AN APPRAISAL OF LAW AS AN INSTRUMENT FOR COMBATING MONEY LAUNDERING IN NIGERIAN BANKS

BY

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Introduction

Money laundering most commonly follows the commission of a crime. The 'washing' of money earned from criminal activities such as armed robbery, kidnapping, tax evasion, gambling, corruption public office, sale of hard drugs, fraud in banks, embezzlement of public funds by public officers, terrorism, etc. is a booming global business. Wherever a criminal act that fetches monetary reward for the criminal is committed, the need to launder that money to make it legitimate automatically arises.

It is difficult to assess the extent of money laundering activities both on an international scale and in relation to Nigeria although it is widely accepted to be extremely significant. The International Monetary fund has estimated its size to be somewhere between two to five percent of the world's gross domestic product each year suggesting that money laundering may be the world's third largest business after foreign exchange transactions and international oil trade. Using 1996 statistics, these percentages would indicate that it ranged between $590 billion and $ 1.5 trillion annually. Some estimates suggest even higher figures. More recent figures on the magnitude of cross- border illicit financial flows suggest a global figure of $ 1 trillion of which $100 to $200 billion is from Africa. Establishing an exact figure for countries like Nigeria is even more difficult to do. What remains certain however is that as communication technology becomes advanced with each passing day, money laundering is becoming more sophisticated and in many cases harder to detect.[1]

More than any other institution, banks are a favorite for laundering. There is a consensus among mainstream business analysts that banks are a central and recurring factor in huge illicit money laundering in Nigeria, to the extent that they account for about 90 percent of the total volume of money laundered in the country today. The recent Pension Fund scam underlines the extent of the culpability of banks in the thriving money laundering business, where huge sums of money were moved around some banks without questions or penalties.

This paper assesses the adequacy or otherwise of the law against money laundering particularly in the banks and recommends ways of making law a better instrument for combating money laundering.

What Is Money Laundering?

The Financial Action Task Force on Money Laundering (FATF)[2] provides a comprehensive definition of money laundering, as follows:

"The conversion or transfer of property, knowing that such property is

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[1] Robert Hull, Jonathan Evans and Stephen Davis: Money Laundering in Nigeria (being a chapter from the Niger Delta Peace and Security Strategy Working Papers), www.legaloil.com sourced on 16/4/2012

[2] An intergovernmental body set up to combat money laundering

derived from a criminal offence, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such offence or offences to evade the legal consequences of such actions, the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from a criminal offence, and the acquisition, possession, or use of property, knowing at the time of receipt that such property was derived from a criminal offence or from an act in participation of such offence."

'Dirty' money is essentially laundered in 3 stages namely: placement, layering and integration.[3] Placement simply refers to the lodgment of illegal funds into the financial system; for instance, into the criminal's bank account[4]. Other complex methods of placement include purchase of high value items such as houses, cars, gold, works of art, foreign currency etc. Layering, the second stage of laundering illegal money is the first serious attempt at concealing or disguising the true source or ownership of the funds. It is intended to obscure the trail left behind by dirty money[5]. Methods of layering include: securing the cooperation of a trader whose takings is in cash. The trader banks criminal money along with his normal takings. If this happens, placement of dirty money as a step in money laundering is done with the trader and not in a bank. Integration or mixing takes place when a money launderer uses his dirty money in a legitimate business e.g trading with it or buying shares with it.[6] When laundered money reaches this stage, it is difficult to suspect or discover its criminal origin. Businesses that end up victims of dirty money are businesses that are trading well but need capital. So the money launder offers his dirty money in return for a share of the equity. As the business prospers he puts in more money gradually buying out the original owners and eventually controls the business.

In contrast to most other types of crimes, money laundering is notable for the diversity of its forms, participants, and settings. It is pertinent to mention here that it is not only members of organized crime groups that are involved in money laundering. It can involve the most respectable of banks unwittingly providing services to customers with apparently impeccable credentials. It can also involve the most respectful of professionals who are not otherwise involved in criminal activities at all. Some may not even be aware that they are laundering. In several cases of "negligent money laundering" that resulted in conviction, it was determined that the agent should have suspected that the funds were derived from criminal activities yet demonstrated "willful Business" in failing to make the observation. Lawyers are among the most common laundering agents or at least facilitators. A lawyer can use his name to acquire bank accounts, credit cards, loan agreements, or other money laundering tools on behalf of the client. Lawyers can also establish trusts or partnerships and receive cash deposits and run transactions through their client's accounts or even their own office accounts. In the event of investigation, lawyer-client confidentiality privilege can be involved or attempted

[3] John K, The Crime of Patriots (Butterworth, London, 1999) 1st ed. p. 170

[4] Ibid at p. 171

[5] Gary W., Organised Crime (Choice Publication, Ney York, 2000) 1st ed. p.143

[6] MacDonald S., Dancing on a Volcano: The Latin American Drug Trade (Praeger, New York)

depending on the rules of the jurisdiction.[7]

Legal Regime Against Money Laundering

Money laundering is largely an international crime. Therefore the legal regime against it is international, regional and municipal.

International Legal Regime

Multilateral organizations have set the framework for anti-money laundering standards, mechanisms, and institutions. The United Nations pioneered the 1988 Vienna Convention Against the Trafficking of Narcotic and Psychotropic Substances, which contain the requirements to criminalize money laundering and immobilize the assets of persons involved in illegal narcotics trafficking.

That same year, a group of ten countries got together to formulate the Basle guidelines for central bank supervision and regulatory controls. The principles were pieced together by the committee of supervisors from the Central Banks of the ten countries that committed themselves to the observance these principles. The guidelines seek to prevent banks from being brought into disrepute through the money laundering activities of criminals.

To give effect to both the Basle Statement of principles and the Vienna Convention on drug trafficking, the Financial Action Task Force on Money Laundering (FATF) was set up in 1989 by Finance Ministers of 7 countries under the leadership of the United States and the United Kingdom. Membership of this task Force has since increased to 26.

In May 1990, the Task Force produced its report containing 40 recommendations, those relevant to the banking industry are: financial institutions should verify the identity of the person(s) on whose behalf an account is opened or a transaction is concluded, financial institutions should keep records on customer identification (e.g copies or record of official documentation like passports, identity cards, driving licenses for at least six years) report to the appropriate authorities any suspicious or unusual transactions, which have no apparent economic or visible legal purpose and financial institutions should develop programmes against money laundering. These programmes should include: an on-going employee training programme, and performance audit to test the system.

The Vienna Convention and the Financial Action Task Force have been given considerable force within Europe. In September 1990 the Committee of Ministers of the Council of Europe adopted a new convention on money laundering, search, seizure and confiscation of the proceeds of crime. This European Directive was passed on 10th June 1991 for implementation by all member states by 1st January 1993.[8]

All these conventions mentioned above obligate signatory governments to cooperate against anti- money laundering from all crimes.

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[7] Other professionals involved in money laundering include accountants, financial advisers, stockbrokers, insurance agents and real estate agents.

[8] See European Directive number 11

Municipal Legal Regime on Money laundering

To give effect to its obligation under the Vienna Convention,[9] Nigeria in 1995 domesticated this Convention through the Money Laundering Decree. No 3, 1995 now replaced by the Money Laundering Act 2004. The 1995 Decree had as its major concern, illegal money from illicit drug trade and Advance Fee Fraud (419). The Decree sought to check these activities by ensuring their perpetrators are unable to convert their huge profits in such a way that would conceal the real source of such monies. Nigeria has also ratified the United Nations Convention transitional organised crime.[10]

These conventions have been domesticated pursuant to Section 12 of the Constitution of the Federal Republic of Nigeria 1999 by virtue of which the following enactments were made:

(1) Money Laundering Prohibition Act 2004[11]
(2) National Drug Law Enforcement Agency (NDLEA)
(3) Economic and Financial Crimes Commission (EFCC) Act
(4) The Advance Fee Fraud and Other Related Offences Act 1995 (Amended)
(5) Failed Banks (Recovery of Debts) and Financial Offences Malpractices in Banks Act as amended
(6) Banks and Other Financial Institutions (BOFIA) Act 1991 as amended.

Under the above Acts, offences of money laundering are criminalized. Also the offences are applicable to all persons who commit the predicate offences including attempts and conspiracy. This extends to conducts that occurred in another country, which would have constituted a predicate offence, had it occurred in Nigeria.[12]

A final measure introduced in Nigeria on the issue of money laundering is the due process office under the Presidency. This is one of Nigeria's greatest efforts to enthrone transparency and accountability in public service.

Bank Related Laws Against Money Laundering

In Nigeria, the CBN also has a great responsibility in dealing with money laundering. The CBN governor has the power to intervene in the banking sctor in order to safeguard confidence in the financial system as a whole. The Cbn also has the role in financial sector survelance, identifying trends and patterns of corruption in banks, and other financial institutions.[13]

As part of various measures towards attaining global effectiveness in the fight against financial crimes, Nigeria has imposed obligations on both financial and designated non-financial institutions to report transfer of funds and securities. Details of these obligations are discussed as follows:

[9] The United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances

[10] The Palermo Convention

[11] Like the European Initiatives, this Act takes a more comprehensive approach to money laundering by seeking to prohibit the laundering of money obtained from any illegal source.

[12] See generally Sections 14-17 of Money Laundering (Prohibition) Act 2004.

[13] The Stock Exchange also has a number of structures and measures in place to check money laundering. These include central security clearing system aimed at making transactions more transparent, administrative guidelines to make proper documentation of legitimate capital importation through Nigerian banks, and a know your client requirement.

Disclosure Provisions of the Money laundering Act

By far the most radical provision of the Money Laundering Act is S.1 dealing with mandatory disclosure by financial institutions. This section fixes a limitation on making and accepting cash payments. It state that 'Notwithstanding anything to the contrary in any other enactment, a financial institution or casino shall disclose and report to the Agency[14] in writing within 7 days any single transaction, lodgement or transfer of funds in excess of N1 million or its equivalent, in the case of an individual; and N5 million or its equivalent in the case of a body corporate. Section 2 in the same vein imposes a duty to report to CBN the transfer to or from a foreign country of funds or securities of a sum greater than $10,000 (U.S dollars) or its equivalent.

The consideration that makes for this legal stipulation is that an amount in excess of N1 million or N5 million is a huge sum of money that if deposited by an individual or corporation, it is likely not to have been legally earned and so should be investigated as money in laundering. With the runaway devaluation of the naira, this consideration may not hold true with big corporations like Shell Petroleum Ltd and other mega corporations to whom N 5 million is chicken feed. Hardly would a bank cause the investigation of such an amount lodged with it by such corporations.

Under Section 10 (2) any person other than a financial institution or casino may voluntarily give information on any transaction as specified above. Under Section 3, the Agency shall acknowledge receipt of any disclosure report or information received under this section and may collect such additional information, as it may deem necessary.

On receiving such a disclosure the Agency is required to issue a stop notice differing the transaction or to block it if it has not reached the financial institution. Section 10 (5) provides that a stoppage notice should not exceed 72 hours within which the Agency should have investigated and ascertained the source of the funds. But it appears by the provision of Section 10 (6) that this time frame for blockage or stoppage may be extended by a Federal High Court Judge upon application by the agency showing good reasons for the extension of the period.

Section 12 (20) of the Money Laundering Act 2004 provides that Banking Secrecy shall not be invoked as a reason for objecting to the measures set out in this law or for refusing to be witness to facts likely to constitute an offence under this Act or the NDLEA Act 1989.

The Act has repealed Section 12 (20) of the Money Laundering Decree 1995 which empowered the Agency in order to locate narcotic drugs and psychotropic substances, proceeds, property, objects or other things related to the commission of an offence under the Decree to:

> "...place any bank account and account comparable to a bank account under surveillance, place under surveillance or tap any telephone line, have access to ant computer system, and obtain communication of any authentic instrument or private contract together with all bank, financial and commercial records when the account, telephone line or computer system is used or may be used by any person suspected or performing or taking part in a transaction involving the proceeds, property or things or when the instrument, contract or record concern or may concern the

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[14] EFCC

transaction".

This section has been repealed because it is inconsistent with Section 34 of the 1999 constitution that provides for the fundamental human right of a citizen to family life and privacy.

Again Section 3 of the EFCC Act requires anybody carrying out over the counter exchange transactions (e.g transactions with bureau de change) to submit to CBN a declaration of his activity, to request for an authentic identity document bearing the photograph of the customer prior to any transaction over $10,000 or its equivalent, and record all transactions in chronological order indicating the surname, forename and address in a numbered register duly initialled by an officer of the CBN for that purpose which register must be preserved for at least 10 years after the last transaction recorded therein. Those who transfer or bring bank home with them part of their legitimate earnings in foreign currency may be caught by this provision. But in their case, it may easily be verified.

However, this provision must be difficult to enforce in practice considering that the bureau de change business in Nigeria is not necessarily operated within the formality of a building. Most Bureau de change in Abuja, Kano, Benin and Lagos are individuals walking with small bags asking for dollars or pounds sterling. It is not realistic to expect these mobile businessmen to comply with a provision such as this given their own incognito character. Money launderers are like to exploit this unenforceability of the provision to the fullest.

Identification of Customers

Section 3 of the MLPA emphatically provides that a financial institution shall verify the customer's identity and address before opening an account, issuing a passbook, entering into any financial relationship, renting a safe deposit box to or establishing any other relationship with the customer. This the bank will do by requesting for proof of the customer's identity by, providing a valid original of an official document (e.g driver license) bearing his names and photographs, address by the presentation of the originals of receipts issued within the previous 3 months by public utilities such as Water Board or NEPA. It is a duty incumbent upon casinos to verify the identity of its customers and record all transactions in chronological order. Thus, where a transaction appears to have no economic justification or lawful objective, the financial institution involved in such transaction shall seek information from the customer as to the origin and destination of the fund, the aim of the transaction, and the identity of the beneficiary.

For a corporate body to meet its identification requirement, its certificate of incorporation and other valid official documents dating from less than 3 months before the date of the transaction and attesting the existence of the body corporate must be provided. In addition to the above, the manager, employee or assignee of the body corporate delegated to open or operate an account must provide 'proof' of the Power of Attorney granted to him. There is need for the bank to check the authenticity of such Power of Attorney with the corporate body concerned before opening the account, for it may be faked.

What Should Banks Do When There is Suspicion of Money Laundering?

The MLPA provides that where a financial institution suspects that the amount involved in a transaction relates to the laundering of money, it shall require identification

from a customer notwithstanding that the amount involved is less than N1,000,000.[15] Furthermore if it appears that a customer may not be acting on his own account, the financial institution shall seek from the customer and by any other reasonable means, information above the true identity of the principal. This provision is difficult for bankers to comply with. Even NDLEA officials armed with guns have not been able to crack fronts for drug trafficking barons into telling them who their principals are. Such fronts usually swear to deadly oaths before being recruited by drug barons. These oaths are usually taken in secret societies under blood binding circumstances. A banker asking too many questions to such fronts may be risking his life as bankers have been murdered in cold blood even in ordinary banking transactions that have gone bad. While the money-laundering Act provides all records of the identity of a customer taken pursuant to a transaction cannot be destroyed in a period less than 10 years, BOFIA allows for the destruction of such documents within 5 years. Which of these conflicting provisions prevails? The answer to this question is that the provision of the Money Laundering Act prevails over the BOFIA because it is a more specific law on the issue than BOFIA.

Bank Secrecy Laws and Money Laundering

Since the 1924 English case of Tournier V. National Provincial and Union Bank of England,[16] it has become trite law that a banker is legally required to keep the affairs of his customer secret. This is part of Nigerian law relating to banker and customer relationship. However, this duty is not an absolute duty but qualified being subject to certain reasonable exceptions. These exceptions include: where the disclosure is under compulsion by law, where there is a duty to the public to disclose, where the interest of the bank requires disclosure, and where the disclosure is made by the express or implied consent of the customer.[17]

One of the best-guarded secrets in the international banking community right presently is the Austrina Sparbuch. This account may be either in the name of an individual or a corporation, including offshore corporation or it may be in no name at all the so called Euberbringger account or bearer-passbook[18]. As the term implies, whoever physically holds the passbook is presumed to be its legal owner. In this manner, people can easily transfer money from one person to another. A person in possession of sparbuch does not need to fear getting into problems with the local police because sparbuch is not considered cash or any other monetary instrument. So a money launderer can travel around the world with a couple of sparbuchs worth any amount fully protected in the knowledge that immediate access to the bulk of his liquid assets will only entail a quick and cheap plane trip to Vienna.

Generally, this account frees the customer of the worries of obtaining alternative identity cards, mailing addresses in other countries, references and what not. You don't even have to create one single professional reference to open it. For one thing, the account does not even have to carry a name[19].

The above lax legal regime on banks secrecy makes nonsense of the stringent legal

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[15] Section 6

[16] (1924) All E.R 109[17] Ibid at page 120

[18] Penny L., In Banks We Trust, (Anchor Press, New York) 1st ed. P.96

[19] Nicholas F., Safety in Numbers: The Mysterious World of Swiss Banking,(Hamish Hamilton, London) 2nd ·d. P.45

regime on money laundering by Nigeria. Normally laundering is an international crime therefore a country that operates a stringent legal regime against money laundering, denies itself of funds that would have taken residence in its territory. Such funds will naturally go to the money laundering havens such as Austria and Switzerland.

It is however heart warming to note that Tournier supra, on which bank secrecy is based is case law and is therefore subordinate to statutory law. This being the case, Tournier supra case is subject to the provisions of the Money Laundering Act 2004, which allows for close scrutiny of customer accounts if they are suspected to be used to launder money.

Penalties for Offences Relating to Money Laundering

Section 14 of the MLPA stipulates not less than 2 years imprisonment term for money laundering and not more than 3 years. Section 15 (1) further provides that:

(a) A director or employee of a financial institution who warns or in anyway intimates the owner of the funds involved in the transaction he is required to report or take action on or refrains from making the report as required; or

(b) Destroys or removes a register or record required to be kept under this decree; or

(c) Carries out or attempts under a false identity to carry out any of the transactions specified in Sections 1-5

(d) Makes or accepts cash payments greater than the amounts authorized under this decree; or

(e) Fails to report an international transfer of funds or securities required to be reported under this decree; or

(f) Who being a director or an employee of a bureau de change, casino or financial institution contravenes the provision of Sections 2,3,4,5, 6,7 and 10 of this Act, commits an offence under this section.

In cases like these, the corporate personality principle, which shields company directors and other employees of the company from liability, is lifted in favour of their liability.

Section 15 (3) of the Act provides further that an offender of its provisions may in addition to the above punishment be banned permanently or for 5 years from exercising the profession, which provided the opportunity for the offence to be committed[20]. This provision runs contrary to the professional ethics of most professions, which entitles professional bodies to discipline their members for unbecoming conduct. Aiding, abetting and procuring the commitment of these offences attract the same penalty. The Act further provides that where a body corporate commits any of these offences, it may be wound up and its assets will be forfeited to the Federal Government of Nigeria[21].

The empowerment of NDLEA to investigate, apprehend and prosecute offenders has helped in uncovering many cases of fraud. In consonance with the international preventive initiative, the Nigerian money laundering Act 2004 empowers

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[20] Section 14 MLPA, Section 15 NDLEA Act

[21] See also Sections 20-24 of the EFCC Act, which permits the forfeiture and confiscation all assets derived from laundering in addition to imprisonment and/or fine.

law enforcement offices to convert, search, seize and confiscate properties and monies of the launderer. This has led to blocking of many accounts and has put money launderers on serious pressure or outright unemployment.

The Act's provisions on customer identification have led to the discovery of people involved in money laundering as documentation requirement for opening new account now provides sufficient information which arms and equips the law enforcement agents to identify money launderers beyond the precincts of the bank, thereby enabling fraud detection.

Money laundering enlightenment programmes have created awareness, which enables both the public and financial institutions to discover unusual or unjustifiable transactions.

Enforcement of the Law Against Money Laundering

Enforcement of law against money launderers is a tricky thing. Law enforcers have complained that bank secrecy laws are hampering their pursuit of criminals and their illegal earnings. Whereas many frauds that cloak money laundering have common features, the degree of complexity is ever increasing. The requisite key to unravelling frauds is access to information on a timely basis to stand a chance of making recoveries. There are a number of hurdles to overcome in order to achieve this aim viz: the inherent secrecy, which surrounds frauds and the difficulty imposed upon investigators when dealing with a fraud, which crosses boundaries.

With regard to money laundering through cyber payments, it is important for law enforcement agents and regulators to work more closely with cyber payment system developers to better understand the broad range of system design and other issues that are under consideration as markets and technologies mature. Cyber payment industry representatives on their part have stated that they both want and need more feedback from law enforcement in order to understand better anti-money laundering concerns. Clearly, only with such interaction can the industry incorporate possible anti money laundering solutions into their emerging system.

Therefore, law enforcement agents must continue to improve their efforts to reach out to the cyber payment industry to better understand the commercial concerns of emerging cyber payment system operators. For instance measures that are necessary for anti money laundering purposes should be considered alongside those safeguards that the industry is already building into its systems to prevent fraud and meet other security concerns. The Basle Principles require banks management to: identify customers who come to deposit huge sums of money with them[22], comply with laws and regulations pertaining to financial transactions[23], refuse to assist in transactions which appear to be associated with money laundering,[24] cooperate with law enforcement agents to the extend permitted by laws and regulation relating to customer confidentiality[25], educate and train all staff of financial institutions to equip them in recognizing and reporting suspicious transactions as well as

[22] Principle 3
[23] Principle 4
[24] Principle 5
[25] Principle 6

money laundering operations to the appropriate authorities[26].

These principles while they generate a normative climate for checking money laundering do not possess the legal teeth that compel compliance. The Vienna Convention of 1988 on drug trafficking attempted to generate the international legal order required to check the laundering of drug money.

The Vienna Convention, which has Nigeria among its signatories requires its members to do the following: criminalize drug trafficking and associated money laundering[27], enact legal statements for the confiscation of the proceeds of drug trafficking[28], empower courts to order banks to make records available to law enforcement agents regardless of bank secrecy laws[29].

Supervising banks, like Nigeria's Central Bank, are also required by the Task Force to ensure that the supervised banks or other financial institutions have adequate programme guards against money laundering. Financial institutions should also cooperate with the appropriate authorities to the full extent within the law.

Geographic Targeting Orders and Anti-Money Laundering

Preventing, detecting and combating money laundering particularly through cyber payment systems, is characterized by techniques that require large number of personnel. Geographic Targeting Order (GTO) is one of the techniques used by law enforcement authorities to investigate money laundering activities relating to drug trafficking in the U.S. The U.S Treasure Department has the authority to require a financial institution or a group of financial institutions in a geographic area to file additional reports or maintain additional records above and beyond the requirements imposed by common regulations.

A GTO initiated in New York in 1996 and extended to 1997 required at one point, 23 money transmitters and their approximately 3200 agents to report, identifying, and information on all cash remittances of $750 or more to Colombia[30]. This led to a dramatic reduction in the volume of suspected drug related funds flowing through money transmitters to Colombia, and triggered a number of large seizures of cash at air and sea ports along the eastern seaboard as traffickers shifted to more vulnerable means of moving money.

A GTO has at least two important and complementary functions. First, it serves as an information-gathering device that enables law enforcement authorities to gain greater knowledge of patterns of money laundering. The information gathered helps to establish better estimates of the volume of illicit funds laundered, and assists in more effective targeting of illegal activities by law enforcement. Secondly, a GTO helps to prevent the evasion of regulations by disturbing established patterns of money laundering through the introduction of uncertainty and heightened risk into the cost-benefit and other calculations of drug traffickers. The implicit rise in the 'price' of handling cash derived from illegal activities is a key variable in the 'economics' of the

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[26] Principle 7

[27] Article 1

[28] Article 2

[29] Article 3

[30] Mary L., law Enforcement Activities Related to Anti-Money Laundering Efforts, March 2001.

business.

Using GTO, Nigeria can stem the rising tide of the laundering of looted money that leave the country mostly for Switzerland, the U.S and the U.K. Nigerian law enforcement officers by such an order would be required to commit their surveillance and monitoring of funds leaving or arriving the country from any of these mentioned countries than to or from other countries. Perhaps if this is done most of the money in the laundering process would be arrested and confiscated before leaving the country.

A GTO needs not be legislated on. Law enforcement officers can resort to it in their enforcement of the law without a statutory enactment in that regard.

Conclusion

The law against Money laundering in banks is largely adequate. What is needed for a better fight against money laundering is political will and better training of our law enforcement officers to go after money launderers.