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AN ANALYSIS OF THE ZIMBABWEAN MONEY LAUNDERING AND PROCEEDS OF CRIME AMENDMENT ACT OF 2018

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DECLARATION

I, Raymond Tendai Nyarugwe, do hereby declare that 'An Analysis of the Zimbabwean Money Laundering and Proceeds of Crime Amendment Act of 2018' is my own work, that it has not been submitted for any degree or examination in any other university or academic institution, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Raymond Tendai Nyarugwe

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Professor Lovell Fernandez

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KEY WORDS

Anti –Money Laundering

Crypto-currency

Designated Non-Financial Business Professions (DNFBPs)

Eastern and Southern African Anti-Money Laundering Group (ESAAMLG)

Egmont Group

Financial Intelligent Unit (FIU)

Financial Institutions (FI)

Financial Action Task Force (FATF)

Illicit Financial Flows (IFFs)

Money Laundering

Mutual Evaluation Report

Money Laundering and Proceeds of Crime Amendment Act of 2018

Reserve Bank of Zimbabwe

Virtual Currencies

Zimbabwe

List of Abbreviations and Acronyms

AU	African Union
BUPA	Bank Use Promotion Act
CDD	Customer Due Diligence
DNFBP	Designated Non-Financial Businesses and Professions
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EU	European Union
FATF	Financial Action Task Force
FICA	Financial Intelligence Centre Act
FIC	Financial Intelligence Centre
FIU	Financial Intelligence Unit
IMF	International Monetary Fund
IFFs	Illicit Financial Flows
OECD	Organisation for Economic Co-operation and Development
PEP	Politically Exposed Person
POCA	Prevention of Organised Crime Act
RBA	Risk-Based Approach
NRA	National Risk Assessment

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CHAPTER ONE

INTRODUCTION

1.1 Background

Financial crimes are transnational in nature, and no country is immune from them. They are an international problem that can best be solved through international cooperation on a global scale. It is therefore necessary to have rules and norms that apply worldwide in order to deal with these crimes comprehensively.[1] Of particular prominence is the crime of money laundering (ML), which may be defined as the processing of criminal proceeds to disguise their illegal origin.[2] This term is relatively new and is broadly defined, with the definitions varying from jurisdiction to jurisdiction. In Zimbabwe, money laundering acts are listed in the Money Laundering and Proceeds of Crime Act 34 of 2013 (the Principal Act).[3] The Financial Action Task Force (FATF) is the main international inter-governmental body formed specifically to set AML standards and to promote their implementation globally. The FATF's 40 Recommendations set the international AML standards, and all countries are required to incorporate the 40 Recommendations into their respective national laws. The rationale for criminalising money laundering is partly to prevent criminals from benefiting from their ill-gotten gains.[4]

1 Brillo B (2016) 'Politics of the Anti-Money Laundering Act 'at 112.

2 Booth R, Farrell S & Bastable G (2001) *Money Laundering Law and Regulation: Practical Guide* Oxford University Press, London at 23.

3 Section 8 of the Money Laundering and Proceeds of Crime Act 34 of 2013.

4 Ferreda J (2013) 'The Effects of Money Laundering' in Unger B and Van der Linde D (eds*) Research Handbook on Money Laundering* Emerald Publishing Limited, Bingley UK at 13.

However, despite the enactment of AML laws, preventing, detecting and prosecuting money laundering offences remain a challenge in Zimbabwe. Money laundering is a derivative offence, which means it takes place after the commission of a crime, which is called the predicate offence.[5] In Zimbabwe, predicate offences are tax evasion, corruption, fraud, externalisation of funds, illegal dealing in gold and precious stones and smuggling.[6] These offences generated an estimated amount of US$1.8 billion in 2013, which amounted to about 13 per cent of the country's Gross Domestic Product (GDP) for the same year.[7] According to Transparency International Corruption Perception Index of 2017 Zimbabwe scored 22 on a score range of 0 to 100, with 0 signifying being highly corrupt and 100 being very clean.[8] South Africa scored 43 and Namibia 51. Zimbabwe's poor performance may partly be attributed to lack of solid and clear anti-money laundering policies and laws. One example of the so-called grand corruption cases that occurred in Zimbabwe, and which elicited a huge public outcry, was the disappearance of an estimated US$15 billion from the Marange diamond fields in 2016. It is alleged that the crime was perpetrated by proxy companies controlled by the Zimbabwean government, in partnership with Zimbabwean subsidiaries of Chinese companies.[9] The use of legal persons or corporate vehicles to launder

5 FATF (2012-2018) Recommendation 1: Scope of the criminal offence of money laundering.

6 National Risk Assessment Committee Money Laundering and Financing Terrorism National Risk Assessment Analysis (2015) available at http://www.fiu.co.zw/wp-content/uploads/2017/07/NRA-Summary-July-2015- final.pdf (accessed 3 April 2018).

6 National Risk Assessment Report Summary (2015) at 23.

7 National Risk Assessment Report Summary (2015) at 23.

8 Corruption Perceptions Index (2017) available *at* htpps:// www.transparency.org (accessed 12 March 2018).

9 Mugova S (2017)*'The impact of corruption and lost US$15 billion on Zimbabwe's economy'* News24 available at https://m.news24.com/MyNews24/the-impact-of-corruption-and-lost-15-billi zimbabwes-economy-20170321 (accessed 29 March 2018).

10 See *Motsi v Attorney General and Others* 1995(2) ZLR 278 (H), *Telecel Zimbabwe (Pvt) Ltd v The State* HH55-06.

money has become the new *modus operandi* for committing financial crimes such as corruption, externalisation, fraud, and tax evasion, to name only a few.[10] The result of such economic criminality is that Zimbabwe is presently facing extreme economic hardships.

Zimbabwe became a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) in 1999. ESAAMLG is one of the eight international so-called 'FATF Styled Regional Bodies' which promote the implementation of the FATF's 40 Recommendations on combating money laundering and the financing of terrorism.[11] The Recommendations are not hard law, but soft law. They therefore are not legally binding on states, but countries which ignore them do so at their own economic peril, as they are listed as 'non-cooperative countries'.[12] The consequences of being blacklisted includes a country being economically boycotted and marginalised by global financial institutions.

In order to comply with FATF Recommendations, Zimbabwe introduced the Bank Use Promotion Act 4 of 2004 (BUP) and the Serious Offences Act. The BUP established the Bank Use Promotion and Suppression of Money Laundering Unit (BUPSMLU) as the main government institution responsible for the investigation, prevention and the tracing of proceeds of money laundering and funding of terrorist activities. It became the *de jure* financial intelligence unit of

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11 ESAALMG Anti-Money Laundering and Counter-Terrorist Financing Measure Mutual Evaluation Report (2016) at 7 available at http://www.esaamlg.org/reports/me.php (accessed 2 March 2018).

12 FATF Non-Cooperative Countries and Jurisdictions available at http://www.fatf-gafi.org/publications/high-riskandnoncooperativejurisdictions/?hf=10&b=0&s=desc(fatf_releasedate) (accessed 28 March 2018).

Zimbabwe.[13] The BUPSMLU operated as an administrative department of the Reserve Bank, headed by a director appointed by the Governor of the Reserve Bank.[14] ESAAMLG conducted the first round of Mutual Evaluations of Zimbabwe in 2007 and made several recommendations on how to beef up Zimbabwe's AML/CFT policies. The upshot of this report was that Zimbabwe made progressive, affirmative efforts to consolidate various laws that had a bearing on ML under the umbrella of the Money Laundering and Proceeds of Crime Act of 2013. The Act thus introduced sound AML/CFT measures, notably increasing the powers of the BUPSMLU with respect to gaining access to information and to sharing it with other countries.[15]

In 2016, ESAAMLG conducted its second mutual evaluation of Zimbabwe. [16] In its report, it stated that the Principal Act is relatively sound.[17] But as regards the question of the national risk assessment, beneficial ownership, functioning of the financial intelligence unit and new technology, it found that here Zimbabwe was slack on actively combating, preventing and prosecuting ML-related offences.[18]

The Mutual Evaluation Report further noted that the principal Act does not adequately provide for the identification and verification of beneficial owners of legal persons.[19] Beneficial

13 Section 3 (1) of the BUP.
14 Section 3 (3) of the BUP.
15 Section 36 & Section 37 of the Money Laundering and Proceeds of Crime Act 34 of 2013.
16 See ESAALMG Report (2016).
17 National Risk Assessment Report (2015) at 8.
18 See ESAAMLG Report (2016).
19 Ministry of Finance and Economic Development *Ministerial Statement on* the Tabling of the Bi-Annual Report on the Bank Use and Promotion Suppression of Money Laundering Unit for the Period 1st July to 31 December 2016.

ownership in the context of customer due diligence requirements is one of the key pillars for combating money laundering.[20] Furthermore, the report recommended that Zimbabwe must ensure the independence of the BUPSMU from the Reserve Bank. The BUPSMU is currently housed at the Reserve Bank Building in Harare, and is not an autonomous government institution but an arm of the Reserve Bank.[21] The principal Act does not give the BUPSMU operational autonomy.[22]

In response to the findings of the 2016 ESAAMLG report and the increasing pressure placed on Zimbabwe by the World Bank, the Parliament of Zimbabwe enacted the Money Laundering and Proceeds of Crimes Amendment Act 32 of 2018 (the Amendment Act). The Amendment Act addresses some of the weaknesses of the Principal Act, for example, it renamed the BUPSMU officially as the Financial Intelligence Unit (FIU) and restructured its composition.[23] Furthermore, the Amendment Act imposed certain obligations on the Registrar of Deeds when dealing with trusts.[24] However, the Amendment Act is yet to be tested against FATF standards and ESSAMLG's recommendations. Therefore, the purpose of this research paper is to critique the Amendment Act against the template of the FATF's 40 Recommendations and the ESSAMLG's Mutual Evaluation Report. There is an urgent need for Zimbabwe to comply with the FATF recommendations to ensure that the country moves speedily towards economic development and financial inclusion.

20 FATF (2012-2018) Recommendations 23 and 24.
21 See Section 3 of the BUP.
22 Mutual Evaluation Report (2016) at 12.
23 Section 6A of the Amendment Act.
24 See Section 70A of the Amendment Act.

1.2 Study Hypothesis

This research is guided by the view that a properly drafted legal framework that is expressly detailed and compliant with FATF Recommendations will contribute significantly to reducing the incidence of money laundering in Zimbabwe. Furthermore, this paper is premised on the notion that an independent FIU which forms part of the Egmont Group will improve the capacity of Zimbabwe to detect, combat, and investigate money laundering activities.

1.3 Research questions

This paper will seek to answer the following two questions:

- To what extent does the Amendment Act address the deficiencies raised in the 2016 ESSAMLG Mutual Evaluation Report?
- What level of legislative precision is required to prevent ML in Zimbabwe?

1.4 Research methodology

This is a purely desktop research paper which references mainly primary and secondary sources of information. The primary sources include the FATF Recommendations, Mutual Evaluation Report, National Risk Assessment Report, International Treaties, National legislation and policy documents of Zimbabwe, Namibia and South Africa, which countries are Members of the Egmont Group and the ESAALMG. The secondary sources will comprise textbooks, journal articles, electronic resources and other media resources. A comparison will be made of legal comparable provisions of Namibia and South Africa. The choice of the countries is deliberate

and motivated by the fact that these two countries employ a broad risk-based approach to combat money laundering. Furthermore, Zimbabwe, Namibia and South Africa are all common law, English-speaking countries, which makes a comparative study easier and more workable. Also, all three counties are part of the Southern African Development Community (SADC) and of ESSAMLG. The comparative approach is suitable for assessing the extent to which Zimbabwe's AML legislation approximates that of the neighbouring countries, especially the norms espoused by ESAAMLG. Uniformity of approach and even application of AML norms is crucial for combating ML and the financing of terrorism at a regional level, as money laundering in invariably transnational in character. Money launderers are also keen to channel ill-gotten proceeds through or to countries with poor anti-money laundering laws or where law enforcement agencies are lax.

1.5 Limitation of the study

This research paper is limited to an evaluation of the shortcomings of money laundering provisions in the Money Laundering and Proceeds of Crime Amendment Act of 2018, (the Amendment Act). From a comparative law point of view, the focus is limited to the neighbouring jurisdictions of South Africa and Namibia, for reasons spelled out above.

1.6 Chapter Outline

Chapter One

This chapter introduces the background to the study. It discusses the problems which this research paper aims to address and the theoretical basis for this study. This Chapter also provides the methodology to be used for this study.

Chapter Two

This chapter will discuss the genesis of money laundering and the international development of various international AML laws and regional instruments. It will also highlight how the international AML system coordinates with some international organisations.

Chapter Three

This chapter will describe Zimbabwe's response to money laundering, and the legal and economic background of money laundering typologies in Zimbabwe. Furthermore, it will highlight recent legislative measures introduced in Zimbabwe to combat ML.

Chapter Four

The focus of this chapter will be on the deficiencies of the Zimbabwean Money Laundering and Proceeds of Crime Amendment Act of 2018 as measured against the 2016 Mutual Evaluation Report 2016 and the 40 Recommendations of the FATF. It will also give a comparative analysis of relevant provisions in the Namibian and South African law.

Chapter Five

This chapter will conclude the research paper and make some recommendations on how Zimbabwe can improve its AML laws and policy framework to reduce effectively the incidence of ML.

CHAPTER TWO

THE GENESIS OF MONEY LAUNDERING AND THE DEVELOPMENT OF INTERNATIONAL ANTI-MONEY LAUNDERING LAWS

2.1 Introduction

Money laundering is a relatively new legal concept.[25] Due to its underhand nature, it is not easy to detect and define, but it may be described as any process or act by which money deriving from a crime is disguised to make it look lawful, thereby concealing its criminal provenance.[26] Money laundering is purportedly derived from the illegal acts of Al Capone, the notorious gangster in Chicago, United States, in the 1930s who was eventually convicted. However, it was not for money laundering which did not then exist as a crime, but for tax evasion.[27] He had used laundromats and brothels as fronts to conceal the illegal profits made from gambling and the illicit sale of liquor.[28] There are some writers who hold the view that the term was formally used

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25 Hamman A (2015) *The impact of anti-money laundering legislation on the legal profession in South Africa'* unpublished LL. D thesis, University of Western Cape (2015) at 7.

26 Goredema C (ed) (2007) 'Confronting the Proceeds of Crime in Southern Africa: An Introspection' ISS Monograph Series No.132 available at *https://www.files.ethz.ch/isn/117819/M132FULL.pdf* (accessed 3 November 2018).

27 Phillips K '*Al Capone Sentenced To Prison For Tax Evasion On This Day In 1931*', Forbes 17 October 2018, available at *https://www.forbes.com/sites/kellyphillipserb/2018/10/17/al-capone-sentenced-to-prison-for-tax-evasion-on-this-day-in-1931/#7fa4e89c7c4c* (last visited on 20 February 2019).

28 Masciandoro D Takáts & Unger B (2007) Implementing Money Laundering, in *Black Finance, The Economics of Money Laundering* (2010) Cheltenham, UK Northampton, Elgar at 103.

for the first time in the famous American case of *United States v $4,255,625*,[29] a civil forfeiture case initiated by the US government to seize drug-tainted money in certain bank accounts controlled by an entity called Sonal. The company operated in the USA as a money exchange business owned by Colombian citizens, who also owned a travel agency business in Cali, Colombia.[30] The court held that the circumstances of the case revealed that the huge sums were proceeds of drugs being laundered to disguise their origins and were accordingly confiscated.[31]

2.2 Globalisation of money laundering

As a result of globalisation economies have become more integrated with one another.[32] Technological innovations and the improved payment systems now make it easy to transfer money in real time and to conceal the transactions.[33] Money laundering typologies are constantly changing.[34] Money is transferred instantaneously across the world, with banks and financial institutions facilitating global commerce and trade.[35] Multinational companies with global supply chains have even more complex networks of transactions.[36] The

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29 *UNITED STATES v. $4,255,625.39* Nos. 81-1867-Civ-JLK available at https://www.leagle.com/decision/1982865551fsupp3141819 (accessed 5 June 2018).

30 *UNITED STATES v. $4,255,625.39*.

31 *UNITED STATES* v. *$4,255,625.39*.

32 Savona EU & De Feo MA (2005) 'International Money Laundering Trends and Prevention/Control Policies' in Savona EU (ed), Bassiouni MC & Bernasconi P *Responding to Money Laundering: International Perspectives (*1997) Harwood Academic, NL at 6.

33 Savona EU (ed) at 6.

34 Demetis S D (2010) *Technology and Anti-Money Laundering, Systems Theory and Risk-Based Approach* Edward Elgar Publishing Ltd, Northampton at 34.

35 Young MA (2015) 'The dark figure of money laundering' in *Journal of Financial Crime* at 4 available at https://doi.org/10.1108/JFC-07-2015-0035 (accessed 24 August 2018).

36 Young MA (2015) at 167.

interconnectedness of the economies makes the so-called 'laundering cycle' more complex. The deeper 'dirty money' gets into the global financial system, the more difficult it is to track its origin.[37] Therefore, the need to cooperate in the fight against ML has become unavoidable. Global and regional uniformity on the rules against ML are also key to the debate.

2.3 Negative effects of money laundering

Money laundering allows criminals to benefit from their illegal activities.[38] For example, a corrupt public official embezzles public funds through a company and then transfers the proceeds to countries A, B and C. ML facilitates the concealment of these illegal funds to make them appear clean for the benefit of the criminal. ML is at the heart of all profit-driven crime. It negatively affects the global economic order as expressed in various preambles to international anti-money laundering instruments.[39] It has macro and micro economic effects.[40] Ryder regards money laundering as a cancer that undermines the financial integrity of an economy. He further contends that allowing organised criminals to enjoy the profits of illegal activities hampers economic development.[41]What is more, ML breeds other crimes associated with organised

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37 Lutescu & Bucur (2008) 'Money Laundering An International Phenomenon' *in AGORA International Journal of Juridical Science* available at https://heinonline.org/HOL/P?h=hein.journals/agoraijjs2&i=154 (accessed 25 August 2018).

38 Savona EU (2005) at 7.

39 'Recognizing the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, *security and sovereignty of States.* 'Preamble of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

40 Masciandro, Takatas & Unger (2007) at 3.

41 Becker S '*The Effects of the Drug Cartels on Medellín and the Colombian State*' available *at* https://bir.brandeis.edu/bitstream/handle/10192/25053/BeckerThesis2013.pdf?sequence=1(accessed 24 August 2018).

crime.[42] For example, Colombia was the world's biggest supplier of cocaine in the 1990s.[43] The main gang groups were the Medellín and Cali cartels.[44] The Medellín cartel was led by the infamous Pablo Escabor.[45] They profited immensely by smuggling illicit narcotics from Colombia to Panama. In order to spread their influence, they bribed politicians and the police, at times even resorting to terrorist acts and violence to control the so-called 'drug market'.[46] Within seven years, Escobar's cartel had grown to become the largest in the world, bigger, wealthier, and more violent than any other organised crime syndicate. [47] It extended to the US and various other countries.[48] In 1989 *Forbes Magazine*, a reliable international magazine focusing on business, technology, leadership and lifestyle, named Escobar one of the world's billionaires with a net worth in excess of US$3 billion.[49] The harm caused by these criminal groups cannot be accurately quantified. In fact, international efforts to curb drug-related money laundering stems mainly from the period that marked the apex of Escobar's reign.

2.4 International anti-money laundering instruments, policies and organisations

Anti-money laundering policies, measures and recommendations have been developed at the international, regional, and national level to address this global problem. Money launderers and terrorist financiers exploit the sophistication of the global financial system as well as variances

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42 Lutescu D & Bucur C (2008) at 155.
43 Becker S (2013) at 5.
44 Becker S (2013) at 5.
45 Becker S (2013) at 6.
46 Becker S (2013) at 10.
47 Becker S (2013) at 10.
48 Becker S (2013) at 10.
49 Forbes (1989) '*The Richest in the World*': Pablo Escobar in Forbes Billionaire Issues available at https://www.forbes.com/pictures/eehd45ekgjj/1987/#6bd38bf19d7d (accessed 25 August 2018).

between national laws. Jurisdictions with weak or ineffective AML/CFT controls are easy to move funds to and from undetected.[50] International AML instruments are incorporated into the AML laws of the respective countries through national enactments, policy documents, and regulations. A prominent example are the FATF's 40 Recommendations which are now reflected in one way or another in AML regimes of countries. Countries are required to domesticate international and regional instruments, more importantly the FAFT Recommendations.[51] According to Gilmore, the first push for coordinated international action to combat money laundering arose out of a growing international concern about illicit trafficking in narcotics.[52] Consequently, money laundering was catapulted to the forefront of the efforts to combat economic criminality worldwide. The initiative started in the 1980s and was led by the US in its campaign called 'the war on drugs'.[53] The United Nations was the first international organisation to take solid action against drug trafficking and its related activities of money laundering with the adoption of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the so-called Vienna Convention, in 1988.

50 Madinger J (2006) *Money Laundering A Guide for Investigators* 2 ed Taylor & Francis at 7.

51 Hopton *D* (2009) *Money Laundering, A Concise Guide to All Business* 2 ed (2009) Gower Publishing Limited, Burlington at 5.

52 Simpson M (2010) 'International Initiatives' in Simpson, Smith & Srivastava (eds) *International Guide to Money Laundering Law and Practice* Bloomsbury Publishing, USA at 193.

53 Wyrwsiz A (2015) *'America's longest War on Drugs-The War on Drugs'* at 54 available at https://depot.ceon.pl/handle/123456789/8081 (accessed on 10 June 2019).

2.4.1 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

The Vienna Convention marked the breakthrough in international collaboration that provided the basis for further development of AML laws.[54] The Convention was adopted in 1988.[55] It has 87 signatories and 190 states parties.[56] Zimbabwe deposited its ratification instrument on 24 February 2004 and it has since domesticated the instrument.[57] The Convention has 34 articles. The most critical provision is the one which obligates signatories to criminalise the process of concealing the illegal origins of money derived from drugs.[58] It also has a provision for the exercise of jurisdiction by States[59] and the tracing, freezing and confiscation of profits from the illicit trade in drugs and mutual legal assistance.[60] However, the Convention is seen to be excessively narrow in its focus as it is confined to drug-related crimes, which implies that money laundering is only related to drugs. Interestingly, the Convention does not specifically use the term 'money laundering'.[61] Despite these limitations, which may be attributed to the global threat at the time the Convention was adopted, this instrument paved the way for the development of anti-money laundering policies which found particular expression in the FATF

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54 Sharman J C (2011) *The Laundering, Regulating Criminal Finance in the Global Economy* Cornell University Press, Ithaca NY at 25.

55 The Vienna Convention Vienna Convention was adopted on 20 December 1988 and entered into force on 11 November 1990.

56 United Nations Treaty Collections available at *https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en* (accessed on 10 October 2018).

57 United Nations Office on Drugs and Crime, Signature and Ratification status available at *https://www.unodc.org/unodc/en/corruption/ratification-status.html*(accessed 10 October 2018).

58 Art 3 of the Vienna Convention.

59 Art 4 of the Vienna Convention.

60 Arts 7 & 10 of the Vienna Convention.

61 Sharman (2011) at 25.

Recommendations which, amongst others, regulate and supplement the offences contained in Article 3 of the Vienna Convention. Gilmore describes the Convention as the 'heart of an effective strategy to counter modern international drug trafficking.'[62] It is coincidental that while the Vienna Convention was being negotiated, the US was being confronted with the problem of financing of terrorism. Western Europe at the time did not perceive the financing of terrorism as a challenge. In Germany the terrorist acts of the so-called *Baader-Meinhof* terrorist group and the Red Army Faction were seen as something of the past, a phenomenon of the 1970s. However, it was only after the 11 September 2001 terrorist attacks in the US that the focus of money laundering shifted to include counter terrorist financing and proliferation.[63]

2.4.2 Basel Committee on Banking Supervision

The Basel Committee was established as the Committee on Banking Regulations and Supervisory Practices by the central-bank Governors of the Group of 10 countries.[64] Its primary objective is to set global standards for sound regulation of banks and also to provide a forum for regular cooperation on banking supervisory matters. Currently, it has 45 central banks and bank supervisors from 28 jurisdictions as members.[65] In response to the international efforts to curb money laundering related to illicit dealing in narcotics, the Committee adopted a Statement of Principles on Customer Identification to mitigate the risk of bank services being abused by

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62 Gilmore W (2002) *Dirty Money-The Evaluation of International Measures to Counter Money Laundering and Financing of Terrorism* 4 ed Council of Europe at 51.

63 Sharman (2011) at 23.

64 The Basel Committee was established in 1974 to strengthen regulation, supervision and practices of banks to enhance financial stability. See Basel Committee Charter.

65 See Basel Committee Supervision 'History of the Basel Committee and its Membership' in available at http://www.bis.org/bcbs/history.pd (accessed 18 August 2018).

launderers.[66] The Committee has issued many guidelines which relate to money laundering, but they are not binding. They are broad best practice standards which are highly recommended to be followed.

2.4.3 FATF Recommendations

The Financial Action Task Force (FATF) is an *ad hoc* organisation of the Organisation for Economic Co-operation and Development (OECD), which was established by the Ministers of the G7 to respond to the problem of money laundering.[67] The first guidelines were drafted in 1990, revised in 1996, 2003, 2012 and updated in February 2018.[68] The FATF Recommendations are universally accepted as the international guidelines on AML/CFT and are domesticated by more than 180 countries. The FATF, through its regional FATF-styled bodies, such as the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG), subjects members to mutual evaluations and assessments of the domestic application of the Recommendations.[69] Countries are also recommended to join the FATF or any of its regional-bodies. Pieth describes the Recommendations as follows:

> 'Through 'soft law' and 'peer pressure', this task force managed to merge the criminalisation agenda (money laundering defined as obscuring the proceeds of illicit drug trade as well as the forfeiture of ill-gotten gains)

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66 Prevention of Criminal Use of The Banking System For The Purpose of Money-Laundering adopted in December 1988.

67 The FATF was established in 1989, it is the main policy making body of AML/CFT regime through its recommendations, the so called FATF Recommendations (2012). See Madinger J (2006) at 100.

68 FATF Recommendations (2012-2018) at 6.

69 FATF-Style Regional Bodies (FSRBS) available at http://www.apgml.org/fatf-and-fsrb/page.aspx?p=94065425-e6aa-479f-8701-5ca5d07ccfe8 (accessed 26 August 2018).

with upcoming regulatory rules (on identification and customer due diligence.)'[70]

The Recommendations were formally adopted by the United Nations Security Council in Resolution 1617 of 29 July 2005.[71] Hence, they enjoy a special status at international level. The FATF recommends that countries adopt the risk-based approach (RBA).[72] The RBA allows each country to adopt measures best suited for its AML/CFT risk vulnerabilities, for example, country risk, customer risk and product risk.[73] The assumption is that a legal framework that is founded on a risk-based approach is sufficiently effective to mitigate the AML/CFT risks. However, the lack of uniformity in the application of the FATF Recommendations makes it difficult to assess their overall effectiveness at a universal level.[74]

2.4.4 Egmont Group of Financial Intelligence Units

The Egmont Group is an association of financial intelligence units (FIUs) from different countries.[75] It was created mainly to promote the sharing of financial intelligence and expertise to curb money laundering, in line with the FATF Recommendations.[76] At present, its membership stands at 159 FIUs. Zimbabwe is not yet a member, but South Africa and Namibia

70 Pieth M & Aiolfi G (2003) 'The Private Sector Become Active: The Wolfsberg Process' *Journal of Financial Crime* at 362 available at https://doi.org/10.1108/13590790310808899 (accessed 30 August 2018).

71 United Nations Security Council in Resolution 1617 adopted by the Security Council at its 5244th meeting on 29 July 2005.

72 FATF Recommendations (2012-2018) Recommendation 1.

73 FATF Recommendations (2012-2018) Recommendation 1.

74 Goredema C (2007) at 13.

75 Egmont of Financial Intelligence Units.

76 Egmont Group of Financial Intelligence Units Charter. See Madinger J (2006) at 102

are members of the Group.[77] Like the FATF, the Egmont Group has regional groups which are aligned to the FATF-Style Regional Bodies. Membership is open to any FIU established in accordance with FATF standards, however, the applicant FIU goes through a rigorous 'eight-step' process before admission into the Group.[78] FIUs play a key role in the fight against ML. They are the national agencies responsible for receiving, analysing and disseminating information regarding any money laundering or terrorist financing activity within a country.[79] They are uniquely positioned to cooperate and support both national and international AML laws.

2.4.5 United Nations Convention against Organised Crime 2000 (hereafter Palermo Convention)

The Palermo Convention was adopted in 2000.[80] It came into force on 29 September 2003. Zimbabwe signed the Convention on 12 December 2007.[81] The Convention extended Article 3 of the Vienna Convention.[82] Its importance lies in the fact that it adopted the same approach as the FATF.[83] ML offences are no longer limited to illicit narcotic drugs, but now incorporate all serious crimes. In addition, the Convention obligates states to criminalise money laundering,

77 Egmont Group Membership available at https://egmontgroup.org/en/membership/list .
78 Egmont Group Membership. See Madinger J (2006) at 102.
79 FATF Recommendations (2012-2018) Interpretive Note to Recommendation 29 at 96.
80 United Nations Convention against Transnational Organized Crime was adopted by resolution 55/25 of 15 November 2000.
81 United Nations Office on Drugs and Crime Signatories to the United Nations Convention against Transnational Crime and its Protocols available https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html (accessed 30 August 2018).
82 Hopton *D* (2009) *Money Laundering: A Concise Guide for All Business* 2nd Edition Routledge at 26.
83 Hopton D (2009) at 26.

and it exhorts states parties to include all serious crimes as predicate offences for money laundering, whether committed in or outside the country.[84] It has regulatory provisions to prevent and detect money laundering, including customer identification, record-keeping and reporting of suspicious transactions.[85]

2.4.6 European Union Directives

The European Union is a regional body with 28 members, founded on the principles of free commerce and free movement of people. It has also, through the Council of Europe, developed a number of AML legal instruments and policies for its members.[86] In 1991, the European Parliament and the Council issued the first EU Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering.[87] The Directive required its member states to align national laws to combat ML threats.[88] Besides, it recognised the key role of financial institutions in detecting and preventing ML. The Second Directive extended the scope of designated institutions to non-financial businesses and professions, and the scope of money laundering offences to encompass tax evasion. It also expanded the reporting obligations.[89] The Third Directive was adopted in 2005 to align the laws of EU states with the FATF updated Recommendations.[90] Recently, the EU adopted its Fourth Directive.[91] It attempts to adjust the

84 Art 6 of the Palermo Convention.
85 Art 7 of the Palermo Convention.
86 Hopton D (2009) at 26.
87 Hopton D (2009) at 26.
88 Hopton D (2009) at 26.
89 Vettori B (2006) *Tough Criminal Wealth, Exploring Practice of Proceeds of Crime Confiscation in the EU* Springer, Dordercht, NL at 7.
90 Hopton D (2009) at 30.
91 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015.

laws to curb illicit flows of money. The primary reforms introduce the risk-based approach to due diligence procedure on an ongoing basis. Moreover, they provide for a central registry for beneficial ownership of legal persons, politically exposed persons (PEPs), and third-party equivalence.[92] The European Commission plays a very important role in the fight against money laundering. Compliance with the Directives is set as a pre-condition for entry into the regional body. EU Directives are obligatory, reasonably detailed and considerably effective within their region of application.[93]

2.4.7 The Wolfsberg Group

After the establishment of FATF, money laundering scandals continued to make headlines in Europe and in the US. Usually, they involved banks. A singularly notorious case was that of former Nigerian President Abacha, who kept huge amounts of 'corrupt money' in international banks. The reputational damage caused by the publicity led to the formation of the so-called Wolfsberg Group in 2000.[94] The Group is comprised of the 12 leading banks in the world, working together with various organisations such as Transparency International, to develop customer due diligence standards in private banking.[95] The 'Basel Committee on Banking

92 Deloitte *The Fourth EU Anti Money Laundering Directive* (2017) available at *https://www2.deloitte.com/mt/en/pages/risk/articles/the-fourth-eu-aml-directive.html*(accessed 30 October 2018). Third party equivalence "refers to a process whereby the European Commission assesses and determines that a third country's regulatory, supervisory and enforcement regime is **equivalent** to the corresponding EU framework." *Third country equivalence in EU banking and financial regulation* European Parliament available at *http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/614495/IPOL_IDA(2018)614495_EN.pdf* (accessed 30 October 2018).

93 Hopton D (2009) at 30.

94 Pieth M (2006) at 8.

95 Hopton D (2009) at 17.

Supervision' as well as the FATF are key stakeholders in the Group, which meets annually to develop and advance AML/CFT policies in private banking.[96] The Group has issued several guidelines for the financial sector. These include Correspondent Banking, Guidance on Risk-Based Approach, the Wolfsberg Anti-Money Laundering Principles on Private Banking, and Guidance for Mutual Funds and Other Pooled Investment Vehicles.[97] These documents are highly regarded and widely used.

2.4.8 African Union Convention on Preventing and Combating Corruption (The AU Convention)

The member states of the African Union adopted the AU Convention on 11 July 2003 at the Second Ordinary Session of the Assembly of the Union, held in Maputo, Mozambique. The Convention entered into force on 5 August 2006. To date the Convention has 40 member states. Zimbabwe deposited its ratification instrument on 17 December 2006. Although the Convention is mainly concerned with preventing and combating corruption, it calls on member states to criminalise the laundering of proceeds of corruption.[98] Convention also provides for cooperation and mutual legal assistance,[99] confiscation and seizure of proceeds of corruption.[100] The instrument also contains provides for extradition for the commission of offences specified in its text. Also, it provides for international cooperation with other regional

96 Hopton D (2009) at 17.
97 Hopton D (2009) at 18.
98 Art 7 of the African Union Convention on Preventing and Combatting of Corruption.
99 Art 18 of the AU Convention.
100 Art 16 of the AU Convention.

and international organisations to give effect to this instrument.[101] The AU Convention is however, limited to corruption-related money laundering.

2.4.9 AU Declaration on Illicit Financial Flows

The AU declaration on illicit financial flows is not an international instrument but rather a commitment by AU members to fight illicit financial flows (IFFs). The declaration was made at the 24th Ordinary Session of the AU Assembly in Addis Ababa, Ethiopia, held from 30 to 31 January 2015.[102] IFFs have gained a great deal of attention within the Majority World as an impediment to Africa's economic progress. There is no precise definition of IFFs, but according to the World Bank the term generally refers to cross-border movement of capital associated with illegal activity, or more explicitly, money that is illegally earned, transferred or used that crosses borders. IFFs can be broken down into three main parts. Firstly, the acts themselves are illegal, for example corruption or tax evasion. Secondly, the funds are the result of illegal acts such as smuggling and trafficking in minerals, wildlife, drugs, and people. Thirdly, the funds are used for illegal purposes, for example, the financing of organised crime. Accordingly, AU member states officially adopted the findings and recommendations of the so-called Mbeki Report on Illicit Financial Flows.[103] More importantly, the member states committed themselves to implementing its findings which shall be discussed in the final chapter of this paper.

101 Art19 of the AU Convention.

102 African Union Declaration on Illicit Financial Flows Doc. Assembly/AU/17(XXIV).

103 Report of the High-Level Panel on Illicit Financial Flows from Africa Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development (2015).

2.4.10 International strategic compliance partners

The International Monetary Fund (IMF) is one of the most influential international organisations that supports international AML laws.[104] The IMF's primary aim is to protect the integrity and stability of the global financial sector, which is why it is concerned about money laundering and terrorist financing.[105] The IMF and the World Bank espouse the enactment of national AML/CFT laws by pressuring countries to implement the FATF's Recommendations as a pre-condition for lending them money – something which lies very close to the heart of almost all African countries.[106] The World Bank, IMF and the African Development Bank, all have observer status within the FATF.[107] The IMF, together with the World Bank, established the Financial Sector Assessment Programme (FSAP) that evaluates national financial systems to identify and address weaknesses.[108] Through this partnership and cooperation the FATF Recommendations, which are purportedly soft law, have become hard law in practice. These are just a few of the organisations that back the implementation of international AML/CFT laws. Countries are nevertheless required to develop their laws in line with the FATF standards and to domesticate the relevant AML instruments.

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104 International Money Fund (IMF) is an organisation of 189 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world. It was created in 1945. See Pieth M (2006).

105 Bergström M *From Global Rules and Standards to Enforceable National Provisions: the Case of Anti-Money Laundering Regulation and Implementation* (2013) Stockholm University, Stockholm at 15.

106 Bergström M (2013) at 15.

107 FATF Members and Observers available at http://www.fatf-gafi.org/about/membersandobservers/ (accessed 5 October 2018).

108 Bergström M (2013) at 15.

CHAPTER THREE

ZIMBABWE'S RESPONSE TO MONEY LAUNDERING

3.1 Introduction

Zimbabwe joined ESAAMLG in 1999.[109] Prior to this period money laundering was not a stand-alone offence. Offenders were prosecuted under common law as accessories to fraud or any other serious offence.[110] There are a number of cases before 1999 which, today, would fall under the rubric of ML.[111] A famous case worth mentioning is that of Roger Boka. He obtained a merchant banking licence which gave him access to deposits from clients.[112] In 1990 the government regulator revoked the licence after it was established that Boka had embezzled depositors' money through a trust account to which his lawyer Gregory Slatter was a signatory.[113] Boka used the depositors' money for his personal gain by purchasing personal property and the bulk of the money was remitted to foreign countries.[114] At the time, the AML laws were still too scanty to deal with this ML typology and bank supervisory policies were weak. Unsurprisingly, therefore, neither Boka nor his lawyer were charged with ML.[115]

109 Fundira B (2004) 'Money Laundering in Zimbabwe 'in Goredema C (2007) at 47.
110 Fundira B (2004) at 47.
111 Fundira B (2004) at 47.
112 Block R, (1998) *Wall Street Journal*, September 8.
113 Fundira B (2004) Legislative and Institutional Shortcomings and the Needs of Financial Institutions and the Business Sector Chap 4 in Zimbabwe Goredema C ed in Tackling Money Laundering in Eastern and Southern Africa: An Overview of Capacity Vol 1, ISS Monograph Series at 126.
114 Fundira B (2004) Legislative and Institutional Shortcomings and the Needs of Financial Institutions and the Business Sector at 126.
115 Fundira B (2004) 'Legislative and Institutional Shortcomings and the Needs of Financial Institutions and the Business Sector' at 126.

3.2 Economic background of money laundering in Zimbabwe

Money laundering trends in Zimbabwe must be viewed in the context of the country's social, political and economic environment.[116] During the period 2001 to 2009, Zimbabwe experienced an unprecedented economic crisis characterised, among other phenomena, by the emergence of new money laundering typologies.[117] The crisis was caused by a combination of factors, which included the decline in agricultural production following the controversial land reform programme of 2001, and the country's involvement in the Second Congo War of 1998, both of which resulted in an economic meltdown.[118] In 2004 Zimbabwe suspended its foreign debt repayments, which resulted in its being sanctioned and being cut off from the list of countries eligible for IMF loans. The US, the UK, Australia, Canada and the European Union followed the IMF's boycotting of the country.[119] The cumulative effect of these actions left the Zimbabwean economy in tatters. The government responded by printing currency which, in turn, led to hyperinflation. In 2001 the inflation rate exceeded 100 per cent and in 2003 it was almost 600 per cent.[120] In 2008 inflation reached the dizzying pinnacle of 500 billion per cent.[121] It was during this period that money laundering became part and parcel of everyday life.[122] Unger

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116 Fundira B (2004) 'Money Laundering in Zimbabwe 'Goredema C (2007) at 47.

117 Fundira B (2004) at 48.

118 Clemance & Moss (2005) 'Costs and Causes of Zimbabwe's Crisis' available at https://www.researchgate.net/publication/238766296_Costs_and_Causes_of_Zimbabwe's_Crisis (accessed 1 September 2018).

119 Chingono H (2010) 'Zimbabwe sanctions: An analysis of the "Lingo" guiding the perceptions of the sanctioners and the sanctionees,' in *the African Journal of Political Science and International Relations Vol.* 4(2) available at http://www.academicjournals.org/ajpsir (accessed 1 September 2018).

120 IMF Report Zimbabwe Article IV Consultation Staff Report; Public Information Notice on the Executive Board Discussion and Statement by the Executive Director for Zimbabwe (2009) IMF Country Report No. 09/139.

121 IMF Report (2009).

122 Fundira B (2004) at 70.

contends that money laundering affects money demand, the exchange rate and interest rate.[123] ML negatively affects the economy in its entirety, as it causes enormous financial losses, weakens social stability, threatens democratic structures, determines the loss of trust in the economic system, breeds corruption and compromises the economic and social institutions.[124] Zimbabwe still suffers from these effects.

According to a report by the Bank Use Promotion and Suppression of Money Laundering Unit (BUPSMLU), between 2003 and 2005 many businesses were engaged in money laundering activities and among these were money transfer agencies (MTAs), banking institutions and asset management companies.[125] Financial institutions were used as conduits to launder money from the 'shadow economy' into the formal economy, something which became an ordinary business survival strategy. The case of *S v Telecel Zimbabwe Ltd*[126] is a classic example. *In casu*, Telecel Zimbabwe a giant telephone mobile company pleaded guilty to 60 counts of purchasing foreign currency from unauthorised dealers in the parallel (informal) market, in violation of the Exchange Control Act[127] as well as the Exchange Control regulations.[128] Telecel had experienced major difficulties in accessing foreign currency from its bankers to pay off its international

123 Unger B (2007) at 169.

124 Lutescu D & Bucur C 'Money Laundering An International Phenomenon', in the *AGORA International Journal of Juridical Sciences (2008) 154-158* available at https://heinonline.org/HOL/P?h=hein.journals/agoraijjs2&i=154 (accessed 6 September 2018).

125 Simwayi M & Mahummed H 'The role of Financial Intelligence Units in combating money laundering': A comparative analysis of Zambia, Zimbabwe and Malawi in *Journal of Money Laundering Control* (2011) Vol 15 at 112-134available at https://doi.org/10.1108/13685201211194754 (accessed 6 September 2018).

126 HH55/2006.

127 Section 5*(1) (a) (i).*

128 Section 4 (*1) (a) (i*).

contractual loans. But the company was not prosecuted for money laundering. Instead, a statutory mandatory sentence was imposed. On appeal, the High Court acknowledged the existence of special circumstances to warrant a lesser penalty, it held that Telecel Zimbabwe breached the law out of necessity for survival.[129] This case shows the difficulty of regulating money laundering under complicated economic circumstances. This would otherwise have been a plain money laundering case. Furthermore, the case highlights the inadequacy of the ML laws at the time. The two major ML laws which were in place between 2004 and 2013 are the Bank Use and Promotion of Money Laundering Act[130] and the amended Serious Offences [Confiscation of Profits] Act.[131]

3.2.1 The Bank Use and Promotion Act (BUPA).

Prior to 2004, the Reserve Bank of Zimbabwe, through the Bank Licensing Supervision and Surveillance Division, had already undertaken initiatives to combat money laundering.[132] However, only merchant banks were required to report suspicious transactions, in terms of a directive issued in 2001.[133] In 2004, the BUPA established the Bank Use Promotion and Suppression of Money Laundering Unit (BUPSMLU). It served as the *de facto* FIU of the Zimbabwe. The Act expanded the range of reporting institutions to incorporate law firms, accounting firms, insurance companies, asset management companies, casinos and real estate

129 HH55/2006.
130 Act 2 of 2004.
131 Act 2 of 1990, as amended by Act 22 of 2001.
132 Financial Intelligence Report (2005) at 2.
133 Financial Intelligence Report (2005) at 4.

agencies.[134] Section 5 of the Act established the Financial Intelligence Inspectorate and Evaluation (FIIE) of the BUPSMLU. The FIIE became an administrative arm of the Reserve Bank with limited investigative powers but with no prosecutorial authority.[135] The director of the Unit was appointed by the Governor of the Reserve Bank of Zimbabwe.[136] As at June 2005, the FIIE received a total of 722 cases of which 409 were investigated and handed over for prosecution.[137] However, there are no records of successful prosecutions of these referred cases.[138] Between the same periods, about US$ 1.6 million were recovered or repatriated by the FIIE, with the assistance of its whistle-blowers fund, which awarded 10 per cent of recovered assets to the whistle-blower.[139] The Act remains an important piece of the AML laws in Zimbabwe and it has been subject to a number of amendments. The recent amendments will be discussed in Chapter 4.

3.2.2 The Serious Offences (Confiscation of Profits) Act (Chapter 9:17)

Zimbabwe was once a member of the Commonwealth. In 1990, the Commonwealth prevailed on its members to enact anti-money laundering laws that provided for the confiscation of ill-gotten proceeds. [140] In response, Zimbabwe enacted the Serious Offences (Confiscation of Profits) Act, which mainly provided for the freezing and confiscation of ill-gotten assets through

134 BUPA First Schedule.
135 Simwayi M & Mahammed H (2011).
136 Section 6 of the BUPA.
137 Simwayi M & Mahammed H (2011).
138 Fundira (2006) at 138.
139 Simwayi M & Mahammed H (2011).
140 Gubbay A R (1998) 'Zimbabwe: Proposed Additional Money-Laundering Legislation' *in the Journal of Money Laundering Control,* Vol.1 380-382 available at https://doi.org/10.1108/eb027164 (accessed 9 September 2018).

court action.[141] The Act granted the police powers to obtain a monitoring order upon an identified financial institution which was reasonably suspected of having been involved (directly or indirectly) in a specified offence.[142] In terms of such an order the financial institution concerned could be required to supply certain specified information to the police on specific named accounts.[143] Due to the sour relations between the police and banks, very few cases were successfully investigated and prosecuted to the end. Section 63 of the Act defined money laundering as an offence. [144] It provided that:

> '(1) A person shall be guilty of money-laundering if he-
>
> (a) engages, directly or indirectly, in a transaction, whether in or outside Zimbabwe, which involves the removal into or from Zimbabwe, of money or other property which is the proceeds of crime; or
>
> (b) receives, possesses, conceals, disposes of, brings into or removes from Zimbabwe, any money or other property which is the proceeds of crime; and he knows or ought to have reasonably known that the money or other property was derived or realised, directly or indirectly, from the commission of an offence…'

The definition of ML was limited in scope. It was non-compliant with the Vienna Convention definition[145] of ML and the FATF recommendations.[146] However, there is one recorded ML case based on this Act.[147] The accused was charged with money laundering under section 63 (1) (b)

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141 Part II and III of Serious Offences (Confiscation of Profits) Act of 12 1990.
142 Part VI of the Act of the Serious Offences Act.
143 Section 30 of the MLPCA.
144 Section 63 of the Serious Offences (Confiscation of Profits) Act.
145 Article 3 of the Vienna Convention.
146 FATF Recommendations (2012-2018) Recommendation 1.
147 *S v Chivhayo* SC94/05.

of the Serious Offences (Confiscation of Profits) Act, and alternatively theft by false presences.[148] The facts of the case are that in 2002 the accused unlawfully received some money which was the proceeds of crime, in the form of three cheques. He deposited the cheques into his bank account and subsequently withdrew the money and used it.[149] The court found him guilty of money laundering and sentenced him to five years' imprisonment with hard labour, two years of which were suspended.[150] Given the fragmented and poorly drafted Zimbabwean AML laws,[151] prosecutions were difficult for the Zimbabwean National Prosecuting Authority.[152] In 2013, Parliament enacted the Money Laundering and Proceeds of Crime Act,[153] a consolidated AML Act which repealed the Serious Offences (Confiscation of Profits) Act and amended the Bank Use Promotion Act, together with other laws regulating ML. However, the Act was rushed through parliament without the bill first being published in the Government Gazette.[154] The Act is discussed below.

3.2.3 Money Laundering and Proceeds of Crime Act (MLPCA)

The Act represents a serious attempt at consolidating Zimbabwe's AML laws in order to meet FATF standards. It defines ML offences widely to include:

(1) Any person who converts or transfers property—

148 SC94/05.
149 SC94/05.
150 SC94/05.
151 FIIE Report 2005.
152 FIIE Report 2005.
153 Act 4 of 2013.
154 Act 4 of 2013.

(a) knowing, believing or suspecting that it is the proceeds of crime; and

(b) for the purpose of concealing or disguising the illicit origin of such property, or of assisting any person who is involved in the commission of a serious offence to evade the legal consequences of his or her acts or omission, commits an offence… '

All serious offences are money launderings offences.[155] The definition is largely FATF compliant and is also similar to the one adopted by the Parlemo Convention.[156] Financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs) are required to submit within 24 hours STRs and CTRs to the BUPSMLU (now officially called the FIU)[157] in respect of all transactions above the amount of US$5 000, whether in a single transaction or in two or more transactions totalling or exceeding US$5 000.[158] Accountable institutions are obliged to keep records.[159] The Act introduced several major AML mechanisms to enable the unlawful proceeds of all serious crimes and terrorist acts to be identified, traced, frozen, seized and eventually confiscated. Despite the tightening of the AML law, there have been only a few successfully prosecuted cases based on it. The Principal Act is non-compliant with the FATF

155 serious offence" means— (a) a money laundering offence; or (b) a terrorist financing offence; or (c) a terrorist act, under whatever offence that act is prosecuted; or (d) an offence for which the maximum penalty is death or life imprisonment; or (e) an offence for which the maximum penalty is imprisonment of four years or more, with or without the option of a fine; or (f) an offence under the law of a foreign State in relation to any act or omission which, had it occurred in Zimbabwe, would have constituted an offence under paragraph (a), (b), (c), (d) or (e).

156 Article 6 of the Palermo Convention.

157 Money Laundering and Proceeds of Crime Amendment Act 12 of 2018.

158 Section 30 (6) of the MLPCA.

159 Section 30 (6) of the MLPCA.

recommendations in some critical aspects.[160] In 2015, the ESAAMLG conducted a peer review of the Zimbabwean AML/CFT regime and made some recommendations.[161] Parliament sought to plug the gaps identified by the report by enacting the Money Laundering and Proceeds of Crime Amendment Act 32 of 2018 (the Amendment Act). The Amendment Act is the focus of this research paper and it will be analysed in greater detail in the next chapter.

3.2.4 Current efforts to curb money laundering in Zimbabwe

From the discussion above it is clear that ML remains a challenge in Zimbabwe despite the efforts by the government to introduce various laws to curb this malice. In November 2018 President Mngangangwa issued the Presidential Powers (Temporary Measures) (Amendment of Money Laundering and Proceeds of Crime Act and Exchange Control Act) Regulations, 2018.[162] There are two notable changes brought about by these regulations. Firstly, the regulations introduced a provision for unexplained wealth.[163] It authorises enforcement agencies authorities to make applications to the High Court calling upon anyone to explain an interest in any property worth more than US$10 000 (ten thousand United States Dollars) in value.[164] It is also grants the Zimbabwe Anti-Corruption Commission (ZACC), National Prosecuting Authority and the Commissioner General of the Zimbabwe Republic Police powers to apply for such orders. The inclusion of the ZACC as an enforcement authority is applauded in the fight against ML related to corruption. Secondly, the regulations introduced the Asset Management Unit as

160 ESSALMG Report (2016) at 25.
161 ESSALMG Report (2016) at 25.
162 Statutory Instrument 246 of 2018.
163 Section 37B of Statutory Instrument 142 of 2018.
164 Section 37B of SI 246 of 2018.

an independent administrative organ of the RBZ, tasked with the responsibility to receive in trust all assets attached in terms of unexplained wealth orders. [165]. In effect, this law breathes some life into the AML laws.

[165] Section 100A of SI 146 of 2018.

CHAPTER FOUR

LEGISLATIVE SHORTCOMINGS OF THE MONEY LAUNDERING AND PROCEEDS OF CRIME AMENDMENT ACT OF 2018

4.1 Introduction

The need to amend the main ML Act was purportedly sparked by the country's desperate need for both foreign direct investment and loans from the IMF and the World Bank.[166] Solid AML laws and a solid AML regulatory framework are pre-conditions for foreign direct investment and the much needed loans.[167] In addition, the amendment was necessitated by Zimbabwe's obligation to beef up its AML law in accordance with precepts laid down by ESAAMLG, of which Zimbabwe is a member. [168] In ESAAMLG's second mutual evaluation of Zimbabwe, the country was found to be compliant with 11 of the FATF Recommendations, largely compliant with 8, partially compliant with 15, and non-compliant with 6 Recommendations.[169] To remedy the deficiencies, Parliament enacted the Money Laundering and Proceeds of Crime Amendment of 2018 (Amendment Act). This chapter will analyse the Amendment Act's main shortcomings measured against the FATF's Recommendations and against analogous provisions in the AML laws of South Africa and Namibia National Risk Assessment and Risk-Based approach.

166 Maguchu P (2018) 'Revisiting money-laundering legislation in Zimbabwe and the role of international Organisations' *African Security Review* at 4 available at http://www.tandfonline.com/loi/rasr20 (accessed 15 December 2018).

167 National Task Force on Money Laundering and Counter Terrorism (2015) *Summary of the Money Laundering and Financing of Terrorism National Risk Assessment of Zimbabwe* at 9, available at http://www.fiu.co.zw/publications/ (accessed 5 December 2018).

168 ESAAMLG Mutual Evaluation Report (2016) at 24.

169 Maguchu P (2018) at 4.

4.2 FATF Recommendation 1 requires countries to conduct a national risk assessment (NRA) to understand their ML/TF risk vulnerabilities.[170] The importance of the NRA lies in the fact that it forms the bedrock of the risk-based approach, a pillar of combating ML/TF risk.[171] The NRA involves the following stakeholders in a country, namely, the state, regulatory bodies (including bodies outside the state institutions), competent authorities and the regulated institutions themselves diagnosing their ML/TF risk factors.[172] It forms the basis of an effective AML regime and serves mainly two purposes. First, it makes available information on the potential ML risks per sector.[173] Second, it improves efficiency by directing resources towards the risk areas.[174]

4.2.1 Zimbabwe's National Risk Assessment

Zimbabwe completed its first national risk assessment in July 2015, two weeks before the ESAAMLG on-site visit.[175] The NRA was spear-headed by a National Task Force on AML/CFT.[176] The report concluded that Zimbabwe's money laundering risk was medium-high and its terrorist financing risk was relatively low.[177] Difficulties were encountered gathering information on the ML risk of legal persons and arrangements registered in the country.[178] This is a major flaw, one which can only be cured after a proper risk assessment which is inclusive of this high risk sector. It is widely accepted that modern trends of money laundering encompass the use of

170 The FATF Recommendations (2012-2018) at 9.
171 The FATF (2014) Risk-Based Approach Guidelines in the Banking Sector. Para 10.
172 Goredema C (2007) at 13.
173 The FATF Recommendations (2012-2018) Interpretive Note to Recommendation 1 at 29.
174 The FATF Recommendations (2012-2018) Recommendation 1 at 9.
175 ESAAMLG Mutual Evaluation Report at 144.
176 Money Laundering and Terrorist Financing Summary National Risk Assessment of Zimbabwe (2015) available *at* http://www.fiu.co.zw/publications/ (accessed 5 December 2018).
177 Money Laundering and Financing of Terrorism National Risk Assessment of Zimbabwe (2015) at 9.
178 ESAAMLG Mutual Evaluation Report (2016) at para 101 at 41.

corporations and legal arrangements through base erosion, profit shifting and many other criminal schemes.[179] Section 12A of the Amendment Act now specifically provides that the FIU shall work together with competent authorities to identify ML/TF risks associated with legal persons.[180] Therefore, the Amendment Act is technically compliant with the Recommendations. However, this flaw in the previous NRA was that beneficial owners of corporate vehicles remained obscure. There are many cases reported in the Zimbabwean media in which companies are implicated in illicit financial activities. In 2018, the Zimbabwean President Emmerson Mnangagwa published the so-called 'looters list'.[181] According to this list, 1 403 companies transferred to overseas destinations an estimated US$124 846 957 through payment of goods not received in Zimbabwe.[182]Further, the list revealed that 157 companies remitted a total of US$ 464 204 171 into foreign bank accounts under suspicious transactions.[183] These sums all involved corrupt dealings by private sector firms. It is therefore crucial that beneficial owners of corporate vehicles are known, for this would help to identify the persons ultimately responsible for the unlawful capital flight from Zimbabwe.

179 High Level Panel on Illicit Financial Flows in Africa (2015) at 24.

180 Section 12A (3) (a) of the Amendment Act of 2018.

181 Reserve Bank of Zimbabwe, Full List of Externalised Funds (2018) available at *https://news.pindula.co.zw/2018/03/19/download-pdf-looters-list-released-by-president-emmerson-mnangagwa/* (accessed 3 January 2019).

182 Reserve Bank of Zimbabwe, Full List of Externalised Funds (2018) at 10.

183 Reserve Bank of Zimbabwe, Full List of Externalised Funds (2018) at 38.

4.3 Beneficial ownership

Corporate vehicles are the new *modus operandi* for concealing or disguising illegal activities such as money laundering, fraud, tax evasion, insider trading and terrorist financing.[184] Launderers find refuge behind the corporate veil, which is why companies and trusts lend themselves to criminal conduct. Nowadays, a company's ownership structure can be strategically layered in complicated arrangements of subsidiaries in different jurisdictions.[185] Corporate vehicles include companies, trusts, foundations, the so-called special purpose vehicles, partnerships, non-profit organisations or any other types of legal persons and arrangements.[186] Nevertheless, these corporate vehicles have essential legitimate roles in the global economy. The FATF has established international standards on beneficial ownership transparency to deter and prevent the misuse of these corporate vehicles.[187] Beneficial ownership transparency measures assist law enforcement authorities and other competent authorities to combat the risks associated with them. [188] Beneficial ownership is described as referring

> 'to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons

184 High Level Panel Report on Illicit Financial Flaws in Africa at 24.

185 Bachus A H, 'From Drugs to Terrorism: The Focus Shifts in the international fight against money laundering after September 11, 2001' Arizona Journal of International & Comparative Law (2004) at 842.

186 Van der Does E *et al* (2011) *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* at 33.

187 FATF (2014) *FATF Guidance: Transparency and Beneficial Ownership* at 11, available at http://www.fatf-gafi.org/documents/news/transparency-and-beneficial-ownership.html (visited 29 December 2018).

188 Martini M & Murphy M (2015) '*Just for Show? Reviewing G20 Promises on Beneficial Ownership*' Transparency International at 7 available at https://www.transparency.org/whatwedo/publication/justforshowg20promises (accessed 23 November 2018).

who exercise ultimate effective control over a legal person or arrangement.'[189]

A beneficial owner is someone who essentially owns or controls a customer and/or the natural person on whose behalf a transaction is concluded.[190] It could also be a person who exercises ultimate control over a corporate vehicle.[191] Corporate vehicles are prone to abuse by enhancing anonymity through adding an additional layer of complexity through the separation of the legal and beneficial ownership of assets. [192] FATF Recommendations 25 and 26 provide guidelines on beneficial ownership for countries and their accountable institutions.[193] Countries are required to ensure that accountable institutions adopt the measures provided in both Recommendations 10 and 22.[194] Recommendation 10 provides an in-depth practical guide on how to identify beneficial owners when conducting customer due diligence procedures (CDD) for legal persons.[195]

4.3.1 Beneficial ownership in Zimbabwe

Zimbabwe was rated non-compliant with Recommendations 24 and 25 on beneficial ownership of legal persons and legal arrangements.[196] According to the 2016 mutual evaluation report,

189 The FATF Recommendation (2012-2018) Glossary at 111.
190 The FATF Recommendation (2012-2018) Glossary at 111.
191 The FATF Recommendation (2012-2018) Glossary at 111.
192 FATTF Report (2018) Professional Money Laundering at 18 available at *http://www.fatf-gafi.org/publications/methodandtrends/documents/professional-money-laundering.html* (accessed 29 December 2018).
193 The FAFT Recommendations (2012-2018) Interpretive Note to Recommendation 24 at 85.
194 The FATF Recommendations (2012-2018) Recommendation 24 at 20.
195 The FATF (2012-2018), Interpretive Note to Recommendation 10 at 58 para C.
196 ESAAMLG Mutual Evaluation Report (2016) at 149.

there was no obligation for recording and obtaining beneficial ownership information either by the Registrar of Companies or the companies themselves.[197] Neither the companies nor the Registrar was obliged to obtain and hold up-to-date information on companies. Section 15(3) of the Principal Act (MLPCA) obliges the FIs and DNFBPs to identify beneficial owners only in respect of prescribed transactions (above five thousand United States Dollars). The Amendment Act remains lacking in identifying the beneficial owner for legal persons despite the recommendations by the ESAAMLG. [198] Section 27 (4) of the Amendment Act obliges financial institutions to identify and verify the originator of a transaction in wire transfers, and the name and account number of the beneficiary. However, where the originator is a legal person there is no obligation to identify beneficial owners of the legal person.[199] Further, the Registrar of Companies is still not obliged to keep accurate, adequate, and timely information on beneficial ownership and neither are the companies themselves obliged to do so. It is only the Registrar of Deeds who is now obliged to obtain beneficial ownership information on newly registering trusts. Equally the trustees are obliged to provide beneficial ownership information and failure to do so attracts a sanction.[200] Section 70A obligates the Registrar to identify the founder, trustees and all the beneficiaries.[201] However, the provision is silent on the verification of the identities of the trustees or beneficiaries through an independent source. This remains a shortcoming, since identification and verification are inseparable processes of proper CDD. [202]

197 ESAAMLG Mutual Evaluation Report (2016) at 149.
198 National Assembly Hansard 05 June 2018 Vol. 44 No. 64 (published on 5 June 2018).
199 Section 27 (4) of the Amendment Act.
200 Section 70A of the Amendment Act.
201 Section 70A of the Amendment Act.
202 The FATF Recommendation (2012-2018) Recommendation 10 at 12.

The FATF Recommendations require countries to take measures to avoid the abuse of legal persons and legal arrangements by obtaining adequate and timely information on beneficial ownership through undertaking full customer due diligence procedures as set out in Recommendations 10 and 12.[203] The Amendment Act is silent on the regulation of the risk associated with nominee shareholders or directors despite clear guidelines in the FATF Recommendations.[204] Common law nominee arrangements which protect the identity of beneficiaries are prone to abuse by launderers. The use of nominee companies to transact business is legal in Zimbabwe. Dividends, for instance, can be paid to nominee companies, thereby providing a camouflage for the real owner of the investment. [205] The absence of risk assessment on vulnerable companies and the legal requirements to obtain and keep up-to-date beneficial ownership information especially represent the greatest deficiencies.[206] Zimbabwe has high levels of economic crime and its flawed beneficial ownership transparency measures continue to undermine the fight against corruption, tax crimes, and externalisation of funds.

203 The FATF (2012-2018) Recommendation 25 at 20.

204 "Countries should take measures to prevent the misuse of nominee shares and nominee directors, for example, by applying one or more of the following mechanisms: (a) requiring nominee shareholders and directors to disclose the identity of their nominator to the company and to any relevant registry, and for this information to be included in the relevant register; or (b) requiring nominee shareholders and directors to be licensed, for their nominee status to be recorded in company registries, and for them to maintain information identifying their nominator, and make this information available to the competent authorities upon request." Interpretive Note 15 of Recommendation 24 of the FAFT (2012-2018).

205 *Motsi v Attorney-General & Others 1995* (2) 278 (H) See also Fundira B(2004) 'Legislative and Institutional shortcomings and needs of financial institutions and the business sector in Zimbabwe' in Goredema C (ed) (2004) *Tackling Money Laundering in Eastern and Southern Africa: An Overview of Capacity Volume 2* at 147.

206 ESAAMLG Mutual Evaluation Report (2016) at 153.

4.4 Comparative analysis of beneficial ownership

The beneficial ownership test is often misunderstood. Although each country has some discretion to design its laws, they all remain guided by the essential universal FATF standards.[207] The distinction between basic information on legal persons and arrangements, and beneficial ownership information is critical.[208] Basic information covers general information such as the names of directors, business address, and number of shares. This information is available in the public records. Beneficial ownership information reveals the identity of persons who ultimately own or control the corporate vehicle.[209] Whereas former is mostly regulated by the Companies Act, the latter falls within the AML regime, and is a relatively new term used in the anti-money laundering vocabulary. The focus now turns to a comparative view of the specific provisions governing beneficial ownership in South Africa and Namibia.

4.4.1 South Africa

South Africa is a member of the FATF and ESAAMLG.[210] Its AML laws are fragmented and are mainly found in the Prevention of Organised Crime Act (POCA)[211] and the Financial Intelligence Centre Act (FICA),[212] which provide for the general money laundering control framework by

207 The FATF Recommendations (2012-2018) at 6.

208 Duri J & Matasane A M (2017) 1'Regulation of Beneficial Ownership in South Africa and Zimbabwe' in *Journal of Anti-Corruption Law* Vol 1 (2) 175 at 182.

209 FATF (2014) 'FATF Guidance on Transparency and Beneficial Ownership' at 11, available at http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf (accessed 28 December 2018).

210 FATF Mutual Evaluation Report Executive Summary, South Africa (2009) available at www.fatf-gafi.org/documents (last visited on 5 January 2018).

211 Prevention of Organised Crime Act 121 of 1998.

212 Financial Intelligence Centre Act of 38 of 2001.

placing various entities under several reporting obligations.[213] The two Acts are the key pillars of AML/CFT in South Africa. With regard to beneficial ownership, South Africa was considered non-compliant with Recommendations 24 and 25 by the FATF/ESAAMLG Mutual Evaluation Report of 2009.[214] However, in May 2017, the Financial Intelligence Centre Amendment Act 1 of 2017 was published in the Government Gazette to beef up its AML/CFT laws.[215] Section 21(1) of FICA requires the accountable institutions in South Africa to establish and verify the identity of every client, and any person acting on behalf of a client or on whose behalf the client is acting.[216] Accountable institutions include financial institutions, lawyers, trustees, estate agents, authorised securities and foreign exchange dealers, insurance companies, casinos and money remitters. The Act precisely outlines the procedure to follow when dealing with legal persons or arrangements.[217] It is clear in the required procedure for conducting customer due diligence. The officer is guided by the procedure itself in clear steps to be followed when identifying beneficial owners.

'a) Establish the identity of the beneficial owner of the client by—

(i) determining the identity of each natural person who, independently or together with another person, has a controlling ownership interest in the legal person;

(ii) if in doubt whether a natural person contemplated in subparagraph

(ii) is the beneficial owner of the legal person or no natural person has

213 De Koker L (2003) 'Money Laundering Control: The South African Model' *Journal of Money Laundering Control* at 169.
214 See FATF Mutual Evaluation Report (2008).
215 See FICA Amendment Act 1 of 2017.
216 See Section 21 of FICA Amendment Act.
217 See Sec 21(B) of FICA, 2001.

a controlling ownership interest in the legal person, determining the identity of each nature person who exercises control of that legal person through other means;

or (iii) if a natural person is not identified as contemplated in subparagraph (ii)determining the identity of each natural person who otherwise exercises control over the management of the legal person, including in his or her capacity as executive officer, non-executive director, independent non-executive director, director or manager;

and (b) take reasonable steps to verify the identity of the beneficial owner of the client, so that the accountable institution is satisfied that it knows who the beneficial owner is.'

The FICA Amendment of 2017 on beneficial ownership dealt precisely with the abuse of legal persons and arrangements. The position is clear and it is in line with the RBA.[218] However, the verification process of the provided information using independent sources remains a challenge.[219]

4.4.2 Namibia

Namibia is a member of the ESAAMLG.[220] The Financial Intelligence Centre Act[221] (Namibian FICA) is the main pillar of its AML regime. FICA provides for identification and verification of

218 Duri & Matasane (2017) at 185.
219 Duri & Matasane (2017) at 185.
220 ESAAMLG Membership.
221 Financial Intelligence Act 13 of 2012.

prospective and existing clients on beneficial ownership of legal persons by accountable and reporting institutions when establishing a business relationship or when concluding prescribed transactions.[222] Section 21(3) provides that:

> '(3) Without limiting the generality of subsection (2) (a) and (b), if a prospective or existing client is a legal person, an accountable or reporting institution must take reasonable steps to establish its legal existence and structure, including verification of;
>
> (a) the name of the legal person, its legal form, address, directors, partner or senior management;
>
> (b) the principal owners and beneficial owners;
>
> (c) provisions regulating the power to bind the entity and to verify that any person purporting to act on behalf of the legal person is so authorised, and identify those persons.'

Section 4 of the Financial Intelligence Centre Act (FICA)[223] specifically deals with the application of the Act to the Registrar of Companies and Close Corporations with regard to their AML/CFT obligations beneficial ownership information mining.[224] To further cement the rules on beneficial ownership, the Financial Intelligence Centre issued exclusive industry guidelines on beneficial ownership in 2015.[225] The guidelines acknowledged that the abuse of legal persons

222 See Sec 21 (3) of Namibian FICA.
223 See Sec 4 of Namibian FICA.
224 Section 4 of Namibian FICA.
225 Financial Intelligence Centre of the Republic of Namibia, Industry Guidance Note No. 1 on Identification and Verification of Beneficial Ownership Information.

and arrangements facilitates the commission of ML and other related offences.[226] Essentially, it provides clear and precise AML guidelines to deter or prevent the abuse of legal persons and arrangements by launderers. It also provides the counter measures in detailed CDD procedures. Beneficial ownership is defined as follows:

> 'Beneficial owner refers to the natural person(s) who ultimately owns or control a legal person and/ or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control.'[227]

More importantly, the guidelines obligate accountable institutions to identify individuals who meet the beneficial ownership test and then perform the required customer due diligence measures, depending on the risk score of the identified individuals.[228] The beneficial owner can only be a person who satisfies the so-called beneficial ownership test, that is, any individual who satisfies any one of the following elements, or a combination thereof:

(a) Owns 20% or more shareholding of the legal person,

(b) Exercises effective control of the same legal person, or

(c) Persons on whose behalf a transaction is conducted.[229]

226 Financial Intelligence Centre Industry Guidance Note No. 1 at 5.

227 'The ability to control the customer and/or dismiss or appoint those in senior management positions, those individuals holding more than 20% of the customer's voting rights those individuals (for example, the CEO) who hold senior management positions.' See Financial Intelligence Centre Industrial Guidance Note No.1.

228 Financial Intelligence Centre Industry Guidance Note No. 1 (2015) at 6.

229 Financial Intelligence Centre (2015) at 6.

Additionally, the guidelines go on to provide the information mining procedures to identify the legal person or arrangement. [230] The Namibian AML regime on beneficial ownership is more precise and detailed in comparison with that of Zimbabwe. Although the Zimbabwean Amendment Act grants the Director-General of the FIU the powers to issue directives and guidelines on any AML issue, to date no guidelines have been issued with respect to determining beneficial ownership.[231] The fact of the matter is that a beneficial owner cannot be identified by means of faulty procedures and outdated data-capturing techniques. Indeed, Zimbabwe still lags behind on this front. It needs quickly to adapt to global standards in order to become a reliable international partner in the fight against ML.

4.5 Financial Intelligence Unit

The Egmont Group defines a FIU as the central national agency responsible for receiving, analysing and disseminating financial information (i) concerning proceeds of illegal activities and potential financing of terrorism, or (ii) required by national legislation or regulation to counter money laundering and terrorism financing.[232] FATF Recommendation 29 requires countries to have a FIU.[233] There are four models of FIUs, namely, the judicial model, law enforcement model, administrative model and hybrid model.[234] The judicial model or

230 Financial Intelligence Centre (2015) at 7.
231 See Section 9(3) of the Amendment Act.
232 Egmont Group of Financial Intelligence Units, Statement of Purpose available at https://egmontgroup.org (accessed 10 January 2019).
233 The FATF (2012-2018) Recommendation Interpretive Note to Recommendation 29 at 95 para A.
234 Egmont Group of Financial Intelligence Unit

prosecutorial model is set-up within the judiciary of a government.[235] It is usually found in countries with a traditional continental law tradition, where the public prosecutors have the power to supervise and direct criminal investigations. Their powers are to seize and freeze accounts. Examples are Denmark and Cyprus. [236] This model has a high degree of independence political non-interference. Some critics argue that it is more focused on investigations than preventing ML.[237]

The law enforcement model forms part of the law enforcement agency with law enforcement powers working together with other similar bodies such as commercial crimes units within the police.[238] Examples are the United Kingdom and New Guinuea.

The administrative model works as a centralised independent authority, which receives and processes financial intelligence from reporting institutions and transmits the financial information to law enforcement authorities for prosecution. For example Zimbabwe and Malawi.[239]

Lastly the hybrid type is a combination of various FIU types as the name entails. Some of the hybrid types are a result of a merger of various agencies mandated to combat ML. [240] It is

235 The World Bank Group, The Role of Financial Intelligent Unit available at http://pubdocs.worldbank.org/en/834721427730119379/AML-Module-2.pdf (last visited 10 December 2019).
236 The World Bank Group at 7.
237 The World Bank Group at 7.
238 The World Bank Group at 8.
239 Egmont Group of Financial Intelligent Units.
240 The World Bank Group at 8.

less common and an examples are Australia and Philippines.[241] The FATF Recommendations do not restrict a country to a specific model, but any model chosen must be in accordance with the FATF standards.[242] Also, FIUs are encouraged to join the Egmont Group.[243] Its policy documents enjoy international recognition and are held in high esteem by countries across the world. This hold particularly true for the Egmont Group Statement of Purpose, and its Principles for Information Exchange between Financial Intelligence Units for Money Laundering.[244]

4.5.1 Zimbabwe's Financial Intelligence Unit

The Amendment Act officially established the Financial Intelligence Unit as an administrative unit of the Reserve Bank.[245] The BUPSMLU is now officially called the FIU, however, the BUPA still applies.[246] At the time of the mutual evaluation report, the FIU did not pass the operational autonomy test in a number of ways.[247] The Director's tenure was not specified in the BUPA. Besides, the Director-General was appointed by the Governor of the Reserve Bank of Zimbabwe (RBZ).[248] According to the BUPA, staff of the BUPSMLU consist of officers appointed under Section 46 of the Banking Act as designated by the Governor of the RBZ, officials designated by the Commission of ZIMRA, and representatives from the National Economic Conduct Inspectorate of the Ministry of Finance, as designated by its Director.[249] At the time of the 2016

241 The World Bank Group at 9.
242 The FATF (2012-2018) Recommendation Interpretive Note to Recommendation 29 para at 95 para A.
243 The FATF Recommendations (2012-2018) Interpretive Note to Recommendation 29 at 95.
244 Hopton D (2009) at 26.
245 Egmont Group of Financial Intelligence Units.
246 See Section 6A (1) of the Amendment Act.
247 ESAAMLG Mutual Evaluation Report (2016) at 163.
248 Section 3 of the BUPA.
249 ESAAMLG Mutual Evaluation Report (2016) at 164.

mutual evaluation report, the FIU had no permanent staff.

4.5.2 Appointment of the Head of the FIU

The Amendment Act addressed some of the identified shortcomings. However, despite the parliamentary debates that preceded the drafting of the bill, the Amendment Act still falls short of FATF standards. When the bill to the Amendment Act was introduced, the issue regarding the appointment of head of the FIU was addressed in the national assembly.[250] It was suggested that the FIU must be a stand-alone institution and that the Director-General must be appointed by an independent board in consultation with the Minister of Finance. [251] Oddly, the contributions and comments were not reflected in the text of the Amendment Act, according which, as matters now stand, the Director-General is appointed by the Governor in consultation with the Minister of Finance.[252]

The amendments therefore continues to leave the Act defective which, in turn, undermines the capacity of the FIU to fulfil its mandate independently of the RBZ. Operational independence means that the FIU as an institution should have the power and capacity to carry out its functions freely without political interference, including the independent decision to analyse, request and/or distribute specific information.[253] According to FATF standards, an FIU must be free from any form of undue influence in its operations. Interference could come from

250 National Assembly Hansard at 3.
251 National Assembly Hansard at 5.
252 See Section 6 A(a) of the Amendment Act.
253 FATF (2012-2018) Recommendations, Interpretive Note to Recommendation 29 at 97 para E.

the side of politicians, the government, or even the private sector.[254] The appointment of the Director-General by the Governor of the Reserve Bank in consultation with the Minister means that the Director can still be required to act at the behest of an external instance. It goes without saying, therefore, that a political appointee is more likely to be at the bidding of the appointing authority than would be the case where the appointment is made by an independent body, consisting of various members from both the public sector and private sector.

The Amendment Act established a National Anti-Money Laundering Advisory Committee, whose main function is to advise the Minister on policies to combat money laundering and terrorist financing.[255] The Committee consists of various members from competent authorities, supervisory bodies, the regulated and other sectors as determined by the Minister of Finance.[256]

4.5.3 Tenure of Office of the Director-General

The Amendment Act is not specific about the term of office of the Director-General. The mutual evaluation report identified this weakness and recommended redress. [257] Although FATF standards are not express about the tenure of office of the head of the FIU, the interpretation and comment by the ESAAMLG report reflects the importance of specifying the duration of tenure.

254 FAFT (2012-2018) Recommendations, Interpretative Note to Recommendation 29 at 97 para F.
255 See Section 12 C of the Amendment Act.
256 See Section 12 of the Amendment Act.
257 ESAAMLG Mutual Evaluation Report (2016) at 163.

4.5.4 Budget and Auditing of the FIU

According to the Amendment Act, the budget of the FIU is approved by the RBZ Board, managed independently by the Director-General, but subject to internal auditing by the RBZ auditors.[258] It is funded by both the RBZ and parliament. [259] The FATF requires countries to fund their FIUs sufficiently to ensure their operational independence.[260] It is clear from this provision that the RBZ controls some power levers in the affairs of the FIU. In as much as the FIU is on paper an independent body, its operations and those of the RBZ are difficult to distinguish, a fact which is complicated even more by their being both housed in the RBZ Building.

4.6 Comparative analysis of Financial Intelligence Units

4.6.1 Namibia: Financial Intelligence Unit

The Namibian Financial Intelligence Centre (FIC) is established in terms of the Financial Intelligence Act (FIA).[261] It adopted the administrative model. The FIC is headed by a Director who is appointed by the Minister of Finance in consultation with the Council established in terms of Section 18 of the FIA. The Council is an independent body consisting of various stake holders from the competent authorities, enforcement agencies, supervisory bodies and the regulated institutions. [262] The decisions concerning the appointment and removal of the Director are made by the Minister, in consultation with the Council. More importantly, the Act is specific

258 See Section 6 A (2) (d) of the Amendment Act.
259 See Section 6 A (2) (d) (ii) of the Amendment Act.
260 FATF Recommendations (2012-2018) Interpretive Note to Recommendation 29 at 97 para E.
261 Act 13 of 2013.
262 See Section 18 of FICA.

on the tenure of office of the Director. It provides that the Director holds office for a term of five years subject to a renewal on terms set out in the contract of employment.[263] This provision in the Act is compliant with the FATF standard in that reference to a contract of employment guards against direct political interference. Furthermore, the Namibian FIC is not funded by the Reserve bank, unlike the Zimbabwean FIU, and its finances are managed separately from those of the Central Bank.[264] It is not clear, however, as to who audits the books of the FIC. The Namibian FIC officially joined the Egmont Group on 6 June 2014 and it has access to financial, administrative and enforcement information to enhance its capacity. [265] More importantly, it has its own permanent staff and it is housed separately from the Central Bank.

4.6.2 South Africa: Financial Intelligence Unit

South Africa's FIC was established by the Financial Intelligence Centre Act of 2001. The Act has since been amended to comply with the FAFT standards. The FIU functions on the basis of the administrative model, and it relies the South African Police Services as its main agency responsible for investigations.[266] The Director of the FIU is appointed by the Minister of Finance.[267] The Director's tenure of office is not more than five years, subject to renewal on terms and conditions set out in the contract of employment.[268] The Minister has no obligation to consult the Counter-Money Laundering Advisory Council established by section 17 except when

263 See Section 11 (2) (a) to (b) of FICA.
264 See Section 14 of FICA.
265 Egmont Group, Namibia Financial Intelligence Centre, available at https://www.fic.na/ (last visited on 10 January 2019).
266 FATF-ESAAMLG Mutual Evaluation Report (2009) at 7.
267 Section 6 of the Financial Intelligence Centre Act of 2001.
268 Section 6 of the South African FICA.

renewing the contract of the Director or when appointing his or her successor.[269] The Minister has more powers in the appointment and removal of the Director without consulting the Council.[270] In comparison with the Namibian position on the appointment of the head of the FIC, the South African position is appears to be clouded by political considerations. The funds of the South African FIC are mainly allocated by parliament, with the rest coming from donations approved by the minister.[271] The books of the FIC are audited by the Auditor General,[272] unlike the Zimbabwean FIU whose books are audited by the auditors of the RBZ.[273] The South African FIC officially joined the Egmont Group on 1 July 2003, which makes it one of the first FICs in Africa to do so. Despite its shortcomings, the South African FIC is highly regarded across the African continent and it would be therefore worthwhile for other African countries to emulate it.[274]

4.7 New Technology

Technological advancement has transformed our day-to-day running of businesses and organisations. It has created a new platform for organising the use of information.[275] More importantly, it has created a new platform for organising information and its management for AML purposes. However, it has also triggered unanticipated challenges to the global fight

269 Section 6(3) of South African FICA
270 Section 7 of South African FICA.
271 Section 8 of South African FICA.
272 Section 15 of FICA.
273 Section 6 A (d) of the Amendment Act.
274 Institute for Security Studies (ISS) workshop held in Cape Town on 8 March 2003.
275 Section 6(3) of the Amendment Act.

against money laundering.[276] It is difficult to supervise technology in line with the risk-based approach. Technological innovation has provided growth opportunities that have improved efficiency, access and delivery of financial services and products to people, businesses and communities thereby promoting financial inclusion.[277] Customer due diligence procedures[278] and record keeping requirements[279] are applied using different technologies. Within this dynamic between regulatory initiatives and technological adoption, the domain of AML is facing constant reform. It is nevertheless crucial to ensure that the financial system is not misused through technology-based products for purposes of money laundering and terrorist financing (ML/TF).[280] The FATF requires financial institutions and countries to identify money laundering risks that may arise from new products and new business practices, including new delivery mechanisms, and the use of new technologies for both new products.[281] FATF Recommendations furthermore direct financial institutions to conduct risk assessments prior to the launch of the new products. According to the 2016 mutual evaluation report, Zimbabwe did not meet this requirement in that there was no law directing financial institutions or competent authorities to identify ML risks associated with modern technologies.[282]

276 Demetis D S (2010) *Technology and Anti-Money Laundering: A Systems Theory and Risk-Based Approach* Edward Elgar Publishing Ltd, Northampton at 34.

277 First Initiative (2008) Implementing FATF standards in developing countries and financial inclusion: Findings and guidelines at 26.

278 The FATF Recommendations (2012-2018) Recommendation 10 at 12.

279 The FATF Recommendations (2012-2018) Recommendation 11 at 13.

280 Malady L, Buckley R & Arner D Developing and Implementing AML/CFT Measures using a Risk-Based Approach for New Payments Products and Services (2014) at 23 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456581 (last visited on 28 November 2019).

281 FAFT Recommendations (2012-2018) Recommendation 15 at 15.

282 ESAAMLG Mutual Evaluation Report (2016) at 139.

4.7.1 Zimbabwe: New Technology

Parliament sought to make the Act comply with the FATF's Recommendations. Section 12 A (3) (b) provides that measures be undertaken by the FIU to assess potential ML/CFT risks associated with the use of new technologies.

The FIU simply lacks the resources to discharge the duty of ensuring that it meets the requirements of Section 12 (3) (b), which in itself is a weakness. This is a ground for concern, especially in view of the advent of crypto currencies – a phenomenon which Zimbabwe's financial authorities have yet to confront head-on. South Africa is at least working on formulating policy documents and laws to deal with crypto currencies and other new technological innovations that have a bearing on financial transactions, although these are still their infancy.[283] The fact of the matter is that unless crypto currencies are properly regulated, they can be misused for criminal purposes. It is therefore in Zimbabwe's own financial interest to ensure that it develops policies for preventing money laundering through the use of crypto currencies and other new technologies

4.8 Conclusion

Based on the comparative analysis above, Zimbabwe's Amendment Act lacks specificity, which renders the AML laws weak. As a result, the responsible authorities and the FIU are unable to detect and to prevent ML. There is no doubt that economic criminals hide behind corporate

283 Financial Intelligence Centre, 'Consultation Paper on Crypto Assets' (2019), South Africa available at www.fic.gov.za (accessed 17 January 2019).

vehicles, concealing their ultimate ownership of such instruments. Zimbabwe's laws aimed at identified beneficial ownership are feeble and hardly enforced. The country's FIU lacks operational independence, making it pliable to political interference. Furthermore, given the fact that Zimbabwe not only lacks the human and technical resources to cope with the quickly evolving world of crypto currencies, but also the lack of political will to counter ML threats. There is generally lack of clear and solid policies to counter ML, as such the country remains extremely vulnerable to economic crimes.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Concluding remarks

This research paper has highlighted the critical weaknesses in the Zimbabwean AML regime and the social and economic consequences of non-compliance with the FATF recommendations. The country loses millions of Zimbabwean dollars because of the poor regulation of the financial sector. The problem has been aggravated by a lack of political will to tackle ML head-on. Zimbabwe has ratified the International treaties governing money laundering, and is a member of the FATF-style region al body, ESSAAMLG. But all this means nothing if the provisions of treaties are domesticated only half-heartedly and where there is little will to enforce even the feeble laws on the statute books. Compared to both South and Namibia, Zimbabwe's AML legal regime leaves much to be desired. While FATF does not prescribe the form AML laws should take, it expects countries to implement its Recommendations.[284]

Understanding the money laundering risk to which a country is exposed is crucial, as this informs the content of the laws and policies need to be put in place to thwart the hazards posed by money laundering. National risk assessments need to be based on hard facts, and must not be tempered by political considerations. It is equally essential that the risk assessment take into account the various ML typologies which make a country particularly vulnerable. As described above, Zimbabwe has omitted to assess the risk posed by legal persons in relation to ML.

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284 FATF Recommendations (2012-2018) at 6.

The Mbeki report on illicit financial flaws in Africa highlighted that commercial activities by the private companies are by far the largest contributor to illicit financial flows.[285] In Zimbabwe, President Emmerson Mnangagwa released the so-called 'looters list' containing more than 2 000 companies which are said to be involved in illicit financial flows. The Amendment Act came later, after these findings, but remains porous on the risk posed by IFFs.

Zimbabwe's FIU failed the autonomy test, as stated in the 2016 mutual evaluation report. The FIU continues to be controlled by the RBZ. In comparison to South Africa and Namibia, Zimbabwe's FIU is bereft of the resources required to fulfil its task. It is fully under political control. It is not even a member of the Egmont Group, which means that it is also excluded from benefiting from information sharing with other FIUs.

The Amendment Act is silent on the regulation of crypto-currencies such as BitCoin, Ethereum, BitCoin Cash, etc. which are the most popular and largest trading virtual currencies.[286] Due to their popularity, these virtual currencies can be traded for real currency 'fiat money.' The crypto currency market has an international dimension and is growing in acceptance, to the extent that some major companies now accept virtual money as a form of payment.[287] Most countries are still at sea as to how to go about regulating virtual currencies,

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285 High Level Panel on Illicit Financial Flows in Africa (2016) at 6.

286 Top 10 Cryptocurrencies 2019: What's The Most Popular Cryptocurrency Today? Available at https://www.bitdegree.org/tutorials/top-10-cryptocurrencies/ (accessed 10 February 2019).

287 Bitcoin is being adopted in the mainstream economy. Bloomberg, Microsoft, Overstock.com, Expedia.com and the list of new Bitcoin-friendly airlines includes Aeromexico, Air New Zealand, American Airlines, Austrian Airlines, China Eastern Airlines, Delta Air Lines, EL AL Israel Airlines, Etihad Airways, Hahn Air, Japan Airlines, Lufthansa German Airlines, Malaysia Airlines, Qantas Airways, Shandong Airlines, United

this despite the fact that the FATF has issued guidelines that could be followed.[288] Zimbabwe needs to take proactive measures in this area, especially since the citizenry has lost faith in the value of the national currency. In fact, a considerable segment of the population is now resorting to storing money in other forms, including buying virtual currencies and foreign currency. Zimbabwe can therefore not afford to content itself with being a spectator on the side-lines. It needs to act with urgency in coming to grips with the challenges posed by new technologies.

5.2 Recommendations

5.2.1 Comprehensive risk assessment

Zimbabwe needs to conduct a comprehensive risk assessment which is inclusive of all sectors, especially as regards the risks posed by legal persons. However, there has to be a genuine political will to conduct such a risk assessment.

5.2.2 Substantive approach to determining the identity of beneficial owners

The Director-General of the FIU, acting in accordance with Section 7A of the Amendment Act, must issue clear and express guidelines that must be followed in identifying the beneficial owners of legal persons. Focus should be on the degree of control exercised and the benefit

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Airlines and US Airways. See also *260 Airlines now accept Bitcoin thanks to new Bitnet partnership | 99Bitcoins* (accessed 10 February 2019).

[288] FATF (2015) Guidance for a Risk-Based Approach to Virtual Currencies available at *http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-Virtual-Currencies.pdf* (accessed 10 February 2019).

derived.[289] Control of a corporate vehicle will always depend on the context, as control can be exercised in many different ways, including through informal ownership or by way of entering into a contract. A formal approach to beneficial ownership based on percentage thresholds of ownership or designated beneficiary of a corporate vehicle under investigation may yield useful information by providing clues to the corporate vehicle's ultimate ownership or control. The Namibian Industry Guidance is a useful example of the detail needed to give effect to the AML laws on beneficial ownership. Therefore, the Registrar of Companies and all the accountable institutions must be specifically obliged by the law to obtain beneficial ownership information for legal persons and legal arrangements.

5.2.3 Training and capacity building

Information mining on beneficial ownership solely depends on the CDD procedures of accountable institutions. It is critical that all personnel responsible for these procedures are properly trained to look for the relevant information. Furthermore, involving technology experts in designing AML programmes would ease the information gathering process which, in most government institutions, is still manually operated and outdated. Also, timeous information verification is key to an effective AML regime. Zimbabwe is therefore strongly urged to upgrade its information gathering processes for purposes of beefing up its methods of identifying beneficial owners. More importantly, the investigating authorities, including Zimbabwe Republic Police and ZACC officials, must be properly trained to investigate and gather relevant evidence

[289] Van der Does *et al* (2011) at 3.

on ML to sustain the charges in the Criminal Court.

5.2.4 Operational Independence of the Financial Intelligence Unit

The Zimbabwean FIU operates in a polarised political environment it is faced with a daunting task to gather and receive ML reports from an economic system in which ML is part and parcel of everyday life. Therefore, it must be well structured and be able to effectively process the financial intelligence which will lead to successful prosecutions. First and foremost, the Zimbabwean FIU must be independent from the Reserve Bank of Zimbabwe. The Director-General must be appointed by the Minister of Finance in consultation with an independent body, preferably the National Taskforce on Anti-Money Laundering and combating of Financing of Terrorism established in terms of Section 12D of the Amendment Act.

More so, the tenure of office of the Director-General must be clearly stated in the Act, and it is recommended that the appointed person holds office not for more than two terms, with each term being a maximum of five years. Further, the Act must make reference to a contract of employment which binds the Director-General and the FIU as an independent authority. The FIU must have its operational building outside the RBZ. Further, its books of accounts must be audited by the Auditor-General appointed in terms of Section 245 of the Constitution of Zimbabwe**.** The budget and funding, it must be funded directly by the Parliament or through government grants in order to properly function as an independent body.

5.2.5 Join the Egmont Group of Financial Intelligence Units

Zimbabwe's FIU must join the Egmont Group to build its capacity to effectively function. The rigorous process of being accepted as a member will force compliance with the FATF standards. At the time of the 2016 Mutual Evaluation report, it had not yet made its application for membership.[290] South Africa and Namibia are members of the Egmont Group, their capacity and effectiveness are far better than the Zimbabwean FIU. Therefore, it is recommended that Zimbabwe joins the Egmont Group.

5.2.6 New technologies

With the growing use of crypto-currencies, Zimbabwe cannot afford to be silent or to ban their use. A pro-active approach is recommended as opposed to banning. It is recommended that Zimbabwe should have policies or regulations in place to guide the service providers in this sector. There are companies already in Zimbabwe who are dealing in crypto-currencies, for example, Golix. The fight against ML can only be achieved if the law is clear and precise and more importantly there must be political will and genuineness in the efforts.

5.2.7 Adopting the High-Level Panel Report on illicit financial flows

The results of the Mbeki Report established that the African continent is losing more than US$50 billion annually through illicit financial flows. Zimbabwe is also not immune to the scourge of illicit financial flows as evidenced by the Marange Diamond scandal and the so-called 'looters list'

290 ESAAMLG Evaluation Report (2016) at 163.

discussed in the previous chapters. Most of the IFF leakages are in the mining sector.[291] Estimates are that Zimbabwe could have lost a cumulative US$2.8 billion (representing an annual average loss of US$276 million) from 2004 to 2013.[292] These cumulative estimates represent potential revenue loss of close to 51 percent of Zimbabwe's 2018 national revenue projections of US$5.533 billion.[293] Given the challenges which the country is facing, which include poor infrastructure, inadequate electricity generation and deteriorating health services, focus on curbing these IFFs may provide the much needed funds. Following the AU declaration on IFFs, it is highly recommended that Zimbabwe properly align its AML regime to give effect to the recommendations by the Mbeki report on IFFs in express terms especially on trade related ML.

291 Zimbabwe Environmental Law Association (ZELA) Unpacking the Reserve Bank of Zimbabwe ''Looters List'' and the need for a holistic approach to combat illicit financial flows (IFFs) in Zimbabwe; An unprotecting on the mining sector' (2017) at 2.

292 Global Financial Integrity available at https://gfintegrity.org/data-by-country/ (accessed on 10 August 2019).

293 (ZELA) Unpacking the Looters List (2017) at 3.

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