Corruption, Money Laundering, Secrecy and Societal Responsibility of Banks

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INTRODUCTION

Corruption is a global problem that affects both developed and developing countries alike. The *modus operandi* for engaging in corrupt transactions are context-dependent. Factors such as the business sector (eg construction, extractive, and defence), types of business activity (eg procurement contracts, obtaining licences and permits), economic opportunities (or lack of opportunities) and the political environment are likely to drive and influence the types and levels of corrupt transactions. To illustrate, Rolls Royce has been in the news recently for engaging in corrupt transactions in China, Indonesia and India.[2] The defence sector often highlighted as a corruption prone sector has seen some high level probes in equipment procurement in India.[3] The corruption scandal surrounding Wal-Mart trying to enter the retail sector in India and Mexico provides another example.[4] And this seems to the be just the tip of the iceberg. Other multinationals such as BAE and Siemens have also engaged in corrupt activities across many jurisdictions. The investigations and prosecutions brought by the United States' Security Exchange Commission under the US Foreign Corrupt Practices Act 1977, for instance, provides ample evidence.[5]

Various mechanisms ranging from bid rigging and trading in influence to bribery are used to achieve the result that favours all the parties to a corrupt transaction. Bribery[6] is perhaps the most easily understood within this range and according to an oft-quoted World Bank study '[a] conservative approach … gives an estimate for annual worldwide bribery of about USD 1 trillion dollars (USD 1,000 billion.)'.[7] The illicit

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[2] 'Rolls-Royce Bolsters Ethics Policy in Face of Corruption Probe' available at http://www.reuters.com/article/2014/03/06/us-rolls-royce-hldg-annualreport-idUSBREA2506Z20140306 - Accessed 31 March 2014.

[3] 'India's Defense Sector Still Plagued by Corruption' (13 February 2014) available at http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?lng=en&id=176507 - Accessed 3 March 2014.

[4] 'Walmart Is Paying Legal Fees For Big Number Of Execs' available at http://www.huffingtonpost.com/2013/12/04/walmart-lawyer-fees_n_4381598.html - Accessed 12 February 2014.

[5] See http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml - Accessed 1 March 2014.

[6] Bribery is understood here as a transaction where the bribe giver promises or offers to the bribe taker a benefit such as a gift, money or other advantage in exchange for an act or omission in the performance of his or her official function.

[7] These figures were derived from 'figures on bribes from worldwide surveys of enterprises, which ask questions about bribes paid for the operations of the firm (licenses, regulations, etc.), as well as bribes paid to get favorable decisions on public procurement. Further, an estimate on bribes paid by household users of public services is derived from governance and anti-corruption diagnostic surveys.'

funds obtained through bribery inevitably find their way to bank accounts and often transferred to banks in foreign jurisdictions. For instance according to Global Witness two Nigerian state governors who had been accepting bribes had deposited millions of pounds in a number of well known UK banks: Barclays, HSBC and RBS.[8]

Open acknowledgement of the problem of corruption and bribery and the detrimental link between corruption, economic growth and development emerged in the 1990s. The resulting anti-corruption discourse at the international level saw the adoption of anti-corruption conventions at both regional and international level along with the adoption of codes of conduct targeting the behaviour of public and private institutions and those working within them.[9] Given that much of the funds acquired through corruption and bribery are moved across jurisdictions using financial institutions the anti-corruption discourse linked anti-money laundering measures as a corruption prevention mechanism resulting in the incorporation of provisions focusing on money laundering in the anti-corruption mechanisms.

Focusing on the link between corruption and money laundering (ie 'a process that employs financial, accounting, legal and other instruments in conjunction with an object that has either been used in, or derived from, unlawful activity'[10]) this paper explores the extent to which the anti money laundering framework has the potential to prevent corruption. The paper therefore in the first instance considers the anti–corruption conventions (in particular, the United Nations Convention against Corruption (UNCAC)) and how they accommodate the anti-money laundering discourse within their overall framework. It is followed with an examination of due diligence procedures including those in relation to PEPs (Politically Exposed Persons) that banks are expected to follow to counter money laundering. Using the UK Financial Services Authority's 2011 Report on the managing of money laundering risks by banks and citing the HSBC money laundering case, this paper argues that anti-money laundering (AML) legislative measures (be they hard or soft) are of limited use only since they are dependent on rigorous application by the banks. To improve the contribution of AML measures to combat corruption, this paper argues that banks, who in some instances encourage this activity through their commitment to bank secrecy, should not be solely profit-seeking entities but should see themselves as having societal responsibility, both at the local and global level. Viewed from this perspective banks would not face the temptation of engaging with high-risk customers and PEPs thus strengthening the fight against corruption. And it goes without saying that adoption of such an approach on the banks' part would also curb other social ills such as human trafficking and drug trafficking that are the sources of illicit funds and

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http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html - Accessed 31 December 2013.

[8] Global Witness *International Thief Thief* (London, Global Witness Ltd, 2010) available at http://www.financialtransparency.org/wp-content/uploads/2010/10/International-Thief-Thief-final.pdf - Accessed 1 January 2014.

[9] See for instance, Report of the Secretary General 'Implementation of the International Code of Conduct for Public Officials' Commission on Crime Prevention and Criminal Justice, Eleventh session Vienna, 16-25 April 2002, available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan039934.pdf - accessed 2 February 2014; OECD, Guidelines for Multinational Enterprises 2011 available at http://www.oecd.org/daf/inv/mne/48004323.pdf - Accessed 1 January 2014.

[10] K. Hinterseer, *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (Kluwer Law International, 2002) p,11.

terrorist activities that use illicitly or illegitimately obtained funds for the furtherance of their causes and ideologies.

CORRUPTION AND MONEY LAUNDERING – THE LINK

Before examining the link between corruption and money laundering it is important to say a few words on the two types of corruption often identified in the anti-corruption discourse: petty corruption and grand corruption.[11] Petty corruption is normally understood to be corruption faced by citizens and the private sector on a daily basis to receive basic services such as connections to utilities, obtaining passports, school admission and customs formalities.[12] Grand corruption, on the other hand, is generally understood to be corruption that takes place at the upper reaches of society involving the political elite, public officials, middle men and the private sector. For instance, bribes paid to the political elite in arms procurement are an illustration of grand corruption.[13] Grand corruption normally involves millions of dollars in contrast to petty corruption. And it is this type of corruption that has the greatest impact on money laundering.[14] The corrupt officials are likely to wish to erase the origins of the illicitly obtained funds and use a variety of mechanisms to enable this. Chief amongst these are the use of banks in foreign jurisdictions such as Switzerland and Lichtenstein where bank secrecy is respected. Besides bank deposits, monies obtained through corruption may also be used to buy other assets such as houses and yachts. In the process of laundering what the launderer is keen to create is a veil of cleanliness. As Hinterseer notes: 'This veil not only prevents the object's association with unlawful activity from being accurately traced and identified, but also enables the object to be used in the legal economy with anonymity and without fear of criminal, civil or equitable sanction'.[15]

[11] It is however important to note that none of the anti-corruption conventions distinguish petty corruption or grand corruption. They do not require the contracting states to make such a distinction upon implementation.

[12] For instance, Transparency International India (TII) undertook a study in 2008 which focused on BPL (below the poverty line) households. The survey with a sample size of 22,728 randomly selected across the States found for instance that 40% of the households who had approached police services and land and housing services had paid a bribe. The study estimates the total bribes by BPL households paid to the eleven services in the previous year at INR 8,830 million (TII, *India Corruption Study,* New Delhi, Transparency International, 2008). Similarly a recent survey from Kenya reports that 36.1% of those seeking public services were solicited for a bribe and of these 41% paid the bribe (EACC *National Corruption Perception Survey* (Nairobi, EACC, 2011).

[13] In a recent news item the Sunday Times is reported as having evidence to show that BAE Systems was implicated in a multi billion rand arms deal, which involved a South African ex minister. 'New Evidence of Arms Deal Corruption – Report' available at http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=30710:new-evidence-of-arms-deal-corruption-report&catid=54:Governance&Itemid=118 - accessed, 1 March 2014.. Other items on BAE involvement in corrupt deals see for instance 'Arms Chief in Cover-up over £6m Penthouses' *The Sunday Times* 3 February 2013, available at http://www.thesundaytimes.co.uk/sto/news/insight/article1206718.ece - accessed 1 March 2013.

[14] The United Nations Office on Drugs and Crime (UNODC) conducted a study in 2009 to attempt to measure how much money was generated by drug trafficking and organised crimes with a view to understanding the extent of money laundering. The report estimates that in 2009, criminal proceeds amounted to 3.6% of global GDP, with 2.7% (or USD 1.6 trillion) being laundered. See http://www.unodc.org/unodc/en/frontpage/2011/October/illicit-money_-how-much-is-out-there.html - accessed 1 March 2014.

[15] K. Hinterseer, op. cit., p11. See also J. Blum et al, *Financial Havens, Banking Secrecy and Money Laundering* (New York, United Nations, 1998).

Addressing the Link between Corruption and Money Laundering – The Anti-Corruption Conventions

All the anti-corruption conventions in force recognize the importance of money laundering either implicitly or explicitly. The scope of money laundering within these conventions also varies. While this paper largely focuses on the UNCAC (since there are 170 States Parties to the Convention) the following paragraphs highlight the scope of money laundering within the other conventions in chronological order. The first of the anti-corruption conventions in force, the Organisation of American States' Inter-American Convention against Convention 1997 (IACAC) does not mention the offence of money laundering. However para (d) of Art VI on acts of corruption does refer to'[t]he fraudulent use or concealment of property derived from any of the acts referred to in [Article VI]'. Since money laundering involves the concealment of property it could be said that Article VI in part does cover, albeit minimally, laundering the proceeds of corruption.

The OECD Convention on the Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention), also adopted in 1997, does not include an extensive provision on money laundering. But it goes further than the IACAC. Article 6 states that where parties have made bribery of a public official a predicate offence for the purpose of the application of its money laundering legislation they should extend this to include bribery of a foreign public official regardless of the place where the bribery occurred. Compared with the OECD Anti-Bribery Convention, the Council of Europe (COE) Criminal Law Convention on Corruption 1999 (COE Corruption Convention) includes a mandatory requirement in its Article 13. It requires all Contracting States to adopt legislation and other measures to establish as criminal offences under its domestic law conduct referred to in Article 6 paragraphs 1 & 2 of the COE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990. The predicate offence consists of criminal offences established in Articles 2-12 of the COE Corruption Convention. These include bribery of domestic public officials, foreign public officials, bribery in the private sector, and trading in influence. Like the COE Corruption Convention, the African Union Convention on Preventing and Combating Corruption, 2003 (AU Convention) requires all States Parties to adopt legislative and other measures necessary to establish as criminal offences conversion, transfer or disposal of property knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property; the concealment or disguise of the true nature, source, location, disposition of property which is the proceeds of corruption or related offences, and the acquisition, possession or use of property with the knowledge at the time of receipt that such property is the proceeds of corruption or related offences (Article 6). As apparent from the above it tries to cover all angles by including all those who with knowledge receive or use the proceeds of corruption. While Article 6 captures the spirit of anti-money laundering the UNCAC stands out as addressing money laundering in the context of corruption in greater details.[16] Article 23 requires States Parties to create an offence of laundering

[16] The other offences created by the UNCAC are bribery of national and foreign public officials including officials of public international organisations (Articles 15 & 16), embezzlement or misappropriation or other diversion of property by a public official (Article 17); abuse of position by a

of proceeds of crime while allowing some flexibility to the State to adapt it to fit with the fundamental principles of their domestic law. It is widely drawn to include a variety of assets including cash, company shares and luxury goods. Provided intentionality and knowledge are present, the sub-paras of Article 23 cover laundering in a variety of settings. The conversion and transfer of illicitly obtained property using acquaintances such as friends and family is a popular method for hiding the illicit origin of the funds. Both the person who converts or transfers property in illicitly obtained goods for the purposes of disguising their illicit origin and the person assisting the person involved in the commission of a predicate offence are brought within the fold of the money laundering offence (Article 23(1)(a)(i). To illustrate, if X (who has obtained a yacht as a bribe) transfers it to his friend Y and Y is aware of its illicit origin then Y would also be liable laundering the proceeds of crime. Article 23(1)(a)(i) does not restrict the offence to friends and family and hence gatekeepers such as accountants, lawyers and financial advisers who are aware of their client's income would come within its ambit. The concealment of funds through the setting up of complex entities such as trusts is another widely used method. For instance, ex-President Ferdinand Marcos had set up a number of trusts to hide the proceeds of corruption.[17] Article 23(1)(a)(ii) therefore covers the concealment or true nature, source, location, disposition or ownership of or rights with respect to property with knowledge that the property is the proceeds of crime. Acquisition, use or possession and participation are also covered in the UNCAC. Article 23(1)(b) creates two offences. The first is the acquisition, use or possession of property that is known at the time of receipt to be the proceeds of crime. So a banker who receives the use of an expensive yacht over the weekend from one of the bank's customers knowing that the property has been obtained with illicit funds would be caught by this provision. The second covers participation in, association with or conspiracy to commit, aiding, abetting and facilitating any of the offences established in Art 23.

Alongside the creation of the above offences, the UNCAC in Article 14 requires States Parties to put in place a 'comprehensive domestic regulatory and supervisory regime' that govern banks and non-bank financial institutions that are involved in formal or informal services for the transmission of money or value. This applies to both natural and legal persons. This provision also expects States Parties to ensure that the regulatory and supervisory regime includes the use of due diligence mechanisms such as customer identification and beneficial owner identification, maintenance of records and the reporting of suspicious transactions. The UNCAC in Article 14(4) also states that reference should be made to 'the relevant initiatives of regional, interregional and multilateral organizations against money laundering' as a guide when setting up an AML system.[18]

public official for obtaining undue advantage (Article 19), trading in influence (Article 18), illicit enrichment (Article 20), bribery in the private sector and embezzlement of property in the private sector (Articles 21 & 22).

[17] For more on Marcos see I. Carr, I. and R. Jago, 'Corruption, the United Nations Convention against Corruption and Asset Recovery' in C Walker and C King (Eds) *Dirty Assets* (Farnham, Ashgate, 2014).

[18] As to how the UNCAC dove tails with the international AML standards see I.Carr & M.Goldby 'Recovering the Proceeds of Corruption: UNCAC and Anti- Money Laundering Standards' 2011 *Journal of Business Law* 170.

THE ANTI-MONEY LAUNDERING STANDARDS – THE FATF STANDARDS[19]

The Financial Action Task Force (FATF)[20] is an important architect in the setting up of procedures for improving best practices by the financial institutions to curbing money laundering. The original Forty Recommendations adopted in 1990 underwent revisions in 1996 to accommodate new money laundering trends and techniques. Initially these Recommendations addressed drug related money laundering but the scope was expanded to go beyond drug-money laundering to include the funding of terrorist acts and terrorist organisations. In 2001, to reflect these changes the Special Recommendations on Terrorist Financing were adopted. The Recommendations underwent further revisions in 2003 and 180 countries endorsed these Recommendations together with the Special Recommendations. They formed the international standard for anti-money laundering and countering terrorist financing. These Forty Recommendations and the Special Recommendations were revised further after the third round of mutual evaluations[21] undertaken by the FATF and the new FATF Recommendations (Recommendations) were adopted in February 2012[22]. In drafting the Recommendations, the FATF worked also in close co-operation with FATF Style Regional Bodies (FSRBs),[23] thus ensuring global effect.

[19] The UK implements these standards through the Proceeds of Crime Act 2002 as amended, and the Money Laundering Regulations 2007.

[20] An independent inter-governmental body, which was established in 1989. Its primary aims are to promote policies that protect the global financial systems against 'money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction'. For more details on the FATF see www.fatf-gafi.org. There are currently 36 members and these are Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, European Commission, Finland, France, Germany, Greece, Gulf Co-operation Council, Hong Kong China, Iceland, India, Ireland, Italy, Japan, Republic of Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States. See also Wolfsberg Principles on correspondent banking relations (http://www.wolfsberg-principles.com/ - Accessed 10 January 2014). The Wolfsberg Group is comprised of the following institutions: Banco Santander, Bank of Tokyo-Mitsubishi UFJ, Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan Chase, Société Générale and UBS. The aim is to 'develop financial services industry standards, and related products, for Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies'.

[21] See FATF GAFI 'Third Rounds of AML/CFT Mutual Evaluations Process and Procedures, Paris: FATF/OECD, 2009.

[22] *The FATF Recommendations*: *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf - Accessed 1 January 2014.

[23] For more on the relationship between FATF and FRSBs see 'High-level Principles for the Relationship between the FATF and FATF-Style Regional Bodies'. available http://www.fatf-gafi.org/media/fatf/documents/High-Level%20Principles%20and%20Objectives%20for%20FATF%20and%20FSRBs.pdf - Accessed 1 March 2014. For more on FSRBs see http://www.eurasiangroup.org/fsrb.php . The following are the FSRBs: The Eurasian Asian Group (EAG); Asia/Pacific Group on Combating Money Laundering (APG); Caribbean Financial Action Task Force (CFATF); The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL); The Eastern and South African Anti Money Laundering Group (ESAAMLG) ; Financial Action Task Force against Money Laundering in South America (GAFISUD); Inter Governmental Action Group against Money Laundering in West Africa (GIABA); and Middle East & North Africa Financial Action Task Force (MENAFATF). There is also another body - The Offshore Group of Banking Supervisors (OGBS) – whose functions are similar to those of the FSRBs.

The Recommendations come with Interpretive Notes and a Glossary (these comprising the FATF Standards) and members of the FATF and the FSRBs are expected to implement them. As before a rigorous mutual evaluation system is in place to assess their implementation. In order to help the members on how best to implement the Standards the FATF also provides best practice papers and guidance. The forty recommendations are arranged under seven sections, Section A on AML/CFT Policies and Co-ordination; Section B on Money Laundering and Confiscation, Section C on Terrorist Financing and Financing and Proliferation, Section D on Preventive Measures, Section E on Transparency and Beneficial Ownership of Legal Persons and Arrangements, Section F on Powers and Responsibilities of Competent Authorities and Other Institutional Measures, and Section G on International Co-operation. It is not the intention here to go through all the provisions. Instead the offence of money laundering and some of the preventive measures such as due diligence procedures are considered to highlight the convergence between the provisions in the UNCAC and the FATF Standards.

The FATF Standards require 'countries to criminalise money laundering on the basis of the Vienna Convention [United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988] and the Palermo Convention [United Nations Convention against Transnational Organised Crime 2000]' and to 'apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences' in its Recommendation 3. The Interpretive Note to Recommendation 3 makes clear that predicate offences are to be described by reference to all offences, or to a threshold linked to a category of serious offences, or to the penalty of imprisonment, or to list of predicate offences, or a combination of these approaches. The countries are to choose what suits them. However whatever approach is adopted, according to the Interpretive Note (para 4.) it must include a range of offences within the designated categories of offences. The meaning of 'designated categories of offences' is to be gathered from the General Glossary and this specifically includes corruption and bribery. The list also includes other offences such as piracy, extortion, counterfeiting and tax crimes. For our purposes it is clear that the FATF Standards clearly link corruption and bribery with money laundering and in that they converge with the UNCAC.

As stated the Recommendations also include a range of preventive measures in its Section D. The first interestingly is in relation to secrecy laws and Recommendation 9 provides that 'countries should ensure that financial secrecy laws do not inhibit the implementation of the FATF Recommendations'. As we shall see in the following section bank secrecy continues to be an issue regardless of the loud noises made in the international AML and corruption discourse. Amongst the preventive measures are customer due diligence (CDD) and record keeping covered by Recommendations 10 and 11. Anonymous accounts or accounts in fictitious names are prohibited, the aim to ensure that money launderers do not hide their assets in such accounts. Financial institutions are also required to carry out CDD when establishing business relations, carrying out of occasional transactions that are above the threshold of USD 15,000 or wire transfers, or there is suspicion of money laundering or terrorist financing, or where the institution has doubts about the veracity or the adequacy of customer identification information that was previously given. Recommendation 10 also lists the various CDD measures to be taken and these include identifying the customer and

verifying their identity through independent documents (para. a), identifying the beneficial owner and verifying their identity (para. b), understanding the purpose and nature of the business relationship (para. c) and conducting due diligence on an on-going basis throughout the course of the business relationship in order to establish that the conduct of the customer is in keeping with the institution's knowledge of the customer, their risk profile and the source of the funds (para. d). The Recommendation also states that where a financial institution is unable to meet the requirements listed in paras. (a) to (d) then the financial institution should not open an account or commence business relationship or terminate their business relationship. The institution should also consider making a suspicious transactions report on the customer to the relevant authorities. It is apparent from Recommendation 10 that the aim is to ensure that funds from illegal transactions do not enter the financial system. Record keeping is of course central for an effective system and Recommendation 11 requires all institutions to keep records for five years on domestic and international transactions so that request for information from competent authorities can be responded to quickly. Five years does seem like a short time since investigations can start well after the five year period. However if the institution has operated the CDD procedures this should lower the incidence of investigations.

As stated earlier in cases of grand corruption the political elite have a central role to play. This is evidenced by cases involving political leaders such as Abacha,[24] Ibori[25] and Chiluba[26] and their use of financial institutions in foreign jurisdictions to hide their ill gotten gains. There is a separate Recommendation 12 in respect of PEPs. So in relation to foreign PEPs, on top of the normal DPP, financial institutions are required to have appropriate risk management systems to ascertain whether the customer or the beneficial owner is a PEP (para. a); obtain the approval of senior management to establish (or continue with) business relationship (para. b); take reasonable measures to ascertain the source of wealth (para. c) and conduct enhanced ongoing monitoring og the business relationship (para. d). Recommendation 12 also makes clear that the requirements should also apply to family members and close associates of the PEPs. The Glossary defines foreign PEPs as 'individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials'. While it may be possible to identify these persons easily it may be more difficult to identify distant relatives or associates of PEPs since these details may not be in the public domain. Presumably the combination of procedures in Recommendations 10 and 12 has the potential to reveal these relationships.

Recommendations 13 – 16 also cover specific activities such as correspondent banking, new technologies and wire transfers. Recommendations 22 and 23 require that CDD and other measures discussed in the context of financial institutions also

[24] See 'U.S. Seizes Over $458 Million Abacha Loot, Largest by Foreign Dictator' available at http://www.channelstv.com/home/2014/03/05/u-s-seizes-500-billion-abacha-loot-largest-by-foreign-dictator/ - accessed 12 April 2014.

[25] See 'Former Nigeria State Governor James Ibori receives 13-year sentence' (17.4.2012) available at http://www.theguardian.com/global-development/2012/apr/17/nigeria-governor-james-ibori-sentenced - accessed 1 February 2014.

[26] See 'The Late Zambian President Fredrick Chiluba: A Legacy of Failed Democratic Transition' available at http://www.brookings.edu/research/opinions/2011/06/24-chiluba-kimenyi - Accessed 1 January 2014.

apply to non-financial businesses and professions. The CDD procedures are extended to a range of businesses and professions. Casinos, real estate agents, dealers in precious metals and stones, lawyers, accountants, trust and company service (providers) are under an obligation to apply CDD procedures.. As stated earlier, corruptly obtained funds can find their way into real estate, precious metals (eg gold, platinum) and precious stones (eg tanzanite, diamonds) and the setting up of trusts. It is important to ensure that these avenues of laundering are also dealt with effectively and that gatekeepers an overview of their high-risk or PEP relationships easily such as lawyers and accountants are not used in a manner that is conducive to laundering. These Recommendations do sit neatly alongside the expectations outlined in UNCAC's Article 14 and if rigorously followed should break the link between corruption and money laundering. This however is dependent upon financial institutions and non-financial institutions adhering to the FATF procedures and processes. A recent review of management of AML risks by banks from the FSA[27] makes a deep dent in any confidence that might have been be exuded by the adoption of AML standards. Indeed, it would not be an exaggeration to say that the findings are sufficiently negative to set alarm bills ringing.

The findings of this Report indicate that bank systems for PEPs robust, for instance, with the systems for PEPs. It found that '[m]ore than a third of banks visited failed to put in place effective measures to identify customers as PEPs. Some banks exclusively relied on commercial PEPs databases, even when there were doubts about their effectiveness or coverage. Some small banks unrealistically claimed their relationship managers (RMs) or overseas offices knew all PEPs in the countries they dealt with. And, in some cases, banks failed to identify customers as PEPs even when it was obvious from the information they held that individuals were holding or had held senior public positions'.[28] While enquiries in respect of the source of wealth is an important part of the due diligence process 'three quarters of the banks in … failed to take adequate measures to establish the legitimacy of the source of wealth and source of funds to be used in the business relationship'.[29] This was the case even where there was adverse information on the integrity of the customer or beneficial owner.

What also stands out in the FSA Report is the largely profit-seeking motivation of the banks in their dealings with the customers and a disregard for the AML obligations in place. Indeed 'some banks appeared unwilling to turn away, or exit, very profitable business relationships when there appeared to be an unacceptable risk of handling the proceeds of crime'.[30]

The FSA Report also identifies record keeping as an issue with a third of the banks visited since they could not provide 'an overview of their high-risk or PEP relationships easily'.[31] The other findings of the Report are equally worrying and they do raise the serious question of how far the AML standards are really applied in practice. If they are not rigorously applied by financial institutions even in the UK, a

[27] FSA 'FSA Report: Banks' Management of High Money-Laundering Risk Situations' published 15 June 2011 available at http://www.fca.org.uk/your-fca/documents/fsa-aml-final-report - Accessed 1 February 2014.
[28] Ibid. Para. 9, p 4
[29] Ibid. Para. 10, p 4.
[30] Ibid. Para 7, p 4.
[31] Ibid. Para 13, p 4.

global financial hub, serious doubts are raised as to the AML practices of banks in other jurisdictions where corruption and/or other illicit activities such as drug trafficking are endemic. A matter of equal concern is whether AML standards are rigorously by the gatekeepers such as accountants and lawyers.[32]

Endorsement of the findings in respect of PEPs in the FSA Report can also be derived from a Report[33] published by Global Witness, a UK based NGO. According to the Global Witness Report, UK high street 'banks have accepted millions of pounds from corrupt Nigerian politicians' and 'are much less concerned about large amounts of corrupt money passing through their accounts'.[34] It is indeed natural after reading the two Reports to come away with a cynical attitude towards AML measures promoted by international institutions such as the FATF. However what we have to remember is that it is not the measures that are at fault but their application by individuals and entities who seem to be chasing capital rather than focusing on the consequences of their actions and acting in a manner that is responsible to society at large.

Against this background it comes as no surprise that HSBC was ordered to pay nearly US$ 2 billion in penalties to US authorities 'for failure to stop hundred of millions of dollars in drug money from flowing through the bank in Mexico'. [35] Despite changes to its compliance structure, the bank is still under scrutiny by the US authorities and HSBC have been told that the improvements in respect of compliance are still unsatisfactory[36]. These AML initiatives are making solid progress but until banks across the world actually implement, rather than merely engage, in removing bank secrecy arrangements the impact may prove to be merely the sound of one hand clapping. In the following section we review bank secrecy and demonstrate its impact in this current battle.

BANK SECRECY

Banks, like clergymen and doctors have long been asked to keep secrets.[37] The laws that govern the practice of bank secrecy emerged after World War 1.[38] Bank secrecy is often defended on the basis that it is there to 'shield persons from financial loss in countries plagued by instability, weak currency and run away inflation rates'. [39] Bank secrecy is also seen as serving 'to protect wealthy individuals or those who promote unpopular political causes by allowing them to hide their assets to avoid the threat of kidnapping or persecution.' [40]

[32] So far we have been unable to find surveys on this dimension of application of AML standards.
[33] Global Witness *International Thief Thief* (London, Global Witness, 2010).
[34] Ibid. Summary.
[35] See 'HSBC still in Regulators' Crosshairs over Money-Laundering' (17.1.2014) available at http://www.reuters.com/article/2014/01/17/us-hsbc-moneylaundering-exclusive-idUSBREA0G1KQ20140117 - accessed 1 March 2014.
[36] Ibid.
[37] For a discussion of banks and secrets going back to Biblical times see E. Chambost, *Bank Accounts: A World Guide to Confidentiality* (London, John Wiley and Sons, 1983)
[38] See C. Todd Jones, 'Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy.' (1992) 12 *Northwestern Journal of International Law and Business* 454.
[39] E.U. Savona, *Responding to Money Laundering: International Perspectives*, (London, Harwood Academic Publishers, 1997) 185
[40] Ibid.

Any discussion of bank secrecy has to start with the Swiss Banking Law 1934.[41] Although bank secrecy in Switzerland had been evident from the 16th Century it was in 1934 that it was formally codified, and according to Article 47(b) of this Law any one that breaches the secrecy rule attracts a sanction.[42] This provision protects and privileges the relationship between the client and the banker and disclosure of individuals banking records can be a criminal offence, subject to an exception where a criminal charge has been laid against the individual. This means a customer's financial information cannot be exposed and more importantly a third party's enquiry should not be responded to. In addition some banks routinely use numbered bank accounts, whilst others assign pseudonyms, both techniques used to make tracing and disclosure more difficult.[43]

The Swiss Banking Law, which is an illustration of the types of legal provision governing bank secrecy[44], is often said to have been initially developed for a benevolent purpose to prevent Nazi Germans attempting to investigate and seize assets, which were held in Switzerland by Jews.[45] Alongside this claim Swiss bankers themselves have argued that bank secrecy is synonymous with an individual's right to privacy and Europe has been particularly sensitive to this need for privacy given its more recent history of authoritarian regimes.[46] However this moral justification for Swiss bank secrecy is not universally accepted[47]. It has been argued that Swiss bank secrecy has, over the years, resulted in both bank accounts held by Jewish individuals being seized by Nazi Germans and several hundred tons of gold bullion being exchanged from Hitler's central bank for Swiss francs for the purposes of purchasing materials such as steel to assist with the war effort.[48] And according to Faith the welfare justification myth has provided 'a flag of morality which they could wrap securely round themselves when they were accused of harboring criminals of every nationality and description.'[49]

While bank secrecy may have started out with 'noble' intentions, due to its very nature it is open to abuse and has been subverted by money laundering and organized

[41] Federal Law of November 8, 1934

[42] Article 47(b) reads:

> Anyone who in his capacity as an officer or employee of a bank, or as an auditor or his employee, or as a member of the banking commission or as an officer or employee of its bureau intentionally violates his duty to observe silence or his professional rule of secrecy or anyone who induces or attempts to induce a person to commit any such offence, shall be liable to a fine of up to 20,000 francs or imprisonment for up to six months, or both.'

[43] There also exist blocking laws which prohibit the inspection, the removal, the copying or the disclosure of documents in the host country in response to an order from a foreign authority. Section 273 Swiss Penal Code is one such example. For a further discussion of these types of laws in practice see C. Todd Jones, 'Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy.' (1992) 12 *Northwestern Journal of International Law and Business* 463.

[44] As amended in 1971. Also see similar laws in Lebanon, Lichtenstein, and Singapore.

[45] See K. Mueller, 'The Swiss Banking Secret: From a Legal View.' (1969) 18(2) *International and Comparative Law Quarterly* 361

[46] See W. de Capitani, 'Banking Secrecy Today.' (1988) 10 *University of Pennsylvania Journal of International Law*, 57.

[47] N. Shaxon,*Treasure Islands* (London, Vantage Books, 2011).

[48] J.A.Mencken, 'Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems.' (1998) 21(2) *Boston College International and Comparative Law Review* 461.

[49] N. Faith, *Safety in Numbers: The Mysterious World of Swiss Banking* (London, Hamish Hamilton Ltd, 1982).

crime.[50] Enactment of secrecy laws is also seen as a means of luring foreign capital that can be both legal and illegal.[51]Although Swiss bankers[52] have denied that money laundering is a problem, preferring to suggest tax evasion is the offence to be concerned about, there is no doubt that bank secrecy facilitates the laundering of illegal money.

Whilst Switzerland is probably the most well known example of a country that promotes bank secrecy, at the current time in Europe alone, there are six countries with well-established bank secrecy arrangements.[53] Around the world, bank secrecy has provided a useful tool to attract foreign investment. In a variety of Caribbean jurisdictions[54] such investment is deemed necessary for growth and prosperity and one such condition for this investment is bank secrecy. It has been suggested that these countries therefore find themselves 'stuck between a rock and a hard place.'[55] Bank secrecy is perceived in some quarters to be a justified economic development measure. Malkawi explains that some Arab countries have developed their bank secrecy arrangements in order to protect money launderers as a way of generating economic prosperity. These arrangements are said to 'embody national economic objectives.'[56] In 2011 it was estimated that $7.8 trillion was currently being held offshore which goes some way to explain the magnitude of the problem globally.[57]

Given the rhetoric of bank secrecy being morally defensible or a tool for justified economic development, why are critics of bank secrecy so opposed to bank secrecy laws? It would appear highly appropriate for our personal banking transactional data to be kept secret. However the concern for critics of bank secrecy is that because the system is shrouded in secrecy, the source of the monies is unknown. Not knowing the source generates suspicion, warranted or not, and the focus of the literature in recent years has been on the link between bank secrecy and the laundering of money which is either the proceeds of illegal activities such as drug trafficking and corruption, or is funding terrorist activity (including maritime piracy).[58]

[50] See M. Moser, 'Switzerland: New Exceptions to Bank Secrecy Laws Aimed at Money Laundering and Organized Crime.' (1002) 27 *Case Western Research Journal of International Law* 321.
[51] A.U. Karzon, 'International Tax Evasion: Spawned in the United States and Nurtured by Secrecy Havens.'(1983) 16 *Vanderbilt Journal of International Law* 757.
[52] Andre Lamprecht quoted in M. Moser, op. cit., 329.
[53] Austria, Switzerland, Liechtenstein, Luxembourg, the Channel Islands and Gibraltar.
[54] P. Maynard, 'The Law against Corruption and Money Laundering in the Caribbean with Special Reference to the Bahamas.' (1997-1998) 29 *University of Miami Inter-American Law Review* 628.
[55] M. McMullen, 'Offshore Banking in the Commonwealth Caribbean.' (2001) 1 *Florida State University Business Review* 178.
[56] In the Arab world there appears to be a distinction between those countries that enjoy absolute secrecy (Lebanon), those countries that enjoy some secrecy with exceptions (Saudi Arabia and Egypt) and those countries that have no ban secrecy (Sudan and Syria). See B. Malkawi,(2006) 'Bank Secrecy in Arab Countries: A Comparative Study', *Banking Law Journal* 894.
[57] BOS. Consultancy Group., 'Global Wealth 2011: Shaping a New Tomorrow' at http://privatebanker.ro/wp-content/uploads/2011/06/BCG_Shaping_a_New_Tomorrow_May_2011.pdf - Accessed 1 March 2014.
[58] See R. Barrett, 'Preventing the Financing of Terrorism.' (2011) 44 *Case Western Research Journal of International Law* 719; N. Beekarry, 'The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law.' (2011) 31*Northwestern Journal of International Law and Business* 137); R. Gordon, 'Losing the War Against Dirty Money: Rethinking Global Standards of Preventing Money Laundering and Terrorism Financing.' (2010-11) 21*Duke Journal of Comparative and International Law*, 503; M. Levi, 'Combating the Financing of Terrorism.' (2010) 50(4) *British Journal of*

The US has long been suspicious of bank secrecy. Prior to the passing of the Bank Secrecy Act 1970 (BSA 1970) the House of Representatives Report commented:

'Secret foreign bank accounts and secret foreign financial institutions have permitted proliferation of "white collar" crime; have served as the financial underpinning of organized criminal operations in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold…have served as essential ingredients in fraud including schemes to defraud the United States.'[59]

The BSA 1970 itself gave government agencies access to bank records of individuals in order to facilitate both criminal and tax investigations. It required mandatory record keeping of all major international transactions and required banks to provide full details of individuals banking arrangements. The Right to Financial Privacy Act 1978 (RFPA 1978) provided safeguards for the sweeping powers of the BSA 1970 by requiring a search warrant to be obtained before an individuals records could be accessed. These safeguards remain easy to circumvent and notoriously difficult to enforce. [60] In 1982 the US and the Swiss signed a Memorandum of Understanding on Insider Trading, which was assisted as a result of the bank secrecy culture in Swizerland.[61] In 1984 the US made money laundering a criminal offence and the Money Laundering Control Act 1988 made the avoiding of Currency Transaction Reports a criminal offence.[62] The US legislative response to bank secrecy has been described as an 'assault' on the basis of its prioritizing its enforcement agenda over any individual bank privacy concerns.[63]

Following the 9/11 terrorist attacks the US passed Title III of the Patriot Act (The International Money Laundering Abatement and Anti-Terrorist Financing Act 2011) which further strengthened the legal framework for combating money laundering and amended both the BSA1970 and the Money Laundering Act 1986 (MLA 1986) by attempting to make it more difficult for money launderers to operate. The Patriot Act requires banks to adopt and implement anti-money laundering compliance programs; requires banks to implement customer identification verification procedures; prohibits banks from maintaining correspondent accounts for shell banks[64] and imposes increased due diligence for certain foreign accounts. Finally this Act requires banks to maintain records of their customers' identification documents and to provide this information upon any request from a law enforcement agency. This is a reflection of the FATF Standards. The Patriot Act has been criticised for the unduly onerous

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Criminology 650; T.M. Nance, 'Laundering Pirates? The Potential Role of Anti-Money Laundering in Countering Maritime Piracy (2012) 10(4) *Journal of International Criminal Justice* 857.

[59] H.R. Rep. No. 975, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4394, 4397.

[60] J.A.Mencken, 'Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems.' (1998) 21(2) *Boston College International and Comparative Law Review* 476.

[61] E. Fugate, 'Banking Secrecy and Insider Trading: The US-Swiss Memorandum of Understanding on Insider Trading.' (1982-1983) 23(4) *Virginia Journal of International Law* 605.

[62] J. Waszak, 'The Obstacles to Suppressive Radical Islamic Terrorist Financing.' (2004) 36 *Case Western Research Journal of International Law* 684.

[63] C. Todd Jones, op. cit., 507.

[64] A foreign bank that does not have a physical presence in any country.

administrative burden on banks.[65] It is often suggested that US banks may not be able to compete internationally with other countries that have greater bank secrecy laws.[66] Panko rejects these criticisms and also focuses on what he refers to as the 'moderate, justifiable intrusions on customer privacy.'[67] Panko points to the inadequacies of the pre-Patriot Act provisions which enabled terrorism activity to flourish. Focusing on the perils of inadequate information sharing, he points to the 9/11 hijackers who were able to move their funds into and around the US. Dismissing bank secrecy and privacy as being of secondary importance to transparency, Panko suggests critics fail to 'recognize the symbiotic relationship between bank secrecy and terrorist financing.'[68] The US has since passed the Foreign Account Tax Compliance Act 2013 (FATCA), which is said to relieve some of the aforementioned administrative burdens.[69] The FATCA puts in place key due diligence steps including a yearly reporting obligation about accounts, which are held by US citizens. The effects of this legislation are yet to be tested but early signs suggest that 'non compliant account holders can no longer assume that they will remain undetected or protected by foreign banking secrecy laws.'[70]

Two recent episodes have once again highlighted the extent of money laundering and tax evasion as a consequence of bank secrecy laws. . The details of these episodes read like a thriller.[71] The first of these scandals was the Liechtenstein Tax Affair. LGT is the primary financial institution in Liechtenstein. The country's royal family owns it. It is currently estimated that £130 billion of foreigners money is held in the country. A small very wealthy country where 'trust and secrecy are perhaps more valuable than money.'[72] Against this backdrop a data archivist, Heinrich Kieber, stole and sold a CD, which contained a list of clients who were tax evaders in their own countries. Kieber worked at LGT Treuhand a subsidiary of LGT and he disclosed the names of around 1,250 out of 77,000 clients at LGT. Once he had made copies of the disc he initially offered to sell the information to the Inland Revenue of the UK who initially declined.[73] Kieber did manage to sell the information to the German Secret Service for around $5.5 million. Kieber is currently assumed to be living under a new identity in Australia as he is wanted by both Interpol for theft and fraud and by

[65] J.J. Norton, and H. Shams, 'Money Laundering Law and Terrorist Financing: Post September 11 Responses- Let Us Step Back and Take a Deep Breath?'(2002) 36 *International Law* 101.
[66] K. Lacey, and B. Crutchfield George, 'Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms',(2003) 23 *Northwestern Journal of International Law and Business* 312.
[67] R. Panko, 'Banking on the USA Patriot Act: An Endorsement of the Act's Use of Banks To Combat Terrorist Financing And A Response To Its Critics' (2005) 122 *Banking Law Journal*123.
[68] Ibid.
[69] For an insight into the operation of customer due diligence (CDD) more generally see N. Mugarura, 'Customer Due Diligence (CDD) Mandate and the Propensity of its Application as a Global AML paradigm.' 2014 (17(1) *Journal of Money Laundering Control* 76.
[70] I. Comisky, and M. 'The Foreign Account Tax Compliance Act: An End to Bank Secrecy.' (2013) 26(6) *Journal of Taxation and Regulation of Financial Institution* 14.
[71] I. Grinberg, 'The Battle Over Taxing Offshore Accounts.' (2012) 60 *UCLA Law Review* 304.
[72] N. Mathiason, A Journey from Heaven to Hell, *The Observer*, Mar 2 2008. Available at http://www.theguardian.com/business/2008/mar/02/tax.personalfinancenews - Accessed 1 March 2014.
[73] But since appeared to have paid $203,000 for the data pertaining to UK citizens. See http://www.tax-news.com/news/Liechtenstein_Issues_Arrest_Warrant_For_Tax_Leak_Suspect____30326.html and http://news.bbc.co.uk/1/hi/business/7267111.stm - Accessed 12 March 2014.

Liechtenstein for revealing confidential information which is a violation of Article 14 Liechtenstein Banking Act.[74]

The effect of this scandal was significant.[75] Germany was able to recover substantial funds that had been lost over the years due to tax evasion and Liechtenstein was no longer viewed as a 'safe bet' when it came to offshore deposits. Other countries also recovered substantial sums. The UK, who hadn't purchased the rogue disc but did agree partial disclosure of said accounts with Liechtenstein, managed to recover $4.75 billion in unpaid taxes. The US was able to demonstrate from the obtained data that US citizens had been evading taxes with the help of LGT. Prior to this no prosecutions could take place, as the US had not known who had been evading tax. Once they had basic biographical data they were able to ask LGT for further details. LGT did not comply citing violations of Liechtenstein bank secrecy laws. Consequently the US investigated LGT and its practices and discovered that LGT had advised US citizens to open accounts with Liechtenstein foundations, which operated as a shield for the US clients, protecting any assets from taxation. Berger also notes that LGT structured the accounts to avoid the Qualified Intermediary requirements that require disclosure of certain accounts. These actions demonstrated not just illegal activity on the part of US citizens but also active complicity on the part of LGT.[76]

Following this scandal the Liechtenstein government issued a strict condemnation of Kieber's actions but appeared not to condemn the actions of LGT, underlining the importance of the bank secrecy laws in Liechtenstein. The response appears to have been a call for a tightening rather than a relaxing of their bank secrecy laws.[77]. Interestingly whilst the Liechtenstein government continues to condemn Kieber as a thief some see his action as an example of whistleblowing and therefore he is deemed a hero rather than a criminal.[78]

In 2007 a similar whistleblowing scandal broke but this time it concerned UBS in Switzerland. UBS, like LGT, has historically attracted US citizens to open accounts in Switzerland. Bradley Birkenfield was a UBS private banker who turned whistleblower. Birkenfield provided the US with documentation that concerned tax evasion by US clients. The documentation included the details of US clients of the bank. There were 19,000 undisclosed accounts.[79] This amounted to around $18 billion

[74] http://www.afr.com/p/national/secret_aussie_life_of_global_tax_uybXtsOrq6voM0kN4bCC5I - Accessed 12 March 2014.

[75] For a lively discussion of the affair see M. Berger, 'Not So Safe Haven: Reducing Tax Evasion By Regulating Corresponding Banks Operating In The United States.' (2013) 12*Journal of International Business and Law*51.

[76] M. Berger, op. cit., 59. Germany, the US and the UK were not the only countries involved here as Finland also recorded its biggest tax evasion scandal as a result of Kieber's actions. Other countries who have subsequently relied on the stolen data include Australia, Canada and France. Ironically it has since been suggested that Kieber was already the subject of a Spanish arrest warrant for alleged cheque fraud in the 1990s, even though this was never picked up by LGT but for which Kieber was later briefly imprisoned. See http://epn.dk/international/article1279324.ece - Accessed 1 April 2014.

[77] http://www.tax-news.com/news/Liechtenstein_Issues_Arrest_Warrant_For_Tax_Leak_Suspect___30326.html - Accessed 10 April 2014.

[78] http://content.time.com/time/world/article/0,8599,2086776,00.html - Accessed 10 April 2014.

[79] Permanent Subcommittee of Investigations, Committee on Homeland Security and Governmental Affairs, *Tax Haven Banks and US Tax Compliance*, Staff Report 1 (2008) and see the more recent

in lost revenue, which generated some $200 million profit for UBS. UBS had used similar methods to LGT to hide private client bank details from the Internal Revenue Service of the US. It became clear following investigations that UBS had deliberately targeted US clients because they are some of the richest investors in the world. In the process of the investigations it emerged that Birkenfield had closely worked with a US client, Igor Olenicoff, and had abeted Olenicoff's extensive tax evasion. Birkenfield was arrested and he pleaded guilty to tax evasion. Birkenfield was sentenced to 40 months imprisonment. At the same time the US Department of Justice reached a deferred prosecution agreement with UBS and UBS paid a fine of $780 million. UBS agreed to disclose full details of their US clients and the US clients were encouraged to take part in a Voluntary Disclosure Programme (a type of amnesty programme) which has resulted in $2.7 billion being recovered in back taxes. Following his release from prison Birkenfield was able to secure a $104 million reward.[80]

The LGT and UBS scandals have, according to Berger, had 'far reaching ramifications.'[81] Firstly there has been a marked shift in the visible indicting of bank employees. Along with Birkenfield, Raoul Weil, Head of UBS' Wealth Management business was charged with conspiracy to defraud the US of income taxes.[82] Martin Lack, a former head of UBS' North American business was also charged with conspiracy to defraud the US.[83] The aim of these high profile arrests appears to be both the securing of more details concerning US clients hiding assets in Swiss bank accounts and also a symbolic statement that those who engage in this type of financial advice will be prosecuted. Birkenfield himself compared the Swiss banking industry with gangsters when he stated:

'In essence, bank secrecy is analogous to criminal racketeering- and the Swiss government, along with every Swiss private banker, is a co-conspirator.' [84]

The comparison with the federal charges against Al Capone in 1931 for tax evasion is clear.

A further effect of the LGT and UBS scandals is the increased effort to ensure greater transparency. Crawford has confirmed that in a time of austerity there has been greater attention placed upon the secret bank.[85] In this climate there has been some shift. Switzerland has reached an agreement with Great Britain to tax money held by British citizens. In addition Liechtenstein has also pledged to ease its bank secrecy

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report on *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts* (2014)

[80] http://money.cnn.com/2012/09/11/news/companies/ubs-whistleblower-reward/ - Accessed 10 April 2014.

[81] M. Berger, op. cit., 62.

[82] Further details can be found at D. Spencer, 'Cross-Border Tax Evasion and Bretton Woods II (part 2)' (2009) 20 *International Tax* 48.

[83] http://www.bloomberg.com/news/2014-02-26/ex-ubs-banker-lack-pleads-guilty-in-u-s-tax-case.html - Accessed 1 March 2014.

[84] http://mamingrui.inube.com/blog/3672861/the-office-of-the-swiss-banking-ombudsman/ - Accessed 1 March 2014.

[85] D. Crawford, 'Tax Havens Pledge to Ease Secrecy Laws.' Wall Street Journal, March 13, 2009 at http://online.wsj.com/news/articles/SB123685028900906181 - Accessed 1 February 2014.

laws.[86] A more specific action came in 2009 when the G20 countries compelled those countries with bank secrecy laws to sign bilateral treaties, which provide for the exchange of banking information. This requirement has had mixed results. On the one hand it has been suggested by the OECD that these treaties do significantly raise the probability of detecting wide scale tax evasion and that will necessarily improve tax collection.[87] Critics are less enthusiastic on the basis that the G20 initiative still leaves scope for bank secrecy and it would appear that whilst most tax evaders did not respond to the treaties those that did ended up relocating their deposits to tax havens that were not covered by the treaty.[88]

In addition international anti-corruption discourse highlights the negative impact of bank secrecy on combatting corruption. For instance, the UNCAC in Article 40 provides that 'Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.'

In 2009 world leaders at the G20 summit announced, 'the era of bank secrecy is over.'[89] Five years on the evidence suggests that although some progress has been made the era of bank secrecy continues.[90]

It seems from the discussion of both the AML standards as well as bank secrecy law we still have a lot of ground to cover to combat the link between corruption, money laundering and bank secrecy. At this juncture it is important to pause and ask some questions about the purpose of banks. There is no doubt that banks are an important cog in the economic engine by protecting the funds of the depositors and lending much needed finance for various ventures, be they private or business. The normal expectation is that banks will engage only in low risk ventures and will act in an ethical manner but globalization and with it greater competition has seen banks enter high risk transactions in order to satisfy their shareholders. Profit it seems has overtaken the ethical expectations that the public might have had of banks. The recent crisis in the financial sector coupled with the huge bonuses paid to bankers has seen a major shift in public opinion towards banks.[91] This in turn has affected the legitimacy and standing of financial banks. This is further compounded when Reports such as those from the FSA and Global Witness indicate that banks are complicit with highly corrupt PEPs to the detriment of the public at large in the corrupt countries. Against this context how can these financial institutions rebuild their reputation and act in a manner that is motivated by ethics and not profit? The answer lies, we believe, in a philosophical shift that places societal responsibility at its core.

[86] http://online.wsj.com/news/articles/SB123685028900906181 - Accessed 1 February 2014.
[87] http://www.oecd.org/tax/exchange-of-tax-information/48996146.pd - Accessed 10 April 2014.
[88] N. Johannesen, and G. Zucman, 'The End of Bank Secrecy? An Evaluation of G20 Tax Haven Crackdown' (2014) 6(1) *American Economic Journal: Economic Policy* 65.
[89] http://www.g20.utoronto.ca/summits/2009london.html - Accessed 10 April 2014.
[90] Some progress has been made but more needs to be done as it has been argued that abandoning bank secrecy may have a positive effect on a country's reputation. See N. Johannesen, and G. Zucman, op. cit., 65.
[91] See for instance T.Middleton 'Is Ethical Banking an Oxymoron?' available at http://www.huffingtonpost.co.uk/ian-middleton/ethical-banking_b_4874216.html - Accessed 12 April 2014.

BANKS AND SOCIETAL RESPONSIBILITY[92]

Before looking at the bank's role in societal responsibility it would make sense to say a few words on what societal responsibility encompasses. We understand societal responsibility to include the duty of an individual and other entities (widely construed to include an institution, charitable establishment, company) to engage in a manner that engages with and takes into account the consequences of their intended actions and how these could affect the world at large. It is not specifically focused at or restricted to particular issues such as the environment, working conditions or child labour but is to be construed widely to include all aspects that are detrimental to the human condition.

This construction of societal responsibility is to be distinguished from the much talked about Corporate Social Responsibility (CSR). We draw such a distinction since there is no consensus about what CSR actually means. Much of the discussion in the 1950s revolved round the responsibilities of companies as opposed to those of the State. The concept of CSR widened in the 1990s to include elements such as workers' rights, health and safety in the workplace, gender issues and environmental responsibilities.[93] The vast amount of literature range from viewing CSR as responsible decision making and practice[94], being responsive to include the interests all stakeholders[95] to simply responding to external expectations and pressures.[96] International institutions such the World Bank, OECD and the UN[97], have also entered the CSR discourse. Given the many interpretative shades of CSR the best in terms of consensus that emerges is that it is expected to go beyond the philanthropic giving to the community when the business makes good profits. As Carroll & Buchholtz note: 'What is particularly paradoxical is that large numbers of business people have enthusiastically embraced the concept of corporate social responsibility during the past three decades, but only limited consensus has emerged about what corporate social responsibility really means.'[98] It is common practice for banks to

[92] The phrase 'societal responsibility' was used by Leo Schuster in his paper 'The Societal Responsibility of Banks: An Introduction to a Societal-Oriented Bank Management Theory' in E P Gardener & J Falzon (eds) *Strategic Challenges in European Banking* (Basingstoke, Macmillan Press Ltd, 2000). However the description is much close to CSR. The authors have found nor references to societal in other management literature. The use of societal responsibility adopted by the authors is wider than CSR.

[93] See for example A. B. Carroll and A. K. Buchholtz *Business & Society - Ethics and Stakeholder Management* (South-Western College Publishing, 1999); W. Frederick 'The growing concern over business responsibility' (1960) 2(4) California Management Review 54; M. W. Hansen, *Theories of transnational corporations, environment and development: A review of four dominant perspectives* (Copenhagen, Institute for Intercultural Communication and Management, Copenhagen Business School, 1995); M. Hopkins, 'Defining Indicators to Assess Socially Responsible Enterprises' (1997) 29(7) *Futures* 58.

[94] This is to include all activities such as marketing, public relations, and human resources (see for example G E Greenley and G R Foxall,. Multiple Stakeholder Orientation in UK Companies and the Implication for the Company Performance (1997) 34(2) *Journal of Management Studies* 259;

[95] See for example A Kolk, R van Tulder, and C Welters, 1999 'International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves? (1991) 8(1) 143.

[96] L S Pettijohn, S Parker, C E Pettijohn, and J L Kent, J. L 'Performance Appraisals: Usage, Criteria, and Observations' (2001) 20(9) *Journal of Management Development* 754.

[97] See for instance The UN Global Compact.

[98] A. B. Carroll and A. K. Buchholtz op. cit., 27

have CSR policies. HSBC, a bank we referred to, earlier in the paper does have a CSR policy. A perusal of its Sustainability Report[99] suggests that the emphasis is on environment and work opportunities that are also commonly referred to in CSR reports from other business institutions. The HSBC Report does talk about 'doing the right thing' as a result of the penalties that HSBC had to pay in the US and the resulting hit on their reputation. But doing the right thing seems to be related to the reputation risk - that is, to rebuilding their (the bank's) reputation (which inevitably is linked to profits) rather than societal responsibility. This indeed is very disappointing in spite of the extensive investigations of the banks' affairs by the US regulatory authorities.

What financial institutions have to recognize and acknowledge fully is any laxity on their part in their dealings with PEPs, especially from countries with high levels of corruption, affects the countless poor. Money meant for building hospitals and schools are siphoned off by the political elite and deposited in financial institutions for their benefit and in total disregard of human rights such as right to life guaranteed by the constitutions of their states. So in disregarding the AML standards it could be said that financial institutions are facilitating (and promoting) the irresponsible attitudes of the PEPs towards their citizens and turning a blind eye to breach of human rights[100]. If seen from this perspective even the banks' shareholders would agree that banks should have a commitment to societal responsibility. It is time given the greater awareness of corruption and its debilitating impact on the poor that we introduced a paradigm shift in our thinking of the banks' attitude towards profits, shareholders and the public at large.

CONCLUSION

This paper focused on the link between corruption, money laundering and bank secrecy and examined the effectiveness of the widely adopted AML standards. This examination revealed that banks in the UK, for instance, are not applying them rigorously with the result that PEPs are able to launder their ill-gotten gains. In other banks, for example Switzerland and Liechtenstein, there appears to be a positive promotion of all things secret, which continues to undermine the tidying up of this process. This paper argues that banks should move away from seeing themselves as profit generating entities willing to take on high risk ventures. Instead they should see themselves as having societal responsibility. In the absence of internalizing this perspective they will continue to engage in risky ventures with PEPs thus promoting breach of human rights. And the global poor will remain the victims of the excesses of their political elite regardless of the anti-corruption frameworks we may have in place.

[99] HSBC Holdings plc *Sustainability Report* 2012

[100] This link between banking sector and human rights has been promoted by the NGO BankTrack. See their interesting submission 'Human Rights responsibilities of private sector banks', submission to Professor John Ruggie, United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises available at http://www.banktrack.org/manage/ems_files/download/the_human_rights_responsibilities_of_banks/310715_hr_responsibilities_of_banks_submission_to_dr_ruggie.pdf - Accessed 10 April 2014. See also See BankTrack, Bauxite Mine Niyamgiri Hills, available at http://www.banktrack.org/show/dodgydeals/bauxite_mine_niyamgiri_hills - Accessed 1 January 2014.