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DOMESTIC IMPLEMENTATION OF INTERNATIONAL INSTRUMENTS FOR COMBATING TERRORIST FINANCING AND MONEY LAUNDERING IN NIGERIA

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ABSTRACT
Treaties do not confer upon citizens' rights which they may enforce in the courts. It is only when a treaty is self-executing that individuals derive enforceable rights from the treaty without further legislative or execution action.... the provisions of the charter of the United Nations are not self-executing and do not vest any of the plaintiffs with any legal rights, which they may assert in court.[1] This paper therefore aim to examine whether Treaties are self executing or must be enacted into municipal law by the National Assembly before becoming enforceable in Nigerian courts.

Keywords: Domestication, International, Instruments, Terrorist- Financing, Money- laundering, Nigeria.

INTRODUCTION

Domestication connotes the enactment of provisions or contents of international instruments as part of municipal laws either wholly or partly. Ezeilo, J. agreeing with Virginia Leary, argued that domestication of international instruments could either be by legislative incorporation or automatic incorporation. She submitted:

> The theory of "incorporation" posits that a treaty can become part of domestic law incorporation… the state of treaties in national law is determined by two different constitutional techniques ..." legislative incorporation" and "automatic incorporation." This is similarly expressed by the positivists – dualist as the doctrine of transformation. According to this, before any rule or principle of intentional law can have effect within the domestic jurisdiction, it must be expressed and specially "transformed" into municipal law by the appropriate constitutional machinery, such as Act of Parliament.[2]

The constitutional mechanism of domestication of international treaties into national laws varies from country to country. For example, in the United Kingdom the court held in *R.V. Keyn* "International law is only part of English law in so far as it is incorporated into English Law by a decision of the courts or by an Act of Parliament."[3]

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[1] Ibid..

[2] Ezeilo, J. "Theory of Incorporation of International Treaties into National Laws," Compilation of International Human Rights Instruments and Articles, Women's and Collective Seminar Publications, 2003, p.62.

[3] (1876)2 EX.D 63.

The courts in the U.S tried making a distinction on whether a treaty is self executing or not. In *Foster v. Nielson*,[4] the U.S. court in giving effect to Article VI Section 2 of the *US Constitution* held that "it is only when a treaty is self executing when its prescribed rules by which private rights may be determined that it may be relied upon for the enforcement of such rights.
Also, in *Diggs v. Dent*, it was held that:

> Treaties do not confer upon citizens' rights which they may enforce in the courts. It is only when a treaty is self-executing that individuals derive enforceable rights from the treaty without further legislative or execution action.... the provisions of the charter of the United Nations are not self-executing and do not vest any of the plaintiffs with any legal rights, which they may assert in court.[5]

From the above, it is clear that state legislative or judicial support is necessary to make treaties executable. The necessity for domestication of treaties becomes more glaringly clear when those international instruments relate to criminal matters. Criminalization of an act of omission or commission in most jurisdictions is dependent on the fact that the act of omission or commission has been defined in written law as a crime and punishment prescribed therefore. For example, within the Nigerian context, section 36(12) of *the Constitution of the Federal Republic of Nigeria 1999* provides:

> Subject as otherwise provided by the Constitution a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this sub section, a written law refers to an Act of the National Assembly or a law of a state, any subsidiary legislation or instrument under the provision of the law.

From the above, it is clear that no act of omission or commission by any person shall be a crime unless that particular act is defined as such by a written law and punishment prescribed therefore and in this context, written law means, a law passed by the National Assembly or a subsidiary legislation pursuant thereto. The enforcement of any international instrument creating a criminal offence therefore must be enacted as part of our domestic law.[6]
This chapter is divided into two parts. The first part will discuss the domestic implementation of international instruments, while the second part analyses data generated from the field.

IMPLEMENTATION OF TREATIES

In Nigeria, the implementation or enforcement of any treaty is dependent on its being re-enacted as an Act of the National Assembly. Section 12(1) of the *Constitution of the Federal Republic of Nigeria (CFRN) 1999* provides:

> No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law."

From the above, it is clear that no act of omission or commission by any person shall be a crime unless that particular act is defined as such by a written law. It follows therefore that enforcement of any treaty entered into by and on behalf of the State of Nigeria is dependent on its domestication as part of Nigerian law.

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[4] Reported in "Incorporation of International Treaties into National Laws," Compilation of International Human Rights Instruments and Articles, Women's and Collective Seminar Publications, 2003

[5] Reported in Compilation of International Human Rights Instruments and Articles. Women's Aid Collective Series, 2003, op. cit. n.3.

[6] Process of implementation of international instruments in Nigeria will be discussed later in this chapter.

In *Fawehinmi v. Abacha*,[7] the respondent is a legal practitioner, an author, publisher, human rights activist, pro-democracy campaigner, and National Co-ordinator Conscience Party. On 30th January 1996, a horde of Police and State Security Service (SSS) officers fully armed with guns, invaded his residence. Without presenting any warrant of arrest or giving any reason therefore, they arrested the respondent and took him away to SSS Lagos State office at Shangisha and detained him for about a week without allowing anybody to see him. Thereafter, he was secretly transferred to Bauchi Prison and detained thereat.

As a result of the foregoing, an application for the enforcement of the respondent's fundamental rights was filed at the Federal High Court Lagos seeking inter alia the following reliefs:

- A declaration that the arrest of the applicant by the SSS officers, servants, agents, privies of the Federal Military Government constitutes a violation of the applicants fundamental human rights guaranteed under sections 31, 32, and 38 of the *1979 Constitution* and Articles 4, 5, 6 and 12 of the *African Charter on Human and Peoples Rights. (Ratification and Enforcement) Act, Cap. 10 LFN, 1990* and is therefore illegal and unconstitutional.
- A declaration that the detention and continued detention of the applicant without charge constitutes a gross violation of the applicants fundamental human rights guaranteed under sections 31, 32 and 38 of the 1979 Constitution and Articles 5, 6, and 12 of the *African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. 10 LFN 1990*, and is therefore illegal.

At the hearing of the preliminary objection the appellant contended that the respondent was detained pursuant to a detention order signed by the Inspector general of Police (IGP) under the provision of the *State Security (Detention of Persons) Decree No. 2 of 1984* and consequently the court has no jurisdiction to hear the action because its jurisdiction was ousted by the Decree.

The respondents counsel in his argument contended that the IGP has no power to issue a detention order and that the provision of the said Decree 2 of 1984 was inferior to and cannot override the provisions of the *African Charter on Human and Peoples Rights* under which the respondent was seeking the afore stated reliefs.

The trial court after hearing the arguments on the objection upheld it and struck out the suit. The respondent consequently appealed to the Court of Appeal against the whole of the decision of the trial court. The Court of Appeal inter alia held that notwithstanding the fact that Cap. 10 was promulgated by the National Assembly, in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria. That the provision of Cap. 10 of the African Charter on Human and Peoples Rights are provisions in a class of their own. While the Decree of the Federal Military Government may override other municipal laws, they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. They are protected by the international law and the Federal Military Government is not legally permitted to legislate out of its obligation.

Both parties were aggrieved by the decision and they appealed to the Supreme Court.[8] The appellant complained against those parts of the judgement of the Court of appeal which relates to the African Charter on Human and Peoples Rights and the order remitting the case to the trial court for the action before the latter court to be resolved in the period of four days not covered by the detention order. The respondents cross-appealed against those parts of the decision of the Court of Appeal relating to:

1. Power of the IGP to sign and issue a detention order
2. Mode of enforcement of Fundamental Human Rights guaranteed under the African Charter on Human and Peoples rights

[7] (1966) 9 NWLR (Pt. 475) 710.

[8] Abacha v. Fawehinmi (2000) 6 NWLR (Pt. 660) p. 228.

3. Procedure for tendering detention order
4. Immunity of the Head of State

In determination of the appeal, the Supreme Court *inter alia* held that before a treaty becomes enforceable in a court it must follow the procedure laid down in section 12(1) of the 1979 Constitution.

Section 12(1) read together with section 36(12) of the CFRN 1999 means that any international treaty to which Nigeria is a signatory and which requires criminalisation of certain actions or inactions must be contained in a written law passed by the National Assembly. The use of 'shall' by Section 12(1) connotes compulsion. The Nigerian courts have interpreted the use of 'shall' in Nigerian legislation to mean must or mandatory.[9]

The national Assembly is also vested with the power to make laws for the federation or any part thereof for the purposes of giving effect to a treaty, provided the matter is not on the Exclusive Legislative List vested with other tiers. The law enacted in this respect doesn't require the assent of the President, which is a departure from the normal way of enacting laws in which recourse must be made to President.[10] However, since the law is to be for the Federation or any part thereof, to ensure transparency and observance of due process, the law must be ratified by a majority of all the Houses of Assembly in the Federation.[11]

Sub section 2 and 3 of Section 12 of *the Constitution of the Federal Republic* of Nigeria 1999 provides:

> (2) The National Assembly may make laws for the federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
>
> (3) A bill for an Act of the National Assembly passed pursuant to the provisions of sub section (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

MONEY LAUNDERING

The Vienna Convention of 1988 was the first international instrument to legislate and introduce the concept of money laundering within the context of proceeds derivable from dealing in illicit substances.[12] The concept was expanded by the *Palermo Convention of 2000* to cover proceeds of other crimes.[13] In addition to above, in 1999, *the Convention for the Suppression of the Financing of Terrorism* was also enacted to criminalize terrorism, terrorist financing and terrorist organization.[14] In an effort to domesticate the provisions of these Conventions, the *National Drug Law Enforcement Decree 48 of 1989* became the first legislation in Nigeria to create the offence of money laundering.[15] The offence of money laundering being a dynamic one which frequently changes in nature and systems or methods of committing it made it necessary for regular updating of the laws for combating the crime. The NDLEA Decree, like the *Vienna Convention of 1988* leans heavily towards hard drugs proceeds to the exclusion of other forms of criminal funds.

Realizing the above deficiency in the NDLEA Decree coupled with the publication of UN Model law on money laundering, *the Money Laundering Decree No.3 of 1995 was enacted*. Though the Decree also confines money laundering to proceeds of drug trafficking.

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[9] *Kere v. Kalba* (2004) ALL F.W.L.R. pt 221, p.1479.

[10] Section 12(2) CFRN 1999.

[11] The President may assent or withhold assent of a bill referred to him. Section 58, CFRN 1999.

[12] Paragraph (b)(I & II) of Article 3(1).

[13] Article 5 and 6(2).

[14] Article 2 of *the International Convention for the Suppression of Terrorist Financing 1999*.

[15] Section 13 of *the NDLEA Decree of 1989*.

Learning from the *Palermo Convention* which expanded predicate offences for the purposes of money laundering beyond the proceeds of drugs,[16] the *Money Laundering Decree No.3 of 1995* was amended by the *Money Laundering (Amendment) Acts of 2002, 2003 2004 and 2011*.
The *Money Laundering (Prohibition) Act 2011* repealed all the previous legislation on money laundering and the Act is divided into three (3) parts. The first part deals with prohibition of money laundering in Nigeria and created duties and responsibilities of financial and designated non-financial institutions in combating money laundering;. The part also deals with limitation of cash payment, reporting international money transfer, identification of customers, reporting suspicious transactions, record keeping and reporting cash transactions etc. The second part deals with definition, categorization and punishment of money laundering and related offences.
The third part deals with miscellaneous provisions such as trial of offences,[17] power to demand and obtain records, obstruction, repeal of the previous money laundering laws and interpretation.
In criminalizing money laundering, the *Money Laundering (Prohibition) Act, 2011* provides that any person who:

> Converts or transfer resources or properties derived directly from – Illicit traffic in narcotic drugs and psychotropic substances; or participate in an organized criminal group and racketeering, terrorism, terrorist financing, trafficking in human beings and migrant smuggling, tax evasion, sexual exploitation, illicit arms trafficking in stolen and other goods, bribery and corruption, counterfeiting currency, counterfeiting and piracy of products, environmental cries, murder, grievous bodily injury, kidnapping, illegal restraint and hostage taking, robbery, or theft, smuggling, extortion, forgery, piracy, act specified in this Act or any other legislation in Nigeria relating to money laundering, illegal bunkering, illegal mining, with the aim of either concealing or disguising the illicit origin of the resources or property or aiding any person involved to evade the illegal consequences of his action.[18]
>
> Collaborates in concealing or disguising the genuine nature, origin, location, dispositions, movement or ownership of the resources, property or right thereto derived directly or indirectly from the Acts specified in subsection (1) (a) (i-ii) commits an offence under this section and is liable on conviction to imprisonment for a term not less than 5 years but nor more than 10 years.[19]

A person who commits an offence under subsection (1) of this section, shall be subject to the penalties specified in that subsection notwithstanding that the previous acts constituting the offence were committed in different countries or places.[20]

[16] The Convention criminalized laundering of proceeds of crime either by International Conversion or transfer of property, knowing that such property is proceed of crime for the purpose of concealing or disguising the illicit origin of the property or of helping the offender who committed the predicate offence to evade justice.

[17] The Act vested jurisdiction on the Federal High Court.

[18] Section 15(1)(a).

[19] Section 15(1)(b).

[20] Section 15(2).

Overview of Key Sections of the Money Laundering (Prohibition) Act, 2011(As Amended)

Limitation to Make or Accept Cash Payments

The *Money Laundering (Prohibition) Act, 2011* (As amended) incorporated the 40 Recommendations of the FATF which provides a complete counter measures against money laundering. These measures are formulated as a means of setting standards and giving expression in national laws.[21] In domesticating these provisions, the *Money Laundering (Prohibition) Act, 2011* (MLPA) regulated the procedure for making and accepting cash payments with a view to ensuring that certain levels of payments go though the financial institutions. This will enable monitoring of financial transactions for purposes of identifying, tracing and investigation of proceeds of crimes. The Act provides:

No person or body corporate shall, except in a transaction through a financial institution, make or accept cash payment of a sum exceeding

(a) N5,000,000.00 or its equivalent, in the case of an individual;[22] or

(b) N10, 000,000.00 or its equivalent in the case of a body corporate.[23]

The consideration that makes for this legal stipulation is that an amount in excess of N5, 00,000.00 or N10, 000,000.00 is a huge sum of money. However, in a cash based economy like Nigeria, this consideration may not be true with big corporation to whom such amount is a chicken feed.[24]

Duty to Report International Transfer of Funds

The *Money Laundering (Prohibition) Act, 2011* (As amended) made it mandatory to report to the Central Bank of Nigeria (CBN) and the Securities and Exchange Commission (SEC) any transfer to or from a foreign country of funds or securities by a person or body corporate including Money Services Business of a sum exceeding N10, 000 or its equivalent within 7 days from the date of the transaction.[25]

The above report shall indicate the nature and amount of the transfer, the names and addresses of the sender and the receiver of the funds or securities.[26]

This Section also provides for the declaration of cash or negotiable instruments in excess of N10, 000 or its equivalent to the Nigerian Customs Service.[27] The Nigerian Customs Services shall report any declaration made under the Subsection (3) to the CBN and the Nigerian Financial Intelligence Unit (NFIU).[28]

The liability for any person who fails to declare or make a false declaration to the Nigerian Customs Service is conviction to forfeit not less than 25% of the undeclared funds or negotiable instrument or to imprisonment of not less than 2 years or to both.[29]

The consideration of fixing the amount of $10,000 is that narcotic drug traffickers and other transnational criminals generate large sums of money from their illicit business and do not want to use the financial institutions to transfer or launder the funds. Rather they prefer using physical transportation of cash and bearer negotiable instruments using the airports or borders. If

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[21] The FATF 40 Recommendations requires countries to criminalize money laundering on the basis of the UN *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* and the *Palermo Convention of 2000*.

[22] Section 1(a).

[23] Section 1(b).

[24] Usman, A.K. "Money Laundering and State Security in Nigeria," *ABU Zaria Law Journal* (2005), p.179.

[25] Section 2(1).

[26] Section 2(2).

[27] Section 2(3).

[28] Section 2(4).

[29] Section 2(5).

launderers and terrorists use the financial institutions to launder their funds, they run the risk of being identified by law enforcement agents and regulators.

Customer Due Diligence

In accordance with international standards set by the Basel Committee on Banking Supervision (Basel Committee), FATF[30]countries must ensure that their financial institutions have appropriate customer identification and due diligence procedures in place. The procedure applies to financial institutions, individuals and corporate customers alike. These rules and procedures ensure that financial institutions maintain adequate knowledge about their customers and their customers' financial activities. Customer identification requirements are also known as "know Your Customer (KYC) rules,[31]a term employed by the Basel Committee.

KYC Procedures not only help financial institutions detect, deter, and prevent money laundering and terrorist financing, they also confer tangible benefits on the financial institutions, its law abiding customers and the financial system as a whole.

The *Money Laundering (prohibition) Act 2011* (As amended) makes it mandatory for financial institutions and designated non-financial to verify the identity and update all relevant information on the customer[32] before opening an account for, issuing a passbook to, entering into financing transaction with, renting a safe deposit box to or establishing any other business relation with the customer,[33] and during the course of the relationship with the costumer.[34]Financial institutions must also scrutinize all ongoing transactions undertaken throughout the duration of the relationship in order to ensure that the customer's transaction is consistent with the business and risk profile.[35]

The use of the word "shall" in the section presupposes mandatory. However, what is not clear from the provision is the use of the term "its customers" as this raises the question at what stage will a person be referred to as a customer? For example, for a person to be considered as a customer of a bank, it is essential and indispensable that the person should have opened an account in the bank[36] or the person is conducting transaction on behalf of another person who has an account.[37]

The Basel Committee defines a customer as:

- A person or entity who maintains an account with a Financial Institutions or whose behalf an account is maintained (i.e. beneficial owners);
- Beneficiaries of transactions conducted by professional intermediaries (e.g., agents, accountants, lawyers; and
- A person or entity connected with a financial transaction that can pass insignificant risk to the bank.

It is submitted that the phrase: 'its customers' ought to have been qualified to include its customers or prospective customers so as to cover both the existing and potential customers.

The identity of a customer is verified, in the case of an individual, by the customer presenting a valid original copy of an official document bearing his or her name and photograph. For

[30]FATF recommendation 5.

[31]Basel Customer Due Diligence for Banks.

[32] Section 3(1)(a).

[33] Section 3(1)(a)(i).

[34] Section 3(1)(a)(ii).

[35] Section 3(1)(b).

[36] *Great Western Railways Company v. London and Country Banking Co*.(1902) AC, 424; *Ademuliyi and Damuye v. A.C.B.* (1964) N.M.L.R. 137.

[37] *New Nigerian Bank v. Odiase*, (1993) 8 N.W,.L.R. 235, at pp.243-4.

example, utility bills, such as water bill and power holding corporation bills etc[38] within the previous three months.

The address of an individual customer is also verified by the customer presenting to the financial institution the original of receipts issued within the previous three months by public utilities or any other documents as the relevant regulatory authorities may from time to time approve.[39]What is not clear is whether the receipts must necessarily bear the name of the customer or of any other person's name. The likely effect of the utility bill bearing the name of the customer is that it may foreclose tenants, dependents, squatters and such others, who will find it difficult to have utility bills in their names. To achieve the objective of the law, it is necessary to expand the scope to include utility receipt issued in favour of a guardian, guarantor, or any such similar person among others.

Public utilities connote services provided for the public, for example, an electricity, water or gas supply.[40] In Nigeria today, it is an onerous task to demand receipt of public utilities from even those who own residential accommodation let alone squatters. Today, the fixed line telephone line is almost extinct and the common telephone facilities are GSM[41] and fixed wireless[42] which are substantially pay-as-you-go with no issuable receipt to establish evidence of particular residential address. The electricity bills are now replaced with pre-paid metering system where electricity consumer will only buy credit units and receipts are no long necessary. Water bill receipts are similarly not a common instrument among the citizenry, because substantial reliance for water supply is through personalized boreholes and water vendors who issue no receipt.

Nonetheless, the purpose of the above requirement is if an institution has only the basic details of a customer, it will lack information that could be used to profile the specific client and to correctly identify a suspicious and unusual transaction that may be concluded by the client.[43] Customer Due Diligence violation is yet to be tested in Nigerian Courts. But in the South African case of *Kwamashu Bakery Ltd v. Standard Bank of South Africa Ltd*,[44] the court held that banks are required in terms of common law to identify and verify prospective clients before opening an account. See also *Powell V. ABSA Ltd*.[45]

A body corporate is required to provide proof of its identity by presenting its certificate of incorporation and other valid official documents attesting its existence.[46]

It is submitted that though the certificate of incorporation is a proof of identity for corporate body, evidence of filing annual returns with corporate Affairs Commission suffices.

Also, the manager, employee or assignee delegated by a body corporate to open account shall be required to produce not only documents mentioned in sub section (2), but also proof of the power of attorney granted to him in that behalf.[47]

A casual customer shall comply with the provisions of subsection (2) for any manner of transaction involving a sum exceeding $1,000 or its equivalent if the total amount is known at the commencement of the transaction or as soon as it is known to exceed $1,000 or its equivalent.[48]

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[38]Section 3(3).

[39] Section 3(2)(b).

[40]Oxford Advanced Learners Dictionary, sixth Edition.

[41] For example MTN, Airtel, GLO, Etisalat, et cetera.

[42] For example multi links, starcomms etcetra.

[43]Dekoker, L. "Money Laundering Control: The South African Model*," Journal of Money Laundering Control* (2001).

[44](1995)2 S.A. 377.

[45](1998), 2 SA 807.

[46]Section 3(3).

[47]Section 3(4).

Financial institutions or designated non-financial institutions shall seek from the customer information as to the true identity of the principal if it appears that the customer is not acting on his own account. Where the customer is a body corporate, the financial institution shall:

(a) take reasonable measures to understand the ownership and control structure of the customer; and
(b) Determine the natural person who truly own or control the customer.[49]

Where the customer is a public officer or Politically Exposed Person (PEP), the Financial Institution or Designated non-financial institution shall in addition to the requirements of subsection (1) and (2)

(a) put in place appropriate risk management systems; and
(b) Obtain senior management approval before establishing and doing any business relationship with the public officer.[50]

Duties Incumbent upon Casinos

Casinos are required to verify the identity of their customers by making them present valid original documents bearing their names and addresses.[51] They are also to record all transaction in chronological order including[52] – the nature and amount involved in each transaction[53] and each customers address in a register forwarded to the Ministry for that purpose.[54] The register under subsection (1) (b) shall be preserved for at least 5 years after the last transaction recorded.[55]

In *R. v. Gayadin*,[56] the accused operated several illegal casinos and admitted to laundering the proceeds of the illegal gambling activity by entering into arrangements with certain people to hide the proceeds in off-shore bank accounts in the Isle of Man and Jersey. More than 11 million South African Rands were transferred to accounts in these jurisdictions. The casino operator was convicted for statutory laundering for his failure to perform the duties imposed by law. The same decision was reached in *R v. Justigar*.[57]

Suspicious Transactions (STRs)

In the area of surveillance of certain transactions and mandatory disclosures by financial institutions, the Act made strict provisions aimed at preventing money laundering in Nigeria. Section 6 provides that where a transaction involves a frequency which is unjustifiably or unreasonable; is surrounded by conditions of unusual or unjustified complexity; it appears to have no economic justification or lawful objective; or where in the opinion of the financial institution or designated non-financial institution involves terrorist financing or is inconsistent with the known transaction pattern of the account or business relationship that transaction shall be deemed to be suspicious and the financial institution shall seek information from the customer as to the origin and destination of the funds, the aim of the transaction and the identity of the beneficiary.[58]

From the above provisions, it is necessary for financial institutions to be extra vigilant where transactions are unusually complex or it involves movement of huge sums of money and apparently without economic justification or lawful objective. However, in adopting the relevant provisions of the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic*

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[48] Section 3(5).

[49] See Section 3(7)(a) and (b).

[50] Section 3(8(a) and (b).

[51] Section 4(i)(a).

[52] Section 4(1)(b).

[53] Section 4(1)(b)(i).

[54] Section 4(1)(b)(ii).

[55] Section 4(2).

[56] Case No. cc6/2000 (Durban and Coast Local Div) unreported.

[57] Case No. cc6/2000 (Durban and Coast Local Div) unreported.

[58] See Section 6(1)(a-d).

Substances of 1988[59] the Act is silent on what will constitute "unusual or unjustified complexity." It appears that conditions of unusual or unjustified complexity could be inferred by reference to the type and nature of the transaction and apparent goal. The Conventions has provided us with a guide as to what to be on the lookout in gauging the unusual or complex nature of the transaction and the illegitimacy of its goal. The personnel of a financial or designated non-financial institution will therefore have to pay special attention for:[60]

(a) Large cash exchange transactions
(b) Large cash deposits and withdrawals that are not consistent with the normal course of transaction
(c) Opening of an account at a branch far remote from the person domicile or workplace, or the opening of several accounts at different branches
(d) The operation of an account essentially to transfer large sums to or from foreign countries, when the person's or company's activities do not appear to justify such movements.
(e) The purchase or sales of security for large sums, for no obvious purpose
(f) Loan requests secured by deposit certificates issued by a foreign bank or by asset that are of an unknown origin or are incompatible with a person's apparent life style
(g) Depositing large amounts of money in order to have them transferred abroad by a relative
(h) Clients (straw men) who carry out transactions under the obvious supervision of third parties
(i) Representatives of business relationships who avoid direct personal contact with the bank
(j) Clients who do not choose to use attractive credit or other bank facilities
(k) A sudden increase in turnover on an account without any acceptable explanation
(l) The same person opening and closing an account within a short period of time

It is impossible to describe all forms of suspicious transactions because it's unlimited in nature.[61]

A financial institution or designated non-financial institution shall within 7 days after the transaction referred to in subsection (1) draw up a written report containing all relevant information together with the identity of the principal and where applicable the beneficiary or beneficiaries;[62] and send a copy of the report and action taken to the Nigerian Financial Intelligence Unit of the EFCC.

As soon as the NFIU gets the report from the financial institutions, it shall acknowledge it and may demand additional information if necessary.[63] The acknowledgement shall be sent to the financial institution within the time allowed and may be accompanied by a notice deferring the transaction for a period not exceeding 72 hours.[64] The chairman of EFCC and the Governor of Central Bank of Nigeria or their authorized representatives shall place a stop order not exceeding 72 hours, on any account or transaction if it is discovered to be involved in crime.[65] If the acknowledgement is not accompanied by a stop notice or where the stop notice expire and the order to block the transaction has not reached the financial or designated financial institution, it may carry out the transaction.[66]

[59]The Vienna Convention of 1988.

[60]Groenhuijsen and Vander Landen in "Financial Institutions and the Penal Fight against Money Laundering," Netherlands Institute for the Banking and Stock broking Industry (NIBE), 1995.

[61] Section 6(2)(a).

[62] Section 6(2)(b).

[63]Section 6(4).

[64] Section 6(56)(a).

[65] Section 6(5)(b).

[66]Section 6(6).

If the origin of the funds cannot be ascertained within the stoppage period of the transaction, the EFCC, or other persons or authorities duly authorized may request for an order of the Federal High Court to block the funds, accounts, or securities referred to in the report.[67] Failure to comply with subsection (1) and (2) will attract a conviction of the financial institution to pay a fine of N1,000,000 for each day during which the offence continues.[68]

Preservation of Records

A financial institution or designated non-financial institution shall keep at the disposal of the authorities the record of a customer's identification for a period of at least 5 years after the closure of the account or the severance of relations with the customer.[69]

Also, the record and other related information of a transaction carried out by a customer and the report provided for in section 6 of this Act shall be preserved for a period of at least 5 years after carrying out the transaction or making of the report.[70]

Mandatory Disclosure by Financial Institutions

Financial institutions and designated non-financial institutions are mandated to report to the NFIU in writing within 7 days any single transaction, lodgement or transfer of funds in excess of –

(a) N5,000,000 or its equivalent, in the case of an individual; or
(b) N10, 000,000 or its equivalent, in the case of a body corporate.

These disclosures are generally referred to as "Currency Transactions Reports (CTRs). Under the MLPA, financial institutions and designated non-financial institutions are mandated to report international money transfers under section 2, Suspicious Transaction Reports (STRs) under section 6 and Currency Transaction Reports (CTRs) under Section 10 of the Act to NFIU. The NFIU is a Central national body under the EFCC responsible for receiving, analysing and dissemination to competent authorities disclosures of financial information. It was created in fulfilment of FATF Recommendation 26.

On January 26, 2005, the NFIU sent letters to all the 89 banks directing them to start sending Currency Transaction Reports (CTRs), Suspicious Transaction Reports (CTRs), and Foreign Exchange Reports (FX). Out of the 89 banks, 74 banks and 2 discount houses started reporting to NFIU.

In 2005 the department received a total of 3,523,267 reports from financial and designated non-financial institution. 3,521,770 CTRs and 1,497 STRs were received. The average STR per week was 28, while the number of STRs disseminated to competent authorities was 42. The table below shows the break down.

Table 1. RECORD OF RENDITION

Total CTRs	Total STRs	Average STR per week	No of STRs disseminated	Total Rendition
3,521,770	1,497	28	42	3,523,267

Source: NFIU Annual Report 2005.

A person other than a financial institution may voluntarily give information on any transaction, lodgement or transfer of funds in excess of N1,000,000 or its equivalent in the case of an individual or N5,000,000 or its equivalent in the case of corporate body.[71] Contravention

[67] Section 6(7).
[68] Section 6(9).
[69] Section 7(a).
[70] Section 7(b).
[71] Section 10(2).

of this section shall on conviction attract a fine of not less than N250, 000 and not more than N1 million for each day the contravention continues.[72]

Surveillance of Bank Accounts

The *Money Laundering (Prohibition) Act, 2011* has demolished whatever remains of banking secrecy and confidentiality by providing that the EFCC, NDLEA and CBN pursuant to an order of the Federal High Court may in order to identify and locate proceeds of properties or other things related to commission of an offence-[73]

(a) Place any bank account or any other account comparable to a bank account under surveillance;[74]
(b) Obtain access to any computer system;[75]
(c) Obtain communication of any authority, instrument or private contract, together with all banks, commercial and financial records, when the account or computer system is used by any person suspected of taking part in a transaction involving the proceeds of a financial or other crime.[76]

The NDLEA may exercise the powers under subsection (1) where it relate to identifying or locating properties, objects or proceeds of narcotic drugs or psychotropic substances.[77]

Banking secrecy or preservation of customer confidentiality shall not be invoked as a ground of objecting to the measures set out in sub section (1) and (2) of this section or for refusing to be a witness to facts likely to constitute an offence under the Act or any other law.[78]

The above section conflicts with the duty of secrecy or confidentiality which banks owe to their customers. More so, it is an established principle in English common law (also applicable in Nigeria) that the relationship between a bank and its customers is a contractual one, and that a bank has a legal duty arising out of this contract to protect the confidentiality of its customers financial details. The classical decision on this point was the English Court of Appeal decision in *Tournier v. National Provincial and Union Bank of England*[79] where Bankes L.J., was firmly of the view that such a duty existed and a breach of it could give rise to a claim for damages. It is worth of note that there was a re-examination of this issue, as it pertains to international investigations in the House of Lords decision in *Re Norways Applications.*[80] It was stressed that the balance must be struck between the duty of confidentiality and that of assisting in obtaining evidence with respect to criminal conduct (abroad). This is as a result of the changes brought about by recent trends worldwide to extend cooperation in relation to crime in its many facets.[81]

Another issue that may follow this section is that the Act may be opened to challenge and constitutional litigations may follow in respect of issues as the infringement of privacy.

The GIABA 2011 Annual Report on AML/CFT indicated that Nigeria's AML/CFT regime did not meet international standard. Sequel to this, the National Assembly amended the *2011 Money Laundering (Prohibition) Act* by harmonizing Act No. 11 2011 and Act No. 1, 2012. This is to make comprehensive provisions to prohibit the financing of terrorism, laundering of the proceeds of crime or illegal acts, expand the scope of money laundering offences, enhance customer due diligence measures, provide appropriate penalties and expand the scope of supervising and

[72] Section 10(3).

[73] Section 13(1).

[74] Section 13(1)(a).

[75] Section 13(1)(b).

[76] Section 13(1)(c).

[77] Section 13(2).

[78] Section 13(4).

[79] See also FATF Recommendation 9. (1924)1 K.B. 461.

[80] (1989)1 ALL E.R. 745.

[81] See also the case of *Enwerem and Others v. NDLEA*, case no. FHCLCS/096/99 unreported.

regulating authorities to address the challenges faced in the implementation of anti money laundering regime in Nigeria. The Act amended sub section (5) of section 2 by making a person who falsely declares or fails to make declaration to forfeit the undeclared funds or negotiable instrument[82]. This subsection replaced the former provision which provided for the forfeiture of 25% of the undeclared funds or negotiable instrument. The new Act has also added a new sub section (1) (C) to section 3 by providing that financial and designated non financial institutions shall identify the beneficial owner and take reasonable measures to verify the identity of the beneficial owner using the relevant information data obtained from a reliable source such that the financial institution or designated non financial institution is satisfied who the beneficial owner is.[83] Under the same section 3, the Act added two new sub sections, (section 2 and 3) on customer due diligence measures[84] and ongoing due diligence on a business relationship.[85] The customer due diligence measures to be undertaken by financial and designated non-financial institutions include:

(a) Establishing business relationships[86]
(b) Carrying out occasional transactions above the applicable designated threshold prescribed by relevant regulations, including transactions carried out in a single operation or in several operations that appear to be linked[87]. This provision is necessitated to preclude those who deposit funds by way of structuring from depositing funds in bits in order to beat the threshold provided by the law. This is known as "smurfing". Smurfing is categorized as a suspicious transaction which must be reported to the NFIU[88].
(c) Carrying out occasional transactions that are wire transactions. This subsection shows that the requirement of customer due diligence extends to casual customers[89].
(d) There is suspicion of money laundering or terrorist financing, regardless of any exempting or threshold[90].
(e) The financial or designated non financial institution has doubts about the veracity or adequacy of previously obtained customer data[91].

The ongoing due diligence introduced by the new subsection 3 includes:

(a) Conduction ongoing due diligence on a business relationship[92].
(b) Sanitizing transactions undertaken during the course of the relationship to ensure that the transactions are consistent with the institutions knowledge of the customer, their business and risk profile and where necessary, the source of funds[93], and
(c) Ensure that the documents, data or information collected under the customer due diligence process is kept-up-date and relevant by undertaken reviews of existing records, particularly for higher risk categories of customers or business relationships[94].

[82] Section 2 (5)
[83] Section 3 (1) (c)
[84] Section 3 (c)
[85] Section
[86] Section 2 (a)
[87] Subsection 2 (b)
[88] Subsection 10
[89] Section 3 Subsection 2 (c)
[90] Subsection 2 (d)
[91] Subsection 2 (e)
[92] Subsection 3 (a)
[93] Subsection (3) (b)
[94] Subsection (3) (c)

Some Key Areas of Amendments under the 2012 Money Laundering (Prohibition) Act

The Money Laundering (Prohibition) Act, 2012 amended some key sections under the 2011 Money Laundering (Prohibition) Act. The following are some of the key amendments made by the 2012 Act:

Section 3 sub section (4) of the 2012 Act provided for management of risks by financial and designated non financial institutions. Enhanced measures are taken to manage and mitigate high risks[95]. While simplified measures are taken to manage and mitigate lower risks[96]. In the case of cross-border correspondent banking and other similar relationships, sufficient information is gathered about a respondent institution[97]. Also the respondent institutions anti money laundering and combating the financing of terrorisms control shall be assessed[98]. Respective responsibility of each institution in this regard must be documented[99]. Also, management approval must be obtained before establishing new correspondent relationships[100]. Former sub section (8) which provided for putting in place appropriate risk management systems and obtaining senior management approval before establishing and during any business relationship with the public officer is now replaced with a new sub section 7. The new sub section replaced "public officer" with "politically exposed person"

Section 6, formerly referred to as "special surveillance on certain transactions" is now referred to as "suspicious transaction reporting" in the current section 6. Subsection (5) has been amended to read "Notwithstanding the provision of paragraph (a) of this sub section, the Chairman of the EFCC or his authorized representative shall place a stop order not exceeding 72 hours, on any account or transaction if it is discovered in the course of their duties that such accounts or transaction is suspected to be involved in any crime". In the 2011 Act, the Governor of the Central Bank or his representative can place a stop order of the transaction. But in the present Act, the CBN Governor is not included among those who can place a stop order. This power can only be exercised by the Chairman EFCC or his representative.

Section 9 (2) has been amended by the new Act. The Act in this sub section gave the CBN, the exclusive power to impose penalties of not less than ₦1, 000,000 or the suspension of license issued to financial and designated non-financial institutions. The Act did not give the court the exclusive power to impose penalties alone, the Securities and Exchange Commission (SEC) and the National Insurance Commission (NAICOM) and other relevant regulatory authorities have similar powers[101]. Also, unlike the 2011 Act, the Act impose penalty of ₦1, 000,000 for capital brokerage[102] and other financial institutions and ₦5, 000,000 in the case of a bank[103]. The Act also imposes the penalty of suspension of license issued to the financial institution or designated non financial institution[104] for failure to comply with the provisions of subsection (i).

In section 11 of the Act, two additional subsections proscribing the operations of shell bank[105] in Nigeria and entering into correspondent banking relationship with shell banks[106]. Also, financial institutions must satisfy itself that a respondent financial institution in a foreign country does not

[95] Subsection (4) (a)
[96] Subsection 4 (b)
[97] Subsection (4) (C) (i)
[98] Subsection (4) (C) (ii)
[99] Subsection (4) (C) (iii)
[100] Subsection (4) (C) (iv)
[101] Section 9 (2)
[102] Subsection (2) (a)
[103] Ibid
[104] Subsection (2) (b)
[105] Section 11 (2)
[106] Subsection (3) (a)

permit its account to be used by shell banks[107]. It has been observed that section 11 did not provide guideline on how to determine the suitability of correspondent bank. Also, there is no guideline in addition to the penalties imposed in the former section 11 for contravening of sections (1), (2) and (3). The new Act further imposed the prosecution of principal officers of the body corporate and the winding up and prohibition of its constitution or incorporation under any form or guise[108].

Section 15 of the Act has been re drafted to replace the former section. The section prohibits money laundering in Nigeria.[109] It also specified the circumstances under which a person or corporate body would be deemed to have committed the offence of money laundering. These circumstances includes: where a person or corporate body conceals or disguises, converts or transfers, removes from jurisdiction or acquires, uses, retains or takes possession or control of any property, knowingly or reasonably ought to have known that any such fund or property is, or forms part of the proceeds of an unlawful act[110]. Unlike subsection (2) of the former Act which provided that an offender shall be subjected to the penalties specified in that subsection, the new subsection (3) specifically provided for conviction to a term of not less than 7 years but not more than 14 years imprisonment for a person who contravenes subsection (2)[111]. Body cooperates who violate subsection (2) are liable on conviction to a fine of not less than 100% of the funds and properties acquired as a result of the offence committed,[112] or have their license withdrawn[113]. Where the offence persists or continues after conviction, the license of the body corporate may be withdrawn or revoked by the regulations[114].

Section 16 is also affected by the amendment. The new Act provided in subsection (f) that any person who being a director or an employee of a financial institution contravenes the provision of section 2, 3, 4, 5, 6, 7, 8, 9 of this Act commits an offence under this Act. In addition to above, sections 9, 10, 12, 13 and 14 were added.[115]

Despite this bold step by Nigeria of amending the 2011 *Money Laundering (Prohibition) Act*, it is submitted that there are still some sections needing amendments especially in the area of Customer Due Diligence, forfeiture, Know your Customer Principles, suspicious transactions, Currency Transaction Report et cetera.

TERRORISM

The FATF formulated 9 Special Recommendations to combat the financing of terrorism, which when combined with the Forty Recommendations on money laundering, set out the basic framework to detect, prevent and suppress the financing of terrorism and terrorist acts. The Recommendations are designed to provide the framework for full implementation of the International Convention for the Suppression of the Financing of Terrorism and the United Nations Security Council Resolution 1373. The Special Recommendations are now merged with the Forty Recommendations.

The Forty Recommendations require each country to criminalize the financing of terrorism, terrorist acts and terrorist organizations and to ensure that such offences are designated as money laundering predicate offences.[116] In domesticating the international treaties[117] to which Nigeria is

[107] Subsection 3 (b)
[108] Subsection (4) (b)
[109] Section 15 (i)
[110] Subsection (2)
[111] Subsection (3)
[112] Subsection 3(a)
[113] Subsection 3 (b)
[114] Subsection (5)
[115] Subsection (f)
[116] SR1.

a signatory, the nation through the terrorist Act of 2011 criminalizes not only the financing of terrorists' acts but also the financing of terrorist organizations. In addition, the EFCC Act 2004 criminalizes participation or financing of terrorism by any means whatsoever and provides punishment of life imprisonment.[118]

Overview of some Key sections under the Terrorism (Prevention) (Amendment) Act, 2013

The Act makes provision for extra-territorial application of the Act and strengthens terrorist financing offences. Some of the key provisions include:

All acts of terrorism and financing of terrorism are prohibited by the Terrorism (Prevention) (Amendment) Act 2013.[119]

The Act also proscribed soliciting and giving support to terrorist groups for the commission of terrorism.[120] It provides:

> Any person who knowingly, in any manner, directly or indirectly, solicits or renders support-
>
> (a) For the commission of any act of terrorism;[121] or
>
> (b) To a terrorist group, commits an offence under this Act and is liable on conviction to imprisonment for a term of not less than twenty years.[122]

This section is a replica of article 2 of the International Convention for the Suppression of the Financing of Terrorism, 1999. For an act to constitute an offence under this section, it shall not be necessary that funds were actually used to carry out an offence. This section also covers situations where a person or group of persons give material, monetary or proprietary assistance to terrorist groups.

It is also an offence when a group of persons acting with a common purpose contribute to the commission of an offence,[123] if the offence is committed-

(i) With the aim of furthering the criminal activity or criminal purpose of a terrorist group.[124]

(ii) In the knowledge of the intention of the group to commit terrorism.[125]

This section generally prohibits a range of violent acts and is strongly state centred. It overtly aimed at protecting the Nigerian government against threats and intimidations of non state actors. We submit that this definition will not provide the nation with the foundation for legally determinate anti- terrorism regime, or one which remains workable through changing political landscape. This is because it is neither legally nor politically tenable to confer monopoly over violence on the state.

The Act also criminalizes funds used to support terrorism. It provides:

> A person or body corporate who, in any manner, directly, willingly provides, solicits or collects any fund or attempts to provide, solicit or collect any fund with the intention or knowledge that they will be used, in full or in part to finance a terrorist or terrorist organization; commit an offence in breach of an enactment specified in the schedule to this Act or do any other act intended to cause death or

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[117] For example, the *1999 Convention for the Suppression of the Financing of Terrorism*, the UN Security council Resolution 1373 et cetera.

[118] Section 15 of the EFCC Act, 2004.

[119] Ibid.

[120] Section 5 (1). Ibid

[121] Section 5 (1) (a). Ibid.

[122] Section 5 (1) (b). Ibid.

[123] Ibid.

[124] Ibid..

[125] Terrorism (Prevention) (Amendment) Act, 2013.

> serious bodily injury to a civilian or any other person not taking active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a group of people or to compel a government or an international organization to do or to abstain from doing any act, is liable on conviction to imprisonment for a term of not less than ten years, and in the case of a corporate body to a fine of not less than N100,000,000, the prosecution of the principal officers of the corporate body, the winding up of the corporate body and prohibition from its reconstitution or incorporation under any form or guise.[126]

This section is violated the moment funds are collected or provided, knowing or intending that they are to be used for terrorist purposes, whether by an individual or group. The offence is complete whether or not the funds are ultimately so used or an intending terrorist act is accomplished or attempted and without regard to whether the funds are of legal or illegal origin[127] The above definition is the one most countries have adopted for purposes of defining terrorist financing. This section is similar to section 13 of the Terrorism (Prevention) (Amendment) Act, 2013 in the sense that both sections defined terrorist funding and funds used for terrorism as "soliciting or collecting of funds with the intention that they would be used for terrorist financing, terrorism or terrorist organization." The only difference between the two sections is that section 13, in addition to terrorist funding added property or other services. It is submitted that these two sections be merged to avoid confusion and duplication. An offence under this section shall apply, regardless of whether the person alleged to have committed the offence is in the same country or a different country from the one in which the terrorist group or proscribed organization is located; or the terrorist act occurred or is planned. [128]In proving the offence of terrorist financing, it is not necessary that funds were actually used to carry out terrorist acts, or funds were used to attempt a terrorist act, or funds were linked to a specific terrorist act.[129] For the purpose of this section, intention may be inferred from objective factual circumstances.[130]

The Act proscribes the collection, soliciting, acquisition or making funds or property available to terrorist organizations. It provides:

> A person or body corporate, who, in or outside Nigeria solicits, acquires, provides, collects, receives, possesses, or make available funds, property or other services by any means, whether legitimate or otherwise, to terrorist organizations, or individual terrorist, directly or indirectly, willingly, with the unlawful intention or knowledge or having reasonable grounds to believe that such funds or property will be used in full or in part in order to commit or facilitate an offence under this Act or in breach of the provisions of this Act solicits, acquires, provides, collects, receives, or possesses monetary or other property, or enters into or becomes involved, participates as an accomplice, organizes or directs others in an arrangement which facilitates the acquisition, retention or control by or on behalf of another person of terrorist fund by concealment, removal out of jurisdiction, transfer to a nominee or in any other way as a result of which money or other property is made available, or is to be made available, for the purpose of terrorism or for a terrorist individual, terrorist organization, or a proscribed organization, commits an offence and shall on conviction be liable to life imprisonment.[131]

[126]Section 10 (1).Ibid.
[127]See Article 2(2) of the UN Convention For the Suppression of the Financing of Terrorism 1999
[128]Section 10 (1) (a) of the Terrorism (Prevention) (Amendment (Act, 2013.
[129]Ibid.
[130]Ibid.
[131]Section 13 (1) and (2) of the Terrorism (Prevention) (Amendment) Act, 2013

It is submitted that for an act to constitute an offence under this section, it is not necessary that, the funds or property were actually used to commit any offence of terrorism.[132] Also, by defining "terrorist funding" as "soliciting, receiving, provision, possession of monetary or other property or making available money for the purpose of terrorism," it means that any person who is in possession or provides some type of aid, monetary or non monetary, to a terrorist could be deemed to have provided funds or property. Additionally, the definition covers other support materials that can be utilized by terrorists to accomplish their goals.[133]

The definition of terrorist funding or property is not limited to financial instruments. It includes providing chemical or biological weapons for terrorist's purposes. Thus, one who violates the provision of section 13 of this Act, by soliciting, receiving, providing money for terrorists purpose or possessing chemical weapons or other like devices can potentially be charged for terrorist funding. This is a powerful tool for prosecutors who wish to maximise the power of the Act. If the evidence merely reveals that the defendant did not know what the terrorist operative who received the support intended to do with the support, all that is required is showing that the defendant knew that the recipient had participated in terrorist activity in the past or has threatened to do so in the future.[134] Thus, whether the supplier of the resources knew the recipient was going to commit a terrorist act or merely knew the recipient had done so in the past, section 13 of the Terrorism (Prevention) (Amendment) Act, 2013 would apply.[135]

Section 14 of the Act provides for dealing, acquisition, possession, conversion, concealment, disguising and provision of financial services to terrorists. It provides:

> A person or entity who, knowingly-
> (a) Deals directly or indirectly, in any terrorist funds;[136]
> (b) Acquires or possesses terrorist fund[137],
> (c) Enters into, or facilitates, directly or indirectly, any transaction in respect of a terrorist funds,[138]
> (d) Converts, conceals, or disguises terrorist funds or property[139], or
> (e) Provides financial or other services in respect of terrorist fund or property at the direction of a terrorist or terrorist group commits an offence under this Act and is liable on conviction to imprisonment for a term of not less than twenty years.[140]

Subsection (2) provides that it is a defence for a person charged under subsection (1) to prove that he did not know and had no reasonable cause to suspect or believe that the arrangement is related to a terrorist property. This section is similar to sections 10 and 13 of the Act. It is therefore submitted that sections 10, 13 and 14 be merged to avoid confusion and misinterpretation. The National Security Adviser or the Inspector General of Police with the approval of the President may seize any cash where he has reasonable ground to suspect that the cash is intended to be used for the purpose of terrorism,[141] or belongs to or is held on trust for, a proscribed organization,[142]

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[132]Ibid.

[133]Giving monetary or property support to terrorists means currency, financial securities or other monetary instruments, financial services, training, safe houses, false documentation, communication equipment, facilities, weapons, lethal substances, explosives, personnel, any nuclear or radiological device etc.

[134]Ibid.

[135]Ibid.

[136] Section 14(1) (a) of the Terrorism (Prevention) (Amendment) Act, 2013

[137]Ibid.

[138]Ibid.

[139]Ibid.

[140]Ibid.

[141]Section 12(1)(a) of the *Terrorism (Prevention) Act, 2013*.

[142]Ibid..

or represents property obtained through acts of terrorism.[143]The enactment of this section shows that Nigeria has complied with the FATF 40 Recommendations[144] which provides that each country should adopt measures similar to those set in the Vienna Convention, Palermo Convention and the Terrorist Financing Convention, including legislative measures to enable competent authorities confiscate funds intended to be used in money laundering, proceeds intended to be used in the financing of terrorism, terrorist act or terrorist organizations or property of corresponding value.[145]

The above section used the word "seizure" while the FATF 40 Recommendation used the word "confiscation", Freezing, seizure and confiscation may have different meanings in different countries. "Freezing" means that a competent authority within a country has the authorization to block or restrain specific funds or assets and thereby prevent those funds or asset from being moved.[146] "Seizure" means that the competent government authority has authorization to take control of the specified funds or assets.[147] Under seizing, the assets or funds remains the property of the original owner, but possession, administration or management of the assets is taken over by the competent authority. "Confiscation" or "forfeiture" means that the competent authority has authorization to transfer ownership of the specified funds or assets to the country itself.[148] Confiscation normally occurs when there is criminal conviction or judicial decisions that determine that the assets are derived from criminal activity or intended to be used in violation of law.

From above, it is obvious that the Act has excluded freezing and confiscation and limited the provision of section 12 to seizure alone.[149] It is therefore submitted that the section should be amended to include freezing and confiscation in order to comply with FATF Recommendation 4, especially because, Nigeria is still practicing the conviction based forfeiture. The Non Conviction based forfeiture Bill is still pending before the Senate committee on Drugs and financial Crimes.

1.3.2.2 Economic and Financial Crimes Commission (Establishment) Act, 2004.[150]

The Act provides for the establishment of the Commission charged with the responsibility of all economic and financial crimes laws among others[151]. Specifically, the Act mandates the Commission to collaborate with government bodies within and outside Nigeria concerning the following:

(a) The identification, determination of the whereabouts and activities of persons suspected of being involved in economic and financial crimes.
(b) The movement of proceeds or property derived from the Commission of economic and financial and other related crimes.
(c) The exchange of personnel or other experts.
(d) The establishment and maintenance of a system for monitoring international economic and financial crimes in order to identify suspicious transactions and persons involved.
(e) Undertaking research and similar works with a view to determining the manifestation, extent, magnitude, and effects of economic and financial crimes, advising government on appropriate intervention measures for combating same.[152]

[143]Ibid
[144]Recommendation 4.
[145]Ibid.
[146]FATF Interpretative Note for Spec. Rec 111, at paragraph 7a.
[147]Ibid.
[148]Ibid.
[149]Ibid.
[150]Cap. E1, LFN, 2004.
[151]Section 1 of the EFCC (Establishment) Act, 2004.
[152]Ibid.

The EFCC Act, 2004 criminalizes participation of financing of terrorism by any means whatsoever and provides punishment for life imprisonment. Section 15 provides:

> (1) A person who wilfully provides or collects by any means, directly or indirectly, any money from any person with intent that the money shall be used for any act of terrorism, commits an offence and is liable on conviction to life imprisonment for life.
> (2) Any person who commits or attempts to commit a terrorist act or participates in or facilitates the commission of terrorist act, commits an offence under the Act and is liable on conviction to life imprisonment;
> (3) Any person who makes funds, financial assets or economic resources or financial or other assets o relates services available for use of any other person to commit or attempt to commit, facilitate or participate in the Commission of a terrorist act is liable on conviction to imprisonment for life.

The EFCC Act provides for the legal capacity to prosecute and apply criminal sanctions to persons that finance terrorism. In establishing the offence "intention" or "knowledge" must be proved by the prosecution. Considering the nature of the punishment, the offences therefore qualify as money laundering predicate offences.[153] This gives a closer connection between international terrorism and money laundering which is the objective of Recommendation 5 of the FATF.

In the fight against terrorist financing and other financial crimes the Act enables the commission to seize and confiscate any property that is the proceed of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations and other financial crimes and forfeiture thereof upon conviction. This is a clear domestication in line with FATF Special Recommendation iii which requires each country to take appropriate action to authorize competent authorities within the country to "seize and confiscate properties that are the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorists acts or terrorist organizations".[154]

In ensuring that such assets are confiscated, the EFCC Act empowers the Commission to put in place interim measure, to seize assets pending obtaining court order[155] to that effect.[156]It is submitted that the objective of the seizure is necessary to deprive terrorists and terrorist networks of the means to conduct future terrorist activity and maintain their infrastructure and operations.

The Act requires the Commission to ensure that all forfeited assets are transferred to the Federal Government.[157] It is however, not clear whether the forfeited assets will be for the benefit of all federating units. Also, the EFCC Act provides that the authority to freeze and confiscate funds or assets also extends to funds or other assets derived or generated from funds or other assets owned or controlled directly or indirectly by terrorists, those who finance terrorism, or other organizations.[158] Again, where a person is arrested for an offence under the Act, the Commission is empowered to immediately trace and attach all the assets acquired by him as a result of economic and financial crime.[159] In *Federal Republic of Nigeria vs. Emmanuel Nwude*[160], the court upheld the order of interim forfeiture made by the Federal Republic of Nigeria and ordered the accused persons involved in a Brazilian Bank scam involving 242 million US dollars to give restitution to the bank. Also, in *Federal Republic of Nigeria vs. Tafa Balogun*,[161] a former

[153]Section 15(1)(a)(ii) of the EFCC (Establishment) Act, 2004.
[154]Ibid.
[155] Court means High Court of State or Federal Capital Territory.
[156]Section 26 and 29, EFCC (Establishment) Act, 2004.
[157]Ibid.
[158]Ibid.
[159]Section 26 of the EFCC (Establishment) Act, 2004.
[160] LHC/ID/92C/2004, unreported.
[161]LHC/L/099/2005, unreported.

Inspector General of Police who was prosecuted for financial crimes had his assets forfeited and bank accounts frozen.

Another issue that is not clear from the Act is whether the proceeds derivable from any forfeited assets should be paid into the Federation Account in line with the *Constitution of the Federal Republic of Nigeria 1999*. This is in contradiction with the stipulation under the NDLEA Act which clearly provided for disposal of forfeited property arising from drugs associated offences and the proceeds of which is to be paid into the Consolidated Revenue Fund Account of the Federation.[162]

The Act also vested the Commission special powers to investigate the properties of any person if it appears to the Commission that a person's life style is not justified by his source of income.[163] It is submitted that how a life style could be determined by a source of income has no scientific basis because it is difficult to gauge a person's income.

CONCLUSION

From the above, it is clear that Nigerian government has demonstrated commitment by putting in place legislative and enforcement framework for the implementation of international instruments for combating terrorist financing and money laundering. The laws put in place include: the *Terrorism Act 2011, the Money laundering (Prohibition) Act 2011, The NDLEA Act, Cap. N30 LFN, 2004*, the *EFCC Act 2004* and the *CBN Act of 2007*. This commitment culminated in vesting enforcement powers to the law enforcement and other regulatory bodies. These bodies complemented the provisions of the laws by providing comprehensive regulatory and supervisory frameworks for combating terrorist financing and money laundering.

In Nigeria, the implementation or enforcement of any treaty is dependent on its being re-enacted as an Act of National Assembly. It follows therefore that enforcement of any treaty entered into by Nigeria is dependent on its domestication as part of Nigerian law.[164]

We have also seen that in an effort to domesticate the provisions of the *Vienna Convention, of 1988*, the *National Drug Law Enforcement Agency Decree 48 of 1989* became the first legislation in Nigeria to create the offence of money laundering. This Act leans heavily towards hard drugs proceeds to the exclusion of other forms of criminal funds. Consequently, the *Money Laundering Decree 3 of 1995* was enacted. This Decree was amended by the *Money Laundering (Amendment) Act* of 2002, 2003, 2004 and 2011. The *Money Laundering (Prohibition) Act, 2011* repealed all the previous legislation and made comprehensive provisions on limitation of cash payments, duty to report international transfers, customer due diligence, reporting suspicious transaction reports, mandatory disclosures etc.

In compliance with the FATF Special Recommendation 9 and the 40 Recommendations, which require each country to criminalize the financing of terrorism, terrorists acts and terrorists organizations and to ensure that such offences are designated as predicate offences, Nigeria enacted the Terrorism act of 2011.

In domesticating the international treaties to which Nigeria is a signatory, the nation through the Terrorism act of 2011, criminalize not only the financing of terrorism but also the financing of terrorist organizations. In addition, the EFCC Act of 2004 criminalizes participation or financing of terrorism by any means whatsoever and provides punishment of life imprisonment. Some of the key provisions of the Terrorism Act are obligation to report suspicious transaction, revocation of charities linked to terrorism, seizure of terrorist's funds etc.

We have also seen the enforcement of AML/CFT laws in Nigeria by the EFCC, NDLEA, CBN, SCUML, SEC, NDIC, NIC and GIABA and reached the conclusion that in spite of these efforts; much is still left to be desired. This is because the perpetrators are professionals and highly

[162]Section 38 of the NDLEA Act

[163]Section 1 (1) of the Terrorism (Prevention) (Amendment) Act, 2013

[164] Section 12(1) of the 1999 Constitution

placed persons in the society. For these reasons terrorist financing and money laundering continue to evolve assuming new scope and applying new tactics.

The *Money Laundering (Prohibition) Act, 2011* provides a comprehensive framework for AML control in Nigeria. Although the law ensures substantial compliance with the Forty Recommendations of the Financial Action Task Force, it is important to appreciate that the Nigerian AML control has many unique elements and that it is more comprehensive than those of many of the members of the Financial Action Task Force. Those unique elements were specifically included to ensure that the Money Laundering (Prohibition) Act is effectively implemented in Nigeria. It is submitted that some of the provisions of the Act may be open to challenge in terms of fundamental human rights.[165] Also constitutional litigations may follow in respect of issues such as infringement of privacy and the breach of confidentiality under the Act.[166] The success of such challenges will depend largely on the way in which the relevant powers are exercised by relevant law enforcement bodies.

Finally, the war against money laundering and terrorism financing is not without impediments. It is submitted that there is need for identifying the challenges in the efforts of relevant regulatory and law enforcement agencies with a view to proffering solution to the problem. These impediments would be discussed in the next chapter.

[165] See Section 13 of the *Money Laundering (Prohibition) Act, 2011*. This section empowers the EFCC, CBN and NDLEA to place any bank account under surveillance, obtain access to any computer and obtain communication of any authority, instrument or private contract as well as all banks and financial records.

[166] Ibid