligence Unit (FIU) or proceed as advised by the FIU.<sup>156</sup>

Financial institutions are required to obtain full particulars and details of every trustee and settlor, as well as of the persons who are the senior managers of a trust.<sup>157</sup> What is more, the financial institution must obtain particulars of any person authorised to enter into a business relationship with the trust and any named beneficiaries of the trust, or the manner in which the beneficiaries will be determined.<sup>158</sup> Under common law, trustees have a duty of confidentiality which prevents them from revealing certain information, including the details of the settlor and the beneficiaries.<sup>159</sup> Trustees are thus trapped in a conflict situation which requires them to comply with AML/CFT laws on the one hand, and on the other, to uphold their duty to maintain confidentiality as trustees. The Interpretive Note to Recommendation 25 of the FATF calls on

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<sup>153</sup> Regulation 3(8) AML Regulations.

<sup>154</sup> Regulation 3(8) (a) AML Regulations.

<sup>155</sup> Regulation 3(8)(b) AML Regulations.

<sup>156</sup> Regulation 3(9) AML Regulations.

<sup>157</sup> Regulation 7(4)(a) and (b) of the AML Regulations.

<sup>158</sup> Regulations 7(4)(c) and (d) of the AML Regulations.

<sup>159</sup> *Tournier v National Provincial and Union Bank of England* [1924] 1 K.B. 461.

countries to abolish laws that prevent trustees from disclosing information regarding the trust to the competent authorities and the reporting institutions.<sup>160</sup> Section 44 of MLA gives effect to the FATF Recommendation by providing that the Act 'shall have effect notwithstanding any obligation as to secrecy or other restriction on disclosure of information imposed by any other written law or otherwise, if the court so orders'.<sup>161</sup> This means that the law in Malawi provides for certain scenarios where a court order may be obtained to prevent the withholding of information.

Paragraph 2 of the Interpretive Note to FATF Recommendation 25 calls on states to remove all legal obstacles that prevent trustees, financial institutions or DNFBPs from providing the competent authorities with information on a trust, and on the beneficial owner of the trust. To this extent, Section 44 is in conflict with the above-mentioned Interpretive Note so far as it relates to the duty of confidentiality by trustees. A court order may still stand in the way of obtaining information on trusts.

Neither the MLA nor the AML Regulations places a positive duty on the trustees to provide information on the trust. All they do is to require the reporting institutions to extract information out of the trustees without imposing a corollary duty on the trustees to provide the information. Where a trust is used to hide the true ownership of assets, it may not be easy for the financial institutions and any reporting institution to identify the person who pulls the strings ultimately. The financial institutions are required to understand the operations and the

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<sup>160</sup> Para 2 Interpretive Notes to Recommendation 25.

<sup>161</sup> Section 44 of the MLA.

control structure of the trust in their dealings so as to identify the beneficial owners.<sup>162</sup> This task could be fulfilled only if trustees are forthcoming with the information. The trustees must, therefore, be required by law to disclose the information regarding the settlor, beneficiaries and source of funds.

The regulations direct that information obtained about trusts should be verified independently.<sup>163</sup> Financial institutions are required to verify independently the trust deeds (or any other founding document creating the trust) or certificates of incorporation with the Registrar General.<sup>164</sup> Independent verification also extends to information regarding the settlor, trustees and the purported beneficiaries.<sup>165</sup> When dealing with a foreign trust, the authenticity of the documents presented must be sought from the jurisdiction where the trust is registered.<sup>166</sup> There is no guidance on where to start the verification process in foreign countries, or what the credible sources for such documents are. However, where it is impracticable for the financial institution to obtain this verification, it may make use of other available, reliable documents, having regard to the risk posed by such use.<sup>167</sup> In the case of a foreign-registered trust, the financial institution must know in which jurisdiction where the trust is registered.<sup>168</sup> For example, trusts that are registered in jurisdictions with weak AML/CFT laws, or in tax havens, carry a higher risk of money laundering and must be dealt with cautiously.

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<sup>162</sup> FATF Recommendation 10.

<sup>163</sup> Regulation 12 AML Regulations.

<sup>164</sup> Regulation 12(1)(a) AML Regulations.

<sup>165</sup> Regulation 12(1)(b) AML Regulations.

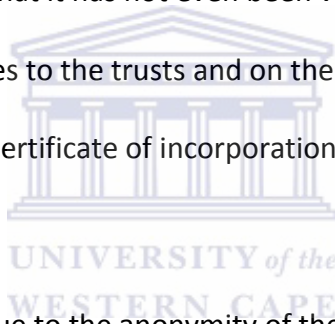
<sup>166</sup> Regulation 12(1)(d) AML Regulations.

<sup>167</sup> Regulation 12(2) AML Regulations.

<sup>168</sup> Regulation 12(2)(a) AML Regulations.



The verification process in Malawi relies heavily on the information kept with the Registrar General. But the difficulty lies in the fact that the Registrar General is not required to have all the information, and whatever information he has is not updated.<sup>169</sup> What complicates matters even further is that registration is effected manually and not electronically, which means that the process is slow and there is always the risk that paper files can be mislaid or lost.<sup>170</sup> A computerised registry would save time and effort, and would ease access to information. Manual procedures are tedious and make it difficult to update information in accordance with what the law prescribes. What is more, the information that the Registrar General has on a trust is sketchy, let alone the fact that it has not even been verified. All that is required of him is to collect information on the parties to the trusts and on the instruments creating the trusts. The Minister, too, who issues the certificate of incorporation, is not duty-bound to carry out an independent verification.



Trusts are appealing to criminals due to the anonymity of the beneficial owner and the obscurity of the source of funds. It is therefore, commendable that the regulation now makes it obligatory to identify the beneficial owner.

As the Malawian economy is predominantly cash-based, not all trusts may require the services of a financial institution in order to be registered. Some trusts may only be involved in activities which do not necessarily require the services of a financial institution, for example, the acquisition and management of real estates. The regulations impose obligations on 'financial institutions' instead of the recommended 'reporting institution'. Since the regulations were

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<sup>169</sup> Para 492 MER.

<sup>170</sup> Para 486 MER.

made before the FATF extended the reporting requirement to DNFBPs, Malawi has since not updated them to reflect this change. There is, therefore, a need to update the regulations so as to make the reporting duty extend to DNFBPs as well.

### **3.5.2 The draft amendment to the Money Laundering Act**

The MLA has been in force since 2006, but it was only in August 2014 that the court convicted someone for contravening it.<sup>171</sup> It is indeed regrettable that, while international AML/CFT standards keep developing and adapting to new money laundering trends, Malawi's AML regulations of 2005 and 2011 have not been revised since they saw the light of day in 2006 and 2011 respectively. At the time of writing, a consultant has been appointed to work on a draft bill to amend the MLA so as to reflect the changes to the FATF Recommendations, Interpretive Notes and best practices made in 2012.

The current MLA was enacted in 2006 and is based on the FATF Recommendations, as revised in 2003. There is a need to update the MLA to reflect the 2012 revision to the FATF Recommendations which, among others, place a high premium on countries' adopting the risk-based approach when conducting customer/client due diligence procedures. The draft amendment of the MLA includes specific requirements relating to the implementation of a risk-based approach, the inclusion of DNFBPs as reporting institutions, and a chapter on civil asset forfeiture.<sup>172</sup>

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<sup>171</sup> *The Republic v. Tressa Namathanga Senzani* HC Criminal Case No. 62 of 2013 (Unreported).

<sup>172</sup> Kainja G, "Review of the Money Laundering Legislation: Issues for Discussions with Stakeholders" Paper Presented at AML Act Review Meeting at Sunbird Mount Soche Hotel, Blantyre on 10<sup>th</sup> and 11<sup>th</sup> October 2013.

The draft bill is yet to be tabled in parliament. Unfortunately, the entire process has taken much too long, a fact which shows the lackadaisical manner in which the relevant authorities have gone about implementing the FATF Recommendations.

### **3.5.3 FATF Mutual Evaluation Report for Malawi**

In 2008, as part of the FATF Recommendations enforcement mechanism, the FATF-styled body, ESAAMLG, of which Malawi is a member, and the World Bank, carried out a joint Mutual Evaluation exercise on Malawi on behalf of the FATF. The main findings are contained in the Mutual Evaluation Report (hereafter MER 2008) and these are set out below.

#### **3.5.3.1 Key Findings**

MER 2008 rated Malawi as non-compliant on FATF Recommendation 12, which requires politically exposed persons (PEPS) to be subjected to CDD. The reason for conducting CDD on PEPs is to find out whether or not they are beneficial owners of entities. MER 2008 was critical of the fact that, in the case of trusts, financial institutions carry out identifications procedures identify only with regard to trustees, and not beneficiaries too.<sup>173</sup>

MER 2008 found that Malawi is partly compliant with Recommendation 25, which requires that competent authorities obtain ‘accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries’ to avoid trusts being used as money laundering vehicles.<sup>174</sup> MER 2008 regretted the fact that, because private trusts are not required to be registered, the authorities have no way of finding out who the beneficial owners of such trusts are, which renders this type of trust vulnerable to misuse.

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<sup>173</sup> Para 503 MER.

<sup>174</sup> Para 504 MER.

### **3.5.3.2 Recommendations of the Mutual Evaluation Report**

MER 2008 recommended that Malawian authorities remind financial institutions and DNFBPs to adhere to the CDD prescriptions enunciated in FATF Recommendation 10 and that private trusts be registered and that information on the beneficial ownership of trusts be made accessible for public inspection.<sup>175</sup> Importantly, MER 2008 recommended that information on incorporated trusts be kept current through regular updating.<sup>176</sup>

MER 2008 noted, too, the need to switch from manual to electronic data capturing and commended the steps underway to do so.

In sum, the Mutual Evaluation exercise was useful. The gist of the recommendations was that CDD needs to be conducted in a manner which ensures that crucial information is obtained across the board and not in the fragmented manner that has been the order of the day until now. This recommendation makes much sense, as key data captured on computer can be cross-referenced effortlessly, making it easier to untangle byzantine legal arrangements that elude the employee who has enough trouble sorting out piles of paper on his desk and preventing them from tumbling into each other and falling onto the floor, flitting all over the place.

### **3.6 Conclusion**

Trusts are registered for particular legitimate purposes, be they private or public. The discussion above shows that some public trusts created in Malawi are vulnerable to being misused to divert public funds for unlawful, private benefit. The potential for anonymity is a crucial factor in enabling the abuse of particular legal arrangements for illicit purposes. FATF

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<sup>175</sup> Para 504 MER.

<sup>176</sup> Para 504 MER.

Recommendation 25 obligates national authorities to put in place laws and structures which require that such information be collected, maintained and made available in a timely fashion. Information on beneficial ownership plays a vital role in the detection of misuse of corporate vehicles including trusts for illicit purposes.

Malawi has, no doubt, made efforts to comply with the international standards set by the FATF, though full compliance has yet to be attained. Law enforcement officers are hard put to gaining access to information when the kind of information they are looking for is not collected in the first place. There is no gainsaying the fact that the present state of Malawian law on trusts creates ample opportunity for economic criminals to use the trust trusts for money laundering purposes. The justice authorities need to address the loopholes in the law as a matter of urgency. The most important change needed, at the macro level, is to implement a method of collecting important data intelligently and make trust documents readily accessible for public and investigative scrutiny.

In general, it is regrettable that ESAAMLG is not playing a more proactive role in helping countries to meet FATF requirements. It is easy to find fault and to recommend what needs to be done, but what is needed is the know-how, which ESAAMLG does not offer. But Malawi needs to take the initiative itself. With African economies becoming more and more integrated, especially at the regional level, it is becoming increasingly necessary to harmonise sectoral policies, especially with regard to macroeconomic and financial policy. Money laundering should, therefore, become a major regional concern, and fighting it requires harmonization of anti-money laundering laws and policies. In researching this study, the author found no concrete evidence of a serious intent within the states comprising the regional economic

community known as the Common Market for Eastern and Southern Africa (COMESA), of which Malawi is a member, to deal with trusts as money laundering vehicles. Unless member states of COMESA, and other regional economic communities in Africa, devote more urgent attention to combating the misuse of the trust as a money laundering device, huge sums of money will continue to be siphoned out of Africa, to the detriment of the peoples of the continent.



## Chapter Four

### Conclusions and Recommendations

#### 4.1 General Conclusions

Criminals do not like to keep dirty money in their own name. They try as hard as possible to distance themselves from it, for the further they lay it away from them, the less likely that they will be associated with the loot or with the crime. This study has revealed the loopholes in the Malawian law on trusts, and it has shown these to be archaic and in need of updating. Although Malawian courts have, until the time of writing, not yet decided a case in which a trust has been used as a vehicle for illicit purposes, the danger that trusts could be used for sinister purposes remains real. Malawi lacks the resources to conduct proper investigations into money laundering, especially when the trail of the dirty money leads to a destination off-shore. But even if an investigation in a foreign country would be successful, the hurdle of getting the criminal will still have to be overcome. Besides, as shown earlier, the main problem facing any investigator is that private trusts are not required to be registered, which means that the identity of the beneficial owner of the trusts is unknown.

The following recommendations are therefore made on how to regulate trusts more stringently:

#### 4.2 Amending the Trust Law

As a member of ESAAMLG, Malawi has committed itself to implementing the FATF Recommendations. One of the Recommendations is that trusts must be registered. It is submitted that the registration process should be subject to the application of risk-based procedures. Malawi, therefore, needs first to introduce a provision in its law regulating trusts

which makes it compulsory for private trusts to be registered with the Registrar General. The legal provision must require that, before the Registrar General issues any letter of administration, he or she must be furnished with the personal details of all parties to the trusts, namely, settlor or principal, the trustee, beneficiary, as well as the details of the capital amount of the property concerned, and its physical location. The Trustees Incorporation Act must render any unregistered trust invalid under the laws of Malawi.

Second, the law must require the Registrar General to verify independently all the information furnished, just as is required of banks, for example, before doing business with a customer. The law must comply with FATF Recommendation 10, in particular.

Third, the Registrar General must be obligated to know the source of the trust funds or assets and must be required furthermore to verify the source or sources independently. The need for this requirement stems from the fact successive Malawian heads of state have created trusts, ostensibly for the public good, but without disclosing any other information about the trust.

Fourth, even though the FATF Recommendations contain no such requirement, it is submitted that trustees must be required to submit to the Registrar General on a yearly basis an annual accounts statement which shows amounts flowing into and out of the trust and by whom and to whom the money was paid. These annual accounts returns will assist the Registrar General in monitoring trusts to prevent or to stop their being misused to launder money. Alternatively, the law needs to authorise the Registrar General to summon a trustee to account for the disbursements of a trust. South African law, for example, provides for such accounting. Section 16 of the Trust Property Control Act authorises the Master of the High Court, the equivalent of



the Malawian Registrar General, to produce records of the accounts and administration of the trust and answer all questions relating to it.<sup>177</sup> The Master may require such records to be produced with respect to the administration of any trust property.

The requirement to furnish information on a trust should be balanced against the need to protect the right to privacy, especially given the danger that public information about a trust could be exploited by some people for malicious purposes. To offset this possibility, it would be necessary to restrict public access to particular information. At present, anyone can access this information by simply paying a search fee. It is submitted that this information should be accessible to investigators in cases of suspected money laundering.

However, given the common law duty of trustees to keep confidential the information on the trusts that they administer, as well as who the beneficial owner of the trust is, it would be necessary for the MLA to state explicitly that the duty of confidentiality does not apply against any reporting institution conducting CDD and against any competent authority, as defined by the MLA.

#### **4.3 Executive Action**

The FATF puts the primary responsibility of implementation of its recommendations on the state. Pushing for legislation is only one way of fulfilling its obligations. It is submitted that the following measures be introduced to supplement the AML/CFT legal framework:

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<sup>177</sup> Act No. 57 of 1988.

#### **4.3.1 Undertaking a national risk assessment**

As a general AML/CFT preventative exercise, Malawi needs to conduct a national risk assessment in order to understand more fully how vulnerable the national economy is to money laundering. The FATF peer evaluation report has identified a number of vulnerabilities. These need to be addressed first. But over and above what has been pointed out by the FATF peer review report, the government should know what other areas in the economy are potentially exploitable by money launderers. Fortunately, the government has realised this need and started a risk assessment exercise in 2013. However, this exercise has, at the time of writing, yet to be concluded.

#### **4.3.2 Introducing a national identification system**

Malawi citizens have no identity cards, which makes it difficult for them and for state agencies and other entities in the private sector to verify their identity. Drivers' licences and passports are usually used to verify the identities of those who possess such documents. But few Malawians can afford to have such documents, for they cost money. The existence of a national identification system would go a long way to ease the life of citizens and would be very beneficial for procedures that require a verification of someone's identity, especially in regard to AML/CFT precautionary procedures.

#### **4.3.3 Investing in information technology**

Malawi suffers from a shortage of information technology, which is a glaring pitfall in the country's AML/CFT efforts. The government and the private sector need to make a concerted effort, even if it is by way of forging a partnership, to ensure that the way in which information

is stored is brought into line with 21<sup>st</sup> century standards. This is essential for the economic well-being of both the economy and for enabling Malawi to stay abreast of the tricks used by launderers, who can play havoc with systems that still depend heavily on information stored on perishable paper. Admittedly, Malawi has serious capacity constraints on this front. But these could be bridged by enlisting the assistance and expertise of organisations that have a keen interest in combating money laundering, such as the FATF, ESAAMLG, the World Bank and the OECD. In fact, the FATF could play a useful role, given the fact that its Recommendation 25 requires states to keep information on trusts which is accurate, up to date and can be accessible in a timely fashion.<sup>178</sup>

#### **4.3.4 Making use of the tax authorities to combat money laundering**

As stated in the previous chapter, in Malawi trusts are taxable. The Malawi Revenue Authority can be used to unmask the people behind a trust. The information gained from tax authorities could thus be very useful in identifying the beneficial owners of trusts.

The longer it takes to implement the international standards, the more time criminals have to exploit the existing weaknesses. The amendments suggested above are not radical, and they are eminently practicable.

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<sup>178</sup> Para 9 of Interpretive Note to FATF Recommendation 25.

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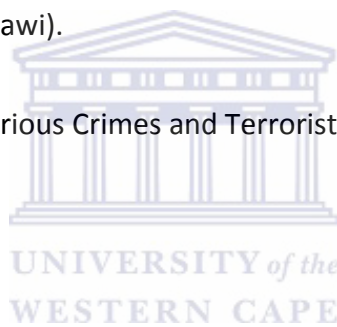
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