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Legal Reform and Corruption of Financial Institutions in
Nigeria

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ABSTRACT

Corruption is a transnational financial crime which undermines the economic and political stabilities of States. The adverse effect of the crime on the economic development of most countries has raised national and international concerns. Most international organisations recommend preventive and criminalization measures as a solution to corruption. However, there is no single recipe for fighting the phenomenon because causes and definitions of the crime vary in accordance with national legal systems and cultures. Most published works seem to have adapted a theoretical approach to the crime. Approaches to prevent corruption, such as by passing laws, creating new institutions and conducting anti-corruption campaigns, have failed to make significant impact to control the phenomenon. The situation calls for more diligent and resolute governmental and international actions. It is pertinent to approach the phenomenon as an 'international concern', rather than as a crime, because what constitutes an immoral or a corrupt behaviour depends on a particular culture; and the ethical standards of a society cannot be separated from its social and political order. Moreover, different countries have divergent perceptions of corruption. Furthermore, preventive measures would have little or no effect in a political environment in which institutions, rules and norms of behaviour have adapted to corruption. There is the need for 'curative measures' in such circumstances; and public awareness and campaign programmes against the phenomenon may produce expected results; albeit in the long-term. The situation calls for a multi-faceted approach to legal and socio-cultural mechanisms to address the malaise. This work is based on four analytical viewpoints of the phenomenon: legal perspective, criminological perspective, sociological perspective and cultural perspective.

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INTERNATIONAL AND INTER-GOVERNMENTAL CONVENTIONS

United Nations (Resolution 58/4)

International Monetary Fund

World Bank

Financial Action Task Force (FATF)

Organisation for Economic Corporation and Development (OECD)

African Union Convention on Prevention and Combating Corruption

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INTRODUCTION

In developing this research, emphases have been placed on primary sources of information and references to secondary sources of information have been made where relevant. Much works have already been published on corruption: notably Webb, Salifu and Kaufmann, among others; but most of these works seem to have taken a theoretical approach rather than considering the societal reasons that encourage the crime. In many parts of the world, corruption has become part of a socio-economic phenomenon; and in many countries, human lives depend on corrupt money. Eradicating corruption is thus a dilemma. On the other hand, if no effort is made to eradicate it, this crime will go beyond all proportion

This work appreciates the dilemma around the crime of corruption; but does not pretend to provide any sort of solution. Whereas the socio-economic effect of corruption is damaging, this research maintains that legislative law alone cannot deliver expected results of combating the crime. One of the most important teams of this research is that public awareness must be created in a proactive situation; and perhaps an ethical approach to eradicate the crime may be helpful.

Although the main focus of this work is on the corruption of Nigerian financial institutions, it represents a critical overview of the international initiatives in combating transnational financial crimes such as corruption. The work is divided into four further chapters. Chapter one evaluates the international comity's viewpoints of the meaning of corruption and the correlation between economic development and corruption. It represents an analytical overview of the efforts of the United Nations, the World Bank, the International Monetary Fund, the Organisation for Economic Cooperation and Development and the African Union

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in combating transnational corruption and the viability of criminalization theory in combating corruption and related transnational crimes based on three analytical viewpoints of the phenomenon: criminological perspectives, sociological perspectives and cultural perspective.

Chapter two examines a general societal perception of corruption in Nigerian and the efforts in combating the phenomenon and chapter three evaluates the corporate governance of Nigerian financial institutions and the effectiveness of corporate governance mechanism in controlling the unethical conducts of banks' board of directors and senior managements in Nigeria.

Chapter three also examines, for example, the correlation between money laundering and corruption; as well as the Financial Action Task Force regulations and the International Monetary Fund's transparency principles for financial institutions. This chapter further examines the critical viability of good governance in combating corruption in Nigeria.

Chapter four represents some jurisdictional issues and validity to transnational crime; and establishes the correlation between law, customs and cultural diversities in the transnational combat against corruption.

The work closes with analytical conclusions and suggests, *inter alia*, that corruption should be treated as an "international concern" rather than as an international crime.

CHAPTER 1

International Initiatives against Corruption

1.1. Introduction

Corruption is identified as an international financial crime due to its association with money laundering¹. Cross-border corruption indicates the need to attack corruption on an international and regional basis; albeit there is no single recipe for fighting corruption because causes and logics of corruption vary². What constitutes an immoral or a corrupt behaviour, for instance, depends on a particular culture; and the ethical standards of a society cannot be separated from its social and political order³. It is thus pertinent to note from outset that there is no comprehensive and universally acceptable definition because corruption is rather a concept that covers a wide spectrum of behaviour and a number of

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1. Philippa Webb, "UN Convention against Corruption" Vol.8 No.1 *Journal of International Economic Law* (Oxford University Press, 2005) pp.191-229 at p. 193.
 2. Opening speech of Peter Eigen, chairman of Transparency International, at the corruption conference in Berlin, Germany, April, 1998.
 3. Mahmood Bagheri, *International Contracts and National Regulation: dispute regulation through international commercial arbitration*, The Hague; London, Kluwer Law International, 2000, p.20.
 4. Richard Alexander "Corruption as a Financial Crime" Vol.30 No.4 *Company Lawyer* (Thomson Reuters 2009) pp. 98-104 at 98.

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different offences⁴ and as such, different countries have divergent perception of corruption given their political and economic history⁵. Moreover, criminalization is not an absolute solution to the fight against corruption.

Be that as it may, there has been evidence of correlation between corruption and lower economic growth in most developing countries of the world in recent years. Corruption has not only become a major political issue, but an economic crime that particularly undermines growth in developing countries and discourages foreign investments⁶. For instance, corruption blights almost everything that the State does in Angola: new business cannot start without paying bribes, nor can goods move through the ports without pay-offs⁷. There have thus been recent calls for greater control of corruption and associated economic crime within many organizations, such the United Nations, the World Bank, the African Union and the Organisation for Economic Corporation and Development.

This chapter represents a critical overview of the United Nations' efforts in an attempt to combat corruption. It addresses relevant questions such as: is corruption good, bad or irrelevant to economic development? Is criminalization an ultimate solution to the fight against corruption? Can corruption be prevented or eradicated? The chapter closes with

5. P. Webb, op. cit., p.193.

6. Adam Salifu, "Can Corruption and Economic Crime be controlled in Developing Economies – and if so, is the cost worth it?" vol. 11 no.3 *Journal of Money Laundering Control* (Emerald Group Publishing, 2008) pp. 273-283 at 273.

7. Robert Guest, *Shackled Continent: Africa's past, present and future*, London: Macmillan, 2004 at p.68.

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analytical conclusions based on three viewpoints of the phenomenon: criminological perspectives, sociological perspectives and cultural perspective; and suggests, *inter alia*, that corruption should be treated as an “international concern” rather than as an international crime. But first, there is the need to establish an appropriate definition of the concept upon which this work shall be built.

1.2. What is ‘Corruption’?

Most authors classify corruption as either grand corruption⁸ or petty corruption⁹, depending on the kind of corrupt activity in question, the sum of money and the sector wherein it takes place. But, it should be emphasised from outset that the distinction often made between what is called ‘grand corruption’ and ‘petty corruption’ is misleading, because both forms of corruption affect the state as well as the individuals¹⁰. Moreover, such classification infers

8. Samuel Monday Atuobi, “Corruption and State Instability in West Africa: An Examination of Policy Options” No. 21, *KAIPTC Occasional Paper*, December 2007 p.7 -

http://www.kaiptc.org/_upload/general/Paper21_Atuobi.pdf.

9. Edward F. Ampratwum “Fight against Corruption and its implication for Development in Developing and Transition Economies” Vol.11 No.1 *Journal of Money Laundering Control* (2008) pp. 76-87 at 79.

10. E. Ampratwum, *ibid*.

11. Daniel Kaufmann, “Myths and Realities of Governance and Corruption” Chapter 2.1, p.82. Available at http://www.worldbank.org/hague/hague_survey.php3.

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that corruption can be quantified. Nevertheless, an empirical study and survey carried out by the World Bank between 1996 and 2004 proved that corruption cannot be measured¹¹.

The focus should thus be on the act of corruption itself rather than the agents involved in the phenomenon.

The word 'corruption' is derived from the Latin word 'corruptus' which means to break. Its derivation stresses the destructive effects of corruption on societal fabric and encompasses all situations where agents and public officers break the confidence entrusted to them¹².

The *Oxford English Dictionary*¹³ defines corruption as the perversion or destruction of integrity in the discharge of public duties by bribery or favour; the use or existence of corrupt practices, especially in a state, public corporation etc. The same Dictionary defines the adjective 'corrupt' as perverted from uprightness and fidelity in the discharge of duty; influenced by bribery or the like venal; and it extends the verb 'corrupt' to any duty, whether public or not, whereof the performer may be induced to act 'dishonestly' or 'unfaithfully'. The Dictionary defines 'bribe' as an act to influence corruptly by reward or consideration, to prevent the judgment or to corrupt conduct by a gift. This definition reflects corruption in its legal sense and does not include favouritism. It as well restricts the

12. Colin Nicholls et al, *Corruption and Misuse of Public Office*, Oxford: Oxford University Press, 2006, p.1. 1989 edn.

13. C. Nicholls, *ibid*, p.2.

14. A. Shehu, *op. cit.*, p.273.

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meaning of corruption to bribery associated with public duties. Meanwhile, the definition of corruption in this sense no longer reflects the laws of most modern states¹⁴.

The United Nations Convention against Corruption is the first global instrument embracing a comprehensive range of anti-corruption measures taken at international level; but it does not define corruption. The Convention rather identifies and describes specific conducts that are generally classified as corrupt. Such conducts includes: bribery of national public officials¹⁵; bribery of foreign public officials and officials of international organisations¹⁶; embezzlement, misappropriation or other diversion of property by public officials¹⁷; trading influence¹⁸; abuse of functions¹⁹; illicit enrichment²⁰; bribery in the private sector²¹; embezzlement of property in the private sector²²; laundering of proceeds of crime²³; concealment²⁴ obstruction of justice²⁵.

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15. Article 15
 16. Article 16
 17. Article 17
 18. Article 18
 19. Article 19
 20. Article 20
 21. Article 21
 22. Article 22
 23. Article 23
 24. Article 24
 25. Article 25

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The Organisation for Economic Corporation and Development (OECD) is mainly concern about the wide spread phenomenon of bribery of foreign public officials in international business transaction and the consequential moral, political and economic effects²⁶. The Convention defines bribery as:

Promise or giving of undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business, incitement, aiding and abetting or authorization of an act of bribery of a foreign public official; attempt and conspiracy to bribe a foreign public official²⁷.

Nevertheless, this definition restricts the meaning of corruption to bribery associated with public officials while corruption constitutes more than that. Moreover, the OECD draws distinction between “active corruption” and “passive corruption” or “passive bribery”²⁸, which is superfluous because whether active or passive, the act of bribery do have the same consequential effect.

The African Union Convention on Prevention and Combating Corruption defines corruption as direct or indirect solicitation or acceptance, the offering or granting of any goods of monetary value, or other benefit, such as gift, favour, promise or undue advantage in

26. See the preamble of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, 1997.

27. See paragraphs 1 and 2 of the Convention.

28. See the OECD Bribery in Public Procurement: Method, Actor and Counter-Measures (2007, Paris), available at <http://213.253.134.43/oecd/pdfs/browseit/2807061E.PDF>. Assessed on 19/07/2010.

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exchange for any act or omission in the performance of public functions, illicit enrichment, embezzlement, concealment, and any collaboration or conspiracy to commit corrupt act²⁹.

However, this definition is not detailed enough to cover most activities that involve corruption in the private sector.

A typical public sector definition is one that attempts to provide an interface between politicians and bureaucrats³⁰. In this regard, corruption can be defined as the utilisation of official position or titles for personal or private gains, either on an individual or collective bases, at the expense of the public good, in violation of established rules and ethical considerations, and through the direct or indirect participation of one or more public or private officials, whether they be politicians or bureaucrats. Hence, the option considered during the elaboration of the United Nations Convention against Corruption, was not to define corruption but to identify and describe the specific conducts that are generally classified as corruption, criminal and fraud, extortion, abuse of discretion, favouritism and nepotism, cheating or exploiting, conflicting interest, and improper political donations³¹.

29. Arts. 1 and 4 of the Convention.

30. Hope, R. K et al, *Corruption and Development in Africa: Lessons from Country Case Studies*, Macmillan Press Ltd, London, p. 18.

31. Michel Dion, "What is Corruption corrupting? A philosophical viewpoint", Vol.13 No.1 *Journal of Money Laundering Control* (Emerald Group Publishing, 2010) pp. 45-54 at p.45.

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Broadly speaking, therefore, corruption can be defined as a direct or an indirect solicitation or acceptance of goods of monetary values, gifts or favour in order to influence ones function; and includes the following acts upon which this work is built: bribery, embezzlement of funds, fraud, intimidation, extortions, abuse of power, conflict of interest, insider trading, receiving an unlawful gratuity, favouritism, nepotism, illegal contributions, money laundering, identity theft, white collar crime and any other conduct that might be classified as corrupt by law in the future.

1.3. Economic Development and Corruption

There is no doubt that benefits also flow from corruption as argued by Heidenheimer Johnson and Le Vine³². Policy-makers from developed nations and institutions established by the Bretton Wood Agreement all perceived liberal economic policy as an encouragement to free trade and foreign investment; and a means of securing economic growth, prosperity and poverty reduction³³. Yet the negative effects of corruption on the prosperity of a nation and it citizens are well rehearsed in economic studies from research institutions and

32. Heidenheimer, Johnson and Le Vine eds., *Political Corruption: a Handbook*, London, Transaction Publishers, 1989.

33. Indira Carr, "Corruption in Africa: is the African Union Convention on Combating Corruption the answer? *Journal of Business Law* (Sweet & Maxwell, March, 2007) pp.111-136 at p.111.

34. Indira Carr, *ibid*, p.112

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international organisations³⁴. India, for instance, has evidenced outstanding growth in her economic sector due to modern trade liberalisation and foreign investments; but poverty is still highly visible in that nation as a consequence of corruption among other things.

According to the United Kingdom Department for International Development, around 350 million people in India still remain below the international US \$ 1 per day poverty line set by the World Bank³⁵. It then follows that liberal economic policy may secure economic growth; but it can contribute little or no effort in reducing poverty in face of endemic corruption.

Furthermore, empirical study over 48 banks in Nigeria between 1996-2006 reveals that corruption has a significant positive impact on bank profitability in Nigeria³⁶; but evidence from 49 countries surveyed by the World Economic Forum reflects that where corruption is more prevalent, the cost of capital and investing for firms tend to be higher³⁷. Research by

35. www.dfid.gov.uk.

36. Toni Aburime, "Impact of Corruption on Bank Profitability in Nigeria" pp 11-13. Available at:
http://kgk.bmf.hu/system/files/Aburime_Toni.pdf.

37. Daniel Kaufmann, "Corruption: the Facts" (summer 1997 edition of Foreign Policy Articles) pp.1-17 at p.5. Available at www.worldbank.org.

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Paolo Mauro also reveals that corrupt countries are likely to achieve aggregate investment levels of almost 5 per cent less than their gross domestic product growth per year.

Although what counts as poverty varies from culture to culture and from time to time, in any society there may be a standard view of what constitutes a minimally decent life: a life which persons with average income can afford; and anyone whose income is substantially below the appropriately designated income is termed poor³⁸. The situation is more obvious in societies where the few in power embezzle public or private funds to enrich themselves and their families while the masses struggle to meet the financial standards required by the same society. Moreover, how well or bad a society is regarding inequality is judge on terms of the principles and institutions of that society³⁹. Thus, corruption impairs capital accumulation and increases income inequality and poverty⁴⁰; thereby hampering economic growth.

1.4. The United Nations (Resolution 58/4): Policies and Challenges

38. Robin Barrow, *Injustice, Inequality and Ethics: a Philosophical Introduction to Moral Problems*, Sussex, Barnes and Noble, 1982, p. 110.

39. Larry Temkin, *Inequality*, Oxford, Oxford University Press, 1993, p.50.

40. Anwar Shah, "Tailoring the Fight against Corruption to Country Circumstances", available at www.worldbank.org.

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In its Resolution 55/4 of 4 December 2000, the General Assembly of the United Nations recognised that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organised Crime (Resolution 55/25), would be desirable. It decided to establish an ad hoc committee for the negotiation of such an instrument in Vienna and the Committee came up with the United Nations Convention against Corruption (UNCAC), which the General Assembly adopted in its Resolution 58/4 on the 31 of October 2003.

The UNCAC is by far the first global instrument embracing a comprehensive range of anti-corruption measures taken at the international level. It was designed as a universal framework to promote and strengthen measures to prevent and combat corruption more efficiently and effectively. States parties to the Convention recognised corruption as a serious multinational dilemma associated with organised and economic crimes, such as money laundering, and involving huge assets which form a considerable part of state reserves.

As a matter of fact, the concern of the international organisations regarding the phenomenon is its harmful causes to impoverishment of national economies as well as the fact that it undermines democratic institutions and the rule of law, and facilitates the emergence of other threats to human rights and security, such as organised crime, trafficking in humans and terrorism⁴¹. Corruption undermines foreign aid and free trade and

41. Antonio Maria Costa, the Executive Director of United Nations Office on Drugs and Crime:

http://www.unodc.org/pdf/crime/corruption/compendium_e.pdf , assessed on 18/06/09. See also the preamble of the UNCAC.

42. Chapter 1

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increases poverty. The purpose of the Convention thus is to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption and asset recovery; and to promote integrity, accountability and proper management of public property⁴². However, the following are the policies and challenges of UNCAC's fight against corruption:

1.4.1. Prevention

Chapter II of the Convention is devoted to preventive measures. Articles 11, 9 and 6 respectively provide for prevention of corruption relating to the judiciary and public procurement as well as the establishment of anti-corruption bodies. Article 13 calls on state parties to actively promote the involvement of non-governmental organisations and other elements of civil society to fight against corruption. Nevertheless, the provisions of this chapter are non-mandatory⁴³ and corruption cannot absolutely be prevented.

Moreover, preventive measures would be irrelevant in countries where institutions, rules, and norms of behaviour have already been adopted to corruption. There is rather the need for curative measures in such instances; and public awareness and campaign programs are long-term effective measures in such circumstances.

43. P. Webb, op. cit., p. 206.

1.4.2. Criminalization

Chapter III of the Convention provides that states parties must adopt legislative and other measures to criminalize basic forms of corruption, such as bribery and embezzlement of public funds, trading influence and concealment and laundering of the process of corruption. Most of the chapter's provisions are mandatory.

Generally speaking, criminalization and law enforcement mechanisms are the United Nations' approach to combating corruption, which requires states to establish a wide range of acts of corruption as criminal offences under their domestic laws⁴⁴. There are thus references to adopting legislative measures in accordance with fundamental principles of states domestic laws or local measures to the greatest extent possible within states domestic legal system.

The qualifying clauses in the Convention, nevertheless, provide potential escapes for reluctant legislators⁴⁵ and the effectiveness of this approach is questionable from empirical evidence. In 1996, the National Accountability Commission was inaugurated in Pakistan by F. Leghari with the responsibility of investigating and decreasing high level of corruption in the country. However, political parties conveyed their acute displeasure and were not eager

44. Art. 15 (a) (b).

45. P. Webb, op. cit., p.206.

46. Marie Chene, "Overview of Corruption in Pakistan", available at

<http://www.u4.no/helpdesk/helpdesk/query.cfm?id=174>).

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to cooperate; and a new wave of corruption began afterwards⁴⁶. Also in Hong Kong, an Independent Commission against Corruption (ICAC) was set up in 1974 to clean police corruption and was considered successful at the initial stage. The Commission's budget, which was US \$ 2 million as at its first inauguration, increased to US \$ 14 million in 1982 and, ironically, the Commission at the end was not able to eliminate corruption in Hong Kong. The number rather increased afterwards⁴⁷.

1.4.3. International Cooperation and Assets Recovery

Asset recovery is an issue of restitution raised throughout the history of mankind and a current doctrine of the international community to solve the problem of recovery of assets hidden abroad by corrupt officials⁴⁸.

Chapter IV of the UNCAC provides that states parties should agree to cooperate in prevention and investigation activities and prosecution of corrupt offences. It binds parties to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court and extradite offenders. Countries are encouraged to take measures to support tracing, freezing, seizure and confiscation of the proceeds of corruption.

47. Tony Kwok Man-wai, "Formulating an Effective Anti-Corruption Strategy – the Experience of Hong Kong ICAC", available at <http://www.unafei.org.jp>.

48. Saliou Bah, "Recovery and return of proceeds of Corruption in the International Anti-Corruption Conventions" Vol.1 *International Business Law Journal* (Thomson Reuters 2009) pp. 15-34 at p.15.

49. P. Webb, op. cit., p. 206.

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This is a vital issue for developing countries where cases of political corruption have exported national wealth to international banking centres and financial heavens while resources are needed for the reconstruction of societies⁴⁹. The Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth states that an estimated US \$ 20 – 40 millions has over the decades been illegally and corruptly appropriated from some of the world's poorest countries, most of them in Africa, by politicians, soldiers and business persons and kept abroad in the form of cash, stock and bonds, real estate and other assets⁵⁰.

The International Monetary Fund (IMF) estimated that the total amount of money laundered on an annual basis is equivalent to three to five per cent of the world's gross domestic product (that is between US \$ 600 billion and \$ 1.8 trillion) and it can probably be assumed that a significant portion of that activity involves funds derived from corruption. Given the staggering amount of money being siphoned out of developing countries, the issue of asset recovery becomes a high priority from the very beginning of the UNCAC negotiations⁵¹. However, the recovery of assets derived from corruption has been hampered by the following major obstacles:

50. http://www.transparency.org/pressrelease_archive/2001/nyanga_declaration.html.

51. P. Webb, *op. cit.*, p. 207.

52. P. Webb, *ibid*, p. 210.

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- a. inadequate resources for investigating and prosecuting corrupt officers because cases of transnational corruption are usually enormously complex and require a sustained effort by experts in forensic, accounting, money laundering, and the civil and criminal laws of different countries⁵². It is thus pertinent that international organisations, such as the INTERPOL, be actively involved in training law enforcement officials and anti-corruption agencies in developing countries on modern techniques of investigating and prosecuting transnational corruption;
- b. complexity in securing admissible evidence particularly in most developing legal jurisdictions where the perpetrators themselves are usually the only witness to the corrupt act⁵³. The act may be easy to conceal but the intention behind it is difficult to establish to the required standard of proof and without adequate and admissible evidence⁵⁴. Moreover, judges and legal practitioners in most developing countries are novices in the field of transnational financial crimes. International legal organisations, such as the International Bar Association (IBA), should collaborate with the United Nations in training judges and legal practitioners of developing

53. Nlerum S. Okogbule, "Official Corruption and the Dynamics of Money Laundering in Nigeria", vol. 14 No. 1 *Journal of Financial Crime* (Emerald Group Publishing 2007) pp 49-63 at p 59.

54. Barry Rider, "Banking on Corruption", Vol. 4 No. 2 *Journal of Money Laundering Control* (Henry Stewart Publications, 2000) p 10.

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countries on legal techniques of prosecuting transnational financial crimes such as corruption;

- c. modern speed with which monies are electronically transferred around the world, from one jurisdiction to another, makes it increasingly difficult to arrest culprits and investigate the transfer of monies and assets. Developing countries thus need more assistance from the developed countries in dealing with this issue; albeit the Convention's mutual technical and legal assistance provisions may mitigate some costs⁵⁵; and
- d. asset recovery actions may be complicated, especially when the requesting state party is faces with internal political obstacles from supporters of the former leader or senior officials who allegedly transferred the assets.

1.4.4. Compliance and Political Will

The issue of compliance and political will are both major concerns in the international combat against corruption. When a treaty comes into force, ratifying states are legally obliged to comply with it according to the principle of '*pacta Sunt Servanda*'. However, the international legal environment is very different to domestic legal systems; and in most cases, there is lack of political will in some states parties to follow through their pledges. Governments should comply with treaties not only because they expect a reward for doing so, but also because of their commitments to the ideas embodied in the treaties⁵⁶; albeit good policies cannot be imposed on unwilling government⁵⁷.

55. P. Webb, op. cit., p. 120.

56. R. Guest, op. cit., p.49.

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Public opinion is much confused in regard to international law⁵⁸. International law differs from private international law in the sense that the former consists of rules which regulate relations of States, while the later concerns itself with the system of municipal law to be applied to the acts and transactions of individuals⁵⁹. Decisions of the United Nations General Assembly have binding force or operative effect that directly or indirectly affect external obligations of States⁶⁰. International Conventions carry with them obligations of cooperation

57. D.H.N. Johnson, "Contribution of Sir Erle Richards to the Science of International Law" Vol.39 *British Year Book of International Law* (Oxford University Press 1965) pp.365-401 at p.387.

58. D. Johnson, op. cit., p.392.

59. Blaine Sloan, "General Assembly Resolutions Revisited (forty years later)", Vol.58 *British Year Book of International Law* (Oxford University Press 1987) pp.39-150 at p.139.

60. B. Sloan, *ibid*, p.140.

61. P. Webb, op. cit., p. 229

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that have value as precedents and gain force through acceptance or estoppels⁶¹. There is thus no reason for States to say Resolutions are not binding.

1.4.5. Jurisdictional Diversities

Where property is appropriated outside a particular jurisdiction, it is assumed that no offence is committed within that jurisdiction because there can be no conviction of theft where the appropriation occurs outside the jurisdiction⁶². Relating this to many civil claims, it is unlikely that proceedings can be commenced against corrupt foreign officials, although it may be possible in some instances to sue them as being the necessary or proper parties to actions brought against banks or intermediaries⁶³. Jurisdictional differences are therefore challenges in combating transnational corruption because the laws of most developing countries have not kept pace with technology in a world where transactions can occur on instantaneous basis. The limit to the criminal justice system has become immediately apparent⁶⁴. Thus, as suggested earlier, the INTERPOL and similar international organisations should provide law enforcement agencies and private sectors of developing countries with

62. B. Rider et al, *Guide to Financial Services Regulation (3rd ed.)*, Bicester, CCH Editions Ltd, 1997, pp 419.

63. For more discussion on international jurisdictional diversities, see chapter 4 of this work.

64. Pauline Tamesis, "Different Perspective of International Development Organisations in the fight against Corruption" in Sahr Kpundeh and Irene Hors edited *Corruption and Integrity Improvement Initiatives in Developing Countries*, New York, United Nations Development Program, 1998 p.132.

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required modern training and expertise in detecting and prosecuting transnational crimes such as corruption.

1.5. International Monetary Fund and World Bank Policies of Combating Corruption

The IMF and the World Bank focus their attention on the donors, non-governmental organisations, and governments and citizens, especially in developing countries where they threaten to undermine grassroots support for foreign assistance. The World Bank particularly views corruption as hindrance to economic development and is concerned not with the exercise of State powers in the broad sense but specifically with the appropriate management of the public sector and creation of an enabling environment for a private sector. Its policy hence calls for priority to be given to a deeper and thorough economic liberalisation and deregulation in order to reduce corruption⁶⁵. Privatisation of state-owned

65. Susan Rose-Ackerman "Corruption and the Global Economy" in Sahr Kpundeh and Irene Hors edited *Corruption and Integrity Improvement Initiatives in Developing Countries*, New York, United Nations Development Program, 1998 p.27.

66. P. Tamesis, op. cit., p.1

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enterprise can no doubt improve economic performance and thus reduce corruption. But the process of turning over state assets to private owners itself is fraught with opportunities for corruption and self-dealings⁶⁶.

The World Bank's process of attaining its goals is: economic policy reform; institution strengthening; and international action. The Bank's framework for addressing corruption guides its activities at the following four levels⁶⁷:

- a. preventing fraud and corruption within bank financial project;
- b. providing aid to countries that request its supports in their efforts to reduce corruption;
- c. taking corruption more explicitly in account when providing countries with assistance, lending considerations and design of project; and
- d. supporting international efforts to reduce corruption.

However, an aid policy based on conditional imposition may rather undermine democracy by making governments more accountable to creditors and donors than their citizens.

Governments may be forced to impose draconian measures directly against the interest of their people because of debt settlement conditions.

67. http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html, assessed on 18/06/2010.

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1.6. The Organisation for Economic Cooperation and Development (OECD) Convention

The Organisation for Economic Cooperation and Development Convention is noted for its efforts in combating bribery of foreign public officials in international business transaction and represents an effort to guide the anti-corruption activities of government that influence the flow of most of the world's investment, trade and goods. OECD is an inter-governmental organisation of those developed countries that accepted the principles of democracy and free market economics⁶⁸.

The Convention deems bribery of foreign officials as an extraditable offence⁶⁹ and its scope covers foreign legislative, administrative or judicial officials and any official or agent of a public international organisation⁷⁰. Article 1 mandates state parties to take necessary measures in criminalizing intentional offer, promise or any undue pecuniary intention to bribe a foreign official and Article 2 ensures that parties take measures to establish liability of legal person for committing the offence; albeit in accordance to their domestic criminal law provisions regarding liability of legal persons.

68. Article 10.

69. Article 1 (4) (a).

70. The Former Recommendation on Bribery in International Business Transactions was adopted in 1994.

In early 1997, the OECD Working Group on Bribery reviewed the Recommendation and issued a revised version, which was adopted by the Council of the Organization for Economic Cooperation and Development on 23 May 1997.

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Article 3 provides that bribery of foreign officials shall be punishable by effective proportionate and dissuasive criminal penalties. Rang of penalties shall be comparable to that applicable to the bribery of the party's own public officials. Article 4 provides that each state party shall take necessary measures to establish jurisdiction over bribery of foreign officials when the offence is committed in the whole or in part in its territory; review its current basis for jurisdiction in the fight against the offence; and take remedial steps in ensuring that its jurisdiction for the offence is updated. Acknowledging the need for mutual cooperation and assistance in the fight against corruption, Article 9 provides for mutual legal assistance for the purpose of criminal investigations and proceedings brought by a state party concerning offences with the scope of the Convention.

Article 12 provides that state parties shall cooperate in carrying out a programme of systematic follow-up to monitor and promote full implementation of the Convention; albeit investigation and prosecution are subject to the applicable rules and principles of each party as provided under Article 5.

The Revised Recommendation of the OECD⁷¹ brings together analytical work on anti-corruption measures and commitments undertaken over previous years to combat bribery in international business transactions. As the expression of a common political agreement, it

71. Dow Jones, "Mitigating Corruption Risk in Global Business Opportunities" (London, 4th March, 2010):

available at

<http://www.dowjones.com/events/worldtour2010/documents/DowJonesWorldSeriesLondonOECD> ,

assessed on 22/07/2010.

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is an important vehicle to encourage action by its member states. It includes three phases of monitoring and other follow-up procedures designed to promote implementation of the Convention.

The purpose of Phase 1 is to evaluate whether the legal texts through which parties implement the Convention meet the standard set by the Convention.

Phase 2 assesses the structures put in place to enforce the laws and rules implementing the Convention and their application in practice. It broadens the focus of monitoring to encompass non-criminal law aspects and serves an educational function as participants discuss problems and different approaches.

Phase 3 maintains an up-to-date assessment of enforcement structures put in place by parties to the Convention in implementing the laws and rules of the Convention.

Nevertheless, not all the legal systems of member states to the OECD are theoretically mature to implement the provisions of the Convention. Most of them are only in the beginning stage of establishing the legislative and judicial framework for monitoring international business behaviour; and do have legal enforcement systems that are reluctant to take on foreign bribery investigations and prosecutions⁷².

72. Dow Jones, op. cit.

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Moreover, socio-cultural differences among member states have posed enforcement and compliance challenges because what constitutes bribery in one state may not be seen as such in another state. Thus, the Convention should not just consider the socio-political and economic circumstances of member states; but also their cultural differences.

Furthermore, the Utstein Groups⁷³ have not registered one single project to the U4 database in the Eastern Europe region on international crime and the combat against corruption; albeit most of the Eastern European countries are new members of the OECD⁷⁴. Thus, for there to be a credible accomplished efforts to eradicate sources of bribery, there has to be Western pressure for institutional reform in the OECD developing and transition economies.

1.7. The Africa Union Convention on Preventing and Combating Corruption

Concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of Africa States and its devastating effects of economic and social

73. Germany, Netherlands, United Kingdom and Norway: all members of the OECD.

74. Antonello Blagioli, "Financial Crime as a Threat to the Wealth of Nations: a cost-effectiveness approach", Vol.11 No.1, *Journal of Money Laundering Control* (Emerald Group Publishing 2008) pp.88-95 at 89.

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development of the Africa people, member states of the African Union adopted the Africa Union Convention on Preventing and Combating Corruption in Mozambique in 2003.

Article 1 of the Convention defines public officials as an official or employee of a state or its agencies including those selected, appointed or elected to perform activities or functions in the name of the state or in its service; and private sector as the sector of a national economy under private ownership and which productive resources is controlled by market force rather than public authorities.

Article 2 states that the objective of the Convention is to promote and strengthen development in Africa and create required mechanisms to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors; albeit it is impossible to eradicate corruption⁷⁵. The Convention aims to facilitate cooperation among states parties and promote policies and legislation that are relevant to corruption.

Article 4 provides for the scope of the Convention, which is broad and covers: active and passive bribery; influence padding; illicit enrichment and concealment of proceeds derived from corrupt acts. Offences under the Convention covers: favouritism; offering or granting of gifts in exchange for any act or omission while performing ones' duty; illicit benefits; undue advantage and collaboration or conspiracy to commit any act referred to in the Convention.

Article 5, accordingly, requires state parties to adopt legislative and other measures that are establish as offences in the Convention subject, however, to the respect of national

75. Art. 18.

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legislation in force. Article 12 also recognises and encourages full engagement of civil society and the media in the fight against corruption.

Article 13 states that state parties have jurisdiction over acts of corruption and related offences when breach is committed wholly or partly within their territories; by one of their nationals outside their territories or by person who resides within; where the criminal is present within and has not yet been extradited to another country; and where an offence committed outside affects their vital interests.

Nevertheless, the Convention does not exclude any criminal jurisdiction exercised by a state party in accordance with its domestic law; albeit a person shall not be tried twice for the same offence. Fair trial is guaranteed under Article 4 of the Convention. The Convention also makes provisions for cooperation and mutual legal assistance in investigation and prosecution of offences⁷⁶; international cooperation and follow-up mechanisms⁷⁷. It also makes room for creation of codes of conduct as means of fighting corruption in public services⁷⁸.

The African Union Convention on Preventing and Combating Corruption is comprehensive in theory and is largely phrased in mandatory terms. The provisions of the Convention may be in the right direction to consolidate participation of civil society and media⁷⁹; but its

76. Arts. 19 and 22.

77. Art. 7.

78. See art.12.

79. Indira Carr, op. cit., p.136.

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effectiveness in the Continent wherein most countries are facing war and political unrest may be difficult because political will is an essential requirement to its success. Most countries of the Continent have a long history of corruption and cultures that lack transparency and accountability⁸⁰. For instance, Gabon is one of the world's poorest countries; yet President Ali Bongo Ondimba recently purchased a luxurious mansion with public funds worth £ 100 million in Paris; and claimed that his action was a sound investment as he and his entourage shall not be spending money to stay in hotel rooms whenever they visit Paris. This is a typical description of how an average political official of the Continent views corruption⁸¹.

1.8. Is Criminalization of Corruption the Way Forward?

Generally speaking, corruption is not simply a matter of weak law enforcement. The integration of economic, sociology and criminology theories are relevant in examining the motives and mechanisms of corruption and related financial crimes⁸²; albeit modern theories

80. *Metro News*, "Gabon leader Ali Bongo Ondimba slammed for Paris mansion purchase" 27TH May, 2010, available at www.metro.co.uk, assessed on 21/07/2010.

81. Raymond Fisman et al, op. Cit., p.80.

82. Petter Gottschalk, op. Cit., p.214.

83. Indira Carr, op. Cit., p.135.

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towards combating corruption and related financial crimes are pro criminalizing the offence with conviction that crime can be reduced through the use of deterrents and based on the assumption that criminals or potential criminals will think carefully before committing a crime if the likelihood of getting caught and the fear of severe punishment are present⁸³. Nevertheless, the use of criminal law to tackle societal problems raises an inevitable question of whether criminal law can deliver intended outcomes⁸⁴. Moreover, there is doubt on the validity of this theory based on empirical studies⁸⁵ and the situation calls for more diligent and resolute governmental actions rather than governmental hyperbole⁸⁶.

84. F.N. Baldwin, "Exposure of Financial Institutions to Criminal Liability" Vol.13 No.4, *Journal of Financial Crime* (Emerald Group Publishing 2006) pp.387-407 at p.387.

85. F. Baldwin, *ibid*, p.401.

86. Edwin H. Sutherland and Donald R. Cressey, *Criminology* (10 ed.), New York, J. P Lippincott, Inc. 1978 at pp.79-80.

87. E. Sutherland et al, *ibid* p.80.

88. Travis Hirschi and Michael Gottfredson (edited), *Understanding Crime: Current Theory and Research* (vol.18 Sage Research Progress Series in Criminology), London, SAGE Publications, 1980 at p.8.

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Criminological explanations of the mechanistic type of criminal behaviour have far been notably unsuccessful, perhaps largely because they have been formulated in connection with an attempt to isolate personal and social pathologies among criminals⁸⁷. According to Sutherland and Cressey (1978), the objective situation of a crime is important to criminality because it provides an opportunity for the criminal act. Thus, in a psychological or sociological sense, the situation is not exclusive of the person⁸⁸. Modern theories therefore support the idea that human nature and structure of human society provides solid platforms for competitive research on crimes⁸⁹.

Sociological theories suggest that people who commit crimes do so after evaluating the risks of detection and punishment; and the rewards they would gain if completing the acts successfully. People would rather bear the risk of committing the crime considering the amount of wealth they would acquire if they are not caught and punished⁹⁰. Financial crimes thus persist because of the incentives and opportunities involved to commit fraud⁹¹. These theories nevertheless disregard the psychological motives behind crimes. Sutherland

89. Petter Gottschalk, op. Cit., pp.211-13.

90. Ilter c. "Fraudulent Money Transfer: a case from Turkey" Vol.16 No.2, *Journal of Financial Crime* (Emerald Group Publishing 2009) pp.125-136.

91. Sutherland Edwin, *White Collar Crime*, New York, Dryden Inc., 1949.

92. E. Sutherland et al (1978), op. Cit., p.80.

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(1949) offers psychological approach to the issue with his Differential Association Theory which explains that certain characteristic play a key role in placing individuals in positions to behave unlawfully: including the proposition that criminal behaviour is learned through interaction with other persons, as well as interaction occurring in small intimate personal groups of individuals who have deviant or unlawful mores, values, and norms⁹². Sutherland and Cressey⁹³ also argued that criminal behaviour is learned via verbal and gesture communications that occur within intimate personal groups.

Incorporating a classical view of the role of choice in human nature and the positivistic view of the role of causation in the explanation of behaviour, Gottfredson and Hirschi⁹⁴ argued that people commit crime because they lack self-control over the tendency to enhance their own pleasure; and that this explains why not all members of an organisation or community commit crime even if some individuals within the same community do.

Nevertheless, while criminal behaviour is an expression of general needs and values, it is not explained by those general needs and values, since non-criminal behaviour is an expression

93. Michael R. Gottfredson and Travis Hirschi, *A General Theory of Crime*, California, Stanford University Press Inc., 1990 at p.85.

94. Gottfredson and Hirschi, op. Cit., p.82.

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of the same needs and values⁹⁵. For instance, thieves generally steal in order to secure money, but likewise honest labourers work in order to secure money. This explanation of criminal behaviour purports to explain the criminal and non-criminal behaviour of individuals and thus presents a weak argument. However, it best explains the criminality of a community, nation, or other group in general. Moreover, it is hard to distinguish psychological and sociological positivisms from that of modern economic approach to crime, which agrees on the nature of human and the idea that all behaviours can be understood as the rational pursuit of self-interest⁹⁶.

The foundation for cultural theory came with the conclusion of Thorsten Sellin's Cultural Deviance Theory which argues that crime is always relative to the norms of the group defining it as crime; therefore, it is a product of social definition⁹⁷. According to Ruth

95. Gottfredson et al, op. cit., p 82.

96. Gottfredson et al, op. cit., p.72.

97. Gottfredson et al, ibid.

98. Ruth Kornhauser, *Social Sources of Delinquency*, Chicago, University of Chicago Press Inc. 1978
p.29.

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Kornhauser⁹⁸, it is human nature to conform to the norms of the groups into which they have been socialized and to which they owe allegiance. People never violate the norms of their own groups, only the norms of other groups. The problems of cross-national criminology are easily identified: societies differ in what they define as criminal; the popular forms of criminal behaviour are not the same from one society to another; and crime control institutions take markedly different shapes across societies.

Nevertheless, if it is human nature to conform to the norms of the groups or communities into which they have been socialized, as Kornhauser's theory claims, one would wonder why some people are not corrupt in a society where greed reigns supreme. There is thus more to the cultural factor of society when it comes to the root causes of corruption. Psychological factors also play vital roles to a great extent.

1.9. Critical Appraisal

Most international organisations recommend preventive measure as one of the solutions to corruption. But traces of allegations of fraud and corruption in democratic countries such as the United States and the United Kingdom infer that corruption is not just a problem of all nations poor and rich, but it cannot be absolutely prevented. Approaches to prevent corruption, such as passing laws, creating new institutions and conducting anti-corruption campaigns, have failed to make significant impact to control the phenomenon: especially in developing countries. Rather, a new orientation that emphasises external accountability; such that imposes extensive checks and balances on public institutions and office holders

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might put sufficient demand on governments to abide by the rule of law and curb corrupt tendencies⁹⁹ .

Moreover, effective prosecution of corruption needs testimonies of credible witnesses. But where an average man in a society sees no wrong in corruption, then detection, arrest and prosecution of culprits become huge challenges for both international and national anti-corruption agencies. Psychological and sociological factors; as well as economic incentives motivate people to commit crime in societies; albeit a society's perception of corruption depends on its cultural belief. Africa, for instance, has a general political environment where institutions, rules and norms of behaviour have adapted to corruption. Preventive measures, in such circumstances, would not be an absolute solution to the problem considering the fact that corruption has become an acceptable life style: the situation is more of cultural than legal.

Preventive and criminalization measures cannot thus produce expected results once the life styles and norms of a society adapt to corruption. There is the need for a curative measure

99. Service delivery survey data suggest that bribes paid to judicial and tax officials amounted to 62 per cent of official public expenditures in Tanzania (see A. Shah, *op. Cit.*, p.233). Not only can you rightly assume you'll get away with bribing police officials in Nigeria and Cameroon, it is actually expected of you. Indeed, you are probably more likely to get in trouble with the police authorities if you do not pay bribe than if you do (see R. Fisman et al, *op. Cit.*, p.79-80).

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in such circumstance; and public awareness and campaign programs against the phenomenon are thus effective solutions. These should include measures that would recuperate the society from its socio-cultural perceptive of corruption: involving not just the media, but both family and educational institutions because of their vital responsibilities of instituting sound ethical standards in upcoming generations. Among other forms, course works in primary and secondary schools should be modified to include topics relating to corruption and economic development.

International and Inter-governmental Conventions, such as the UNCAC and OECD, also bind parties to render specific forms of mutual legal assistance in recovering assets stolen from national treasury. But identification and recovery of stolen assets is not enough. The issue is not just with recovering of the stolen assets, but the fact that they might be put back into a corrupt system or into the hands of other corrupt politicians who will again abuse their powers to loot the national treasury¹⁰⁰.

Assets recovery thus needs to be treated with caution¹⁰¹. Moreover, most judges and legal practitioners of developing countries are novices in the field of transnational financial crime.

100.A. Salifu, op. cit., p. 279.

101.For instance, while the Nigeria was trying to recover the assets stolen by her former dictator, Sani Abacha, in 2004 the Plateau Stat Governor, Joshua Dariye was arrested in London with £80,000.00 cash and over £2 million in his London bank account; and in 2005 the Bayelsa State Governor, D.S.P Alamiyeseiyha was tried for laundering stolen money from the government treasury.

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International Anti-Corruption Academies, such as the INTERPOL; and the International Bar Association thus need to train anti-corruption law enforcement agencies, judges, legal practitioners, the private sectors and public officials of developing countries on modern mechanisms of recovering and detecting stolen assets as well as prosecuting transnational corruption.

Nevertheless, the lack of a robust monitoring mechanism means that domestic and transnational legal incentives for enforcement of Conventions against corruption are low. International anti-corruption Conventions share the same fate with other international legal agreements in struggling with the tension between domestic sovereignty and international obligations; albeit there is no reason for States to say International Resolutions are not binding after rectifying such Resolutions. The success of international anti-corruption Conventions thus rest with political and business leaders, civil societies, the media, and the individuals that make up the international community¹⁰².

Furthermore, codes of conducts and corporate governance mechanisms are effective means of regulating the unethical or corrupt conducts of governmental institutions and private corporations as well as their agencies and employees; albeit the fight against corruption should be tailored to country circumstances.

102.Susan Rose-Ackerman, "Establishing the Rule of Law" in Robert Rotberg (ed.) *When States Fail: Causes and Consequences*, Princeton, Princeton University Press, 2004, p 185.

103.B. Rider (2000), op. cit.

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Criminology tells us that it is impossible to eliminate deviant and criminal behaviours completely; and that an acceptable and appreciable goal could be to reduce the crime rate below a “serious social alarm threshold”. In the case of financial crime such as corruption, this threshold is related to the stability of the system¹⁰³. Thus, corruption cannot be eradicated; albeit it can be reduced. There is need for a multi-faceted approach of socio-economic, legal and cultural mechanisms in combating the phenomenon.

Cognizance should be taken of the fact that there is more to legal systems in the international combat against corruption. For instance, crimes like murder and assault are no doubt transnational in nature; but corruption has more to do with general beliefs and life styles of societies. Its tolerance and detest thus depends on the general standards of norms and cultures of societies: which differ from one to another. In the United Kingdom, for example, bribery is illegal; yet it might be viewed as a means of survival in other countries¹⁰⁴. In Latvia, a recent survey of the World Bank¹⁰⁵ found that more than 40 per cent of households and enterprises agreed that corruption is a natural part of their lives and helps solve many problems.

The argument on criminalization of corruption is a distraction from the main apprehension: been the adverse effects of corruption to economic development, political stabilities and the rule of law. There would be no reconciliation to the political and academic arguments

104. Antonello Blagioli, *op. cit.*, p.89.

105. Alan Doig et al “Corruption and Anti-corruption strategies: issues and case studies from developing countries”, in Sahr Kpundeh et al, *op. cit.*, p.45.

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about criminalization of corruption except the international community starts to approach the phenomenon as an 'international concern', rather than as crime. Approaching the transnational combat against corruption as an international concern would not only reconcile the differences of what should and what should not constitute corruption in domestic criminal statutes; but also grant the campaign more international appreciation as well as channel the course in the right direction: tackling the adverse effects of corruption to national security, political stability, economic development etc.

1.10. Conclusion

Corruption is a direct or an indirect socio-cultural phenomenon that is found in all countries, rich and poor. Nevertheless, it hits poor countries harder than the rich by diverting money away from development. The adverse effect of corruption on the economic development of developing countries cannot be overemphasised; albeit some authors argued that some benefits flow from corruption. This development has called for greater concerns of the international community.

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However, there is no single recipe for fighting the phenomenon because causes and definitions vary in accordance with national legal system and culture. Yet corruption cannot be combated in isolation. Political will is therefore a vital requirement for global fight against corruption; albeit international laws have binding force or operative effect that directly or indirectly affect external obligations of States.

Furthermore, there can hardly be effective and efficient results to the fight against corruption without in-depth understanding and consideration of the economic, legal and socio-cultural perspective of the situation in the jurisdiction in question. Rather than generalizing reform, every anti-corruption reform should be tailored in accordance with the legal system and socio-cultural norms of each State as specified in the UNCAC; albeit such clause in an international convention provided loopholes for avoiding obligations.

Nevertheless, it is impossible to completely eliminate deviant and criminal behaviours such as corruption. At best, the rate of crime can only be reduced below a “serious social alarm threshold”. In the case of corruption, this threshold is related to the stability of the system. Hence, conditional aid policy might rather lead to draconian measures that worsen situations in beneficiary countries since corruption is a socio-cultural phenomenon, which can only be reduced and cannot be eradicated in any state or society.

Curative measures such as public awareness and campaign programs against corruption are long-term effective means of dealing with the situation mostly in countries where institutions, rules and norms of behaviour have already adapted to corruption; and where even foreign corporations, bureaucrats and other agents abide to the predatory examples of the society.

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Howbeit, for the transnational combat against corruption to have a better international appreciation, the phenomenon should be treated as an international concern rather than as transnational crime; yet the decision of criminalization should be national.

CHAPTER 2

Anti-Corruption Regulations in Nigeria

2.1. Introduction

Nigeria, the most populous nation in the Africa, has consistently been rated as highly corrupt in the sub-region, Africa and the world and yet Nigeria did little before 2000 to

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address corruption as a national problem¹⁰⁶. The stability of Nigeria is currently being challenged by high levels of poverty, organized crime, ethnic and religious tension¹⁰⁷.

Corruption has a long history in Nigeria and usually involved misappropriation or diversion of large sums of money from state funds¹⁰⁸. Corruption may be a universal phenomenon, but the Nigerian situation is a social construct that implies an amoral perspective towards any corrupt practice¹⁰⁹. The pervasiveness of corruption in all Nigerian ramifications has assumed renewed problematic phenomenon in the nation to the extent that Transparency International continually ranks it as one of the world's most corrupt nations. Commenting on the gravity of the situation in Nigeria, Uwaifo, J.S.C, in *Attorney General of Ondo State v. Attorney General of the Federation*, thus:

The stolen resources lost by Nigeria through endemic corruption and abuse of office have had inimical effect on the economy by causing inflation and lowering living standards to stupendous proportions such that what is known as 'middle class' was

106.Ige Bolodeoku, "The war against Corruption in Nigeria: a new role of the FIRS?", Vol.12 No.4, 2009 *Journal of Money Laundering Control* (Emerald Group Publishing) pp. 417-431 at 418.

107.S. M. Atuobi, "Corruption and State Instability in West Africa: An Examination of Policy Options" No. 21, *KAIPTC Occasional Paper*, December 2007 p.17 - http://www.kaiptc.org/_upload/general/Paper21_Atuobi.pdf.

108.TI, *National Integrity Systems: Country Study - Nigeria 2004* p 15, available at www.transparency.org/content/download/1685/8494/file/nigeria.pdf, assessed on the 29/05/2010.

109.M. Dion, "What is Corruption corrupting? A philosophical viewpoint", Vol.13 No.1 *Journal of Money Laundering Control* (Emerald Group Publishing, 2010) pp.45-54 at p.46.

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virtually wiped out and basic necessities of life have become luxuries....Corruption is evidently Nigeria's greatest problem...since the attainment of independence....While admission and examination scandals are examples of corruption in our education institutions, payment of salaries to ghost workers, over invoicing of goods and services and the raising of fictitious local purchase orders, are examples of corruption in our private and public sections. It suffices to state that a nation where corruption is an accepted norm is bound to suffer economic backwardness and isolation¹¹⁰.

Thus:

1. Corruption is one of Nigeria's problem as a nation;
2. Corrupt practices in Nigeria are not limited to governmental officials, but rather cover: examination malpractices, admission into universities, payment of salaries to ghost names in the ministries, raising of fictitious purchase orders in both public and private sectors etc; and
3. Generally, corruption is an accepted norm in Nigeria and it is thus unlikely to achieve the Millennium Development Goals aim to improve people's lives through poverty reduction and increased access to basic services in Nigeria, despite its oil wealth¹¹¹; albeit the situation arouses both national and international concern.

Commenting further on the transnational nature of the phenomenon in Nigeria and suggesting a practical solution to the problem, Mohammed, J.S.C., thus:

110.[2002] 9 NWLR, at pages 385-389, paragraphs D-B. The learned Justice's opinion and decision in this case was based on the article "Legal and Institutional Framework for Combating Corruption in Nigeria" Taiwo Osipitan and Oyewo published in UNILAG READINGS LAW; and brief of the Attorney General of the Federation, Chief Afe Babalola (SAN), in the same case).

111.UKParliament, Saturday23January2010:

<http://www.publications.parliament.uk/pa/cm/200809/cmselect/cumintdev/840/84003.htm>,

visited on the 29/05/2010.

112.A-G Ondo State v. A-G Federation (supra) at pages 347-348, paragraphs F-C.

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It is quite plain that the issue of corruption in Nigerian society has gone beyond our borders. It is more a local affair... How can the nation tackle this evil practice? The answer is clear; a criminal law has to be promulgated providing that every act or omission contrary to the Corrupt Practices Act, 2000...this is the only way the evil of corruption can be talked nationally¹¹².

However, it has been established in the chapter 1 of this work that criminalization is not an absolute solution to corruption, especially in societies where institutions, rules, and norms of behaviour have already been adapted to a corruption. There is need for a multi-faceted approach of socio-economic, legal and cultural mechanisms. Be that as it may, this chapter represents an overview of Nigerian societal perception of corruption and some of the provisions of the Corrupt Practices Act, 2000 and Economic and Financial Crimes Commission Act, 2004 (both of Nigeria) regarding the fight against corruption in Nigeria.

2.2. Societal Perception of Corruption in Nigeria

Nigeria is a federal constitutional Republic comprising thirty-six states and a Federal Capital Territory (Abuja). It is a country that has 250 different languages, tribes and cultures; albeit the largest ethnic groups are the Hausa, Igbo and Yoruba. Nigeria has diversified culture and these diversities affect even the societal perception of corruption in the nation because the perception of what conduct is moral or corrupt in Nigeria depends to the individual cultures of the nation. For instance, the opinions of the States were divided in the case of *A-G Ondo State v. A-G Federation*¹¹³. The Plaintiff State in that case argued, *inter alia*, that the National Assembly has neither the constitutional authority to create an ant-corruption law (the Independent Corruption Practices and Other Related Offences Act, 2000) nor the authority

113.Supra.

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to determine what should constitute corruption in all the states of the federation. In the opinion of the Plaintiff, such action constitutes a possible intrusion into the functions of the states and their public bodied: in other words, only a state has the authority to determine what constitutes corruption within its boundary.

However, the Supreme Court of Nigeria held, *inter alia*, that the Constitution empowers the National Assembly to make laws for the peace, order and good judgment of the Federation or any part thereof with respect to any matter included in the Executive List. Giving the rationale for this decision, Uwaifo, J.S.C, stated thus:

*As Helvering v. Davis*¹¹⁴ and *Heart of Atlanta Motel v. United States*¹¹⁵ aptly demonstrate, there may be occasion, and probably always would, when what appears a local problem (meaning corruption) assumes such a proportion as to become a matter of concern to a federal country as a whole. In such a case it may turn out to be inevitable to regard the matter as affecting the peace, order and good government of the country which ought to be so addressed by means of a uniform law. The separate components of the federation may feel or be deemed able to pass laws to deal with the problem within their jurisdiction. In effect, however, that may be very unsatisfactory¹¹⁶.

Thus, the fact that corruption is a socio-cultural phenomenon in Nigeria is not in dispute.

Even the Supreme Court acknowledges that corruption is a local problem. But when a local problem becomes a matter of concern to the federal government, it becomes inevitable to enact a uniform federal law. Hence, the need to enact a federal anti-corruption legislation in Nigeria aroused out of concerns for the effects of corruption on the peace, order and good

114.[1957]301 US 607.

115.[1964] 379 US 241.

116.A-G Ondo State v. A-G Federation (supra) at page 407, paragraphs A-C. Words in bracket are inserted by the writer.

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governance of Nigeria.

The pervasiveness of corruption in Nigeria is so obvious that even those charged with responsibility of investigating and combating corrupt activities are either directly involved or are beneficiaries of the crime¹¹⁷. In the words of the former EFCC Chairman, Nuhu Ribadu, those who live thrive on corruption want the old dispensation to continue and others that are paid to check the activities of corruption are ever willing to share in the proceeds with the event that they themselves become culprits; thus corruption in seems like a difficult 'monster' to fight¹¹⁸.

However, it is pertinent to note at this outset that law is not an ultimate solution to corruption in Nigeria. There is the need to develop effective public awareness strategies that emphasise the economic and social disadvantage of corruption in Nigeria.

Be that as it may, the task at this juncture is to establish the meaning of 'corruption' from Nigerian legal perspective. Corruption has been fought principally in Nigeria by two governmental agencies: the Independent Corruption Practices and Other Related Offences Commission (ICPC) and the Economic and Financial Crime Commission (EFCC).

2.3. The Corrupt Practices and Other Related Offences Act, 2000

117. A former Inspector General of Police, Tafa Balogun, was arrested and convicted in Nigeria for money laundering and corrupt activities.

118. Nlerum S. Okogbule, "Official Corruption and the Dynamics of Money Laundering in Nigeria" Vol.14 No.1 Journal of Financial Control (Emerald Group Publishing, 2007) pp.49-63 at p.57.

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Corruption has been acknowledged as an obstacle to economic development and political stability in Nigeria. It contributed to the destruction the First Republic (1960-1966) and the Second Republic (1979-1983). In both cases the Military cited pervasive corruption as the justification for overthrowing the democratically elected government. Nevertheless, when political power was eventually returned to an elected government in 1999, evidence came to light that the Military regimes were more corrupt than the Civilian regimes; and thus Nigeria has repeatedly topped the list of the most corrupt nations in the Transparency International Perception Index¹¹⁹.

With the intention to fight corruption and restore Nigeria to respectability and dignity with the comity of nations, President Olusegun Obasanjo (at the inception of the 1999 democratic administration of Nigeria)¹²⁰ thus presented a bill to the National Assembly in 1999; and the bill was promulgated into The Corrupt Practices and Other Related Offences Act of 2000, which came into force on June 13, 2000.

Accordingly, the Act, which contains seventy-one sections, seeks to prohibit and prescribe punishment for corrupt practices and other related offences in Nigeria. An Independent Corruption Practices and Other Related Offences Commission (ICPC) was inaugurated on 29 September 2000, with mandate to prohibit and prescribe punishment for corrupt practices and other related offences. The Commission has the responsibility to enforce and prevent

119. Yemi Akinseye-George, available at <http://juristlaw.pitt.edu/world/nigeriacor2.htm>.

120. Hannatu Raji (ICPC Legal Office) <http://www.icac.org.hk/news/issue17eng>

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corruption; as well as educating the public about the fight against corruption¹²¹.

The Act defines corruption as bribery, fraud and other related offences dealing, inter alia, with any purchase, sale, loan, charge, mortgage, lien, gift, donation, deposit, withdrawal, or transfer between accounts and trust; as well as abuse of any interest, title or privilege, agency or power of attorney¹²². The offence is committed by:

- a. giving or accepting gratification through agent¹²³: whereof both the acceptor and giver are guilty notwithstanding whether or not the purpose was carried out in relation to principal's affairs or business¹²⁴;
- b. counselling offences relating to corruption¹²⁵;

121.S. 6 (a-f)

122.S.2

123.S.9

124.S.10

125.S.11

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- c. fraudulent receipt and acquisition of property¹²⁶;
- d. bribery of Public Officer¹²⁷: such bribery relating to giving assistance etc in regard to contracts as well as acquiring property through gratification¹²⁸;
- e. making false statements or return¹²⁹; and
- f. offence of using office or position for gratification¹³⁰.

It is thus clear that corruption under the Nigerian legal system covers the following offences: bribery, embezzlement of public funds and fraud. The Act also covers the boundaries of financial activities and institutions and thus makes corruption, not just an economic crime but financial crime in Nigeria. Nonetheless, nepotism is a socio-cultural phenomenon in both public and private sectors of Nigeria, which is not covered by the Act. This definition does not thus reflect the complete nature of corruption in the nation.

Notwithstanding any customary law to the contrary, the Act provides that a witness who took part in any corrupt act(s) that constitutes an offence shall not be regarded as an

126.Ss. 12 and 13

127.S. 18

128.S.22

129.S.16

130.S.19

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accomplice provided such witness reported the act to the Commission before the its completion¹³¹.

Sections 55 – 64 of the Act provide for measures of prosecution and trial of offences under the Act; as well as proof and admissibility of evidence. However, the Evidence Act¹³² is a replicate of the English Evidence Act of 1945 and it is inadequate to cover the present advancement in technology with the concomitant sophistication employed in the commission of international financial crimes such as corruption¹³³; and this is an impediment towards combating the crime in Nigeria. Moreover, the provisions of the Act expressly disregard the socio-cultural backgrounds of Nigeria¹³⁴; albeit this is ought to be an important issue for legal reform.

2.4. Economic and Financial Crimes Commission Act, 2004

Section 1 of the Economic and Financial Crimes Commission Act, 2004, established the Economic and Financial Crimes Commission as the Anti-Corruption regulatory body of Nigeria, which has the function of investigating financial crimes; coordination and enforcing all economic and financial crimes laws; confiscating and freezing of proceeds derived from

131. S.55

132. Cap E 14, Vol. 5 Law of the Federation of Nigeria, 1990.

133. N. S. Okogbule, op. Cit., p.58.

134. S.60

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terrorist and corrupt activities. Section 28 of the Act empowered the Commission not only to arrest any person suspected to have committed an offence under the EFCCA, but also to trace and attach all the assets and properties of the accused person or persons suspected to have been acquired as a result of such economic or financial crime, and subsequently cause to be obtained and interim attachment order from court. Thus, in *Nwaigwe v. Federal Republic of Nigeria*¹³⁵, where the defendant and others appealed to set aside or discharge an *ex parte* order for interim forfeiture of their properties by the EFCC, the Court of Appeal dismissed the application and held, *inter alia*, that the Act confers a 'ready made licence' to the Commission to forfeit assets of corrupt culprits.

In *Ahmed v. Federal Republic of Nigeria*¹³⁶, the appellant contented that he is not guilty of some of the charges made against him (precisely that of fraud and forgery) because they were not done with the aim of earning wealth illegally and did not contain the requisite *mens rea* of any economic and financial crime. Therefore, the EFCC lacked the *locus standi* to prosecute him. The Court of Appeal, determining the scope and extent of investigative power of the Commission stated, *inter alia*, that by virtue of section 10 (1) and (2) of the Interpretation Act (Nigeria); where an enactment confers a power or imposes a duty, the power may be exercised and the duty shall be performed from time to time as the occasion requires; and that an enactment which confers power to do any act shall be construed as

135. *Nwaigwe v. Federal Republic of Nigeria* [2009] 16 NWLR 169 at 175. See also S.6 of the Act.

136. [2009] 13 NWLR 536 at 540 and 542.

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also conferring all such other powers as are reasonably necessary to enable that act to be done or are incidental to the doing of it.

The court held that the Commission, by virtue of section 7 (1)(a) and (2)(f) of the EFCC Act, had the power to cause investigations to be conducted as to whether any person, corporate body or organisation has committed an offence under the Act or other law relating to economic and financial crimes; and that the Commission shall be the coordinating agency for the enforcement of the provisions of any financial crimes, including the Criminal Code and Penal Code and to prosecute any other offences as long as they are financial crimes¹³⁷.

Thus, the scope of the Commission is not restricted to the provisions of the Act. Its powers and functions cover all financial and economic crimes as defined by any law in Nigeria¹³⁸; and all conducts of both natural and legal persons that are incidental to committing financial and economic crimes as may be determined from time to time. The EFCC is thus the most active anti-corruption agency in Nigeria¹³⁹.

137. See S.6 of the EFCC Act.

138. including those confer on the Independent Corruption Practices and Other Related Offences

Commission by the Corrupt Practices and Other Related Offences Act, 2000, section 6 (a-f).

139. I. Bolodeoku, op. cit., p. 417.

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Although the Commission has powers to investigate and prosecute conducts of corruption, Nigeria lacks the necessary legal enforcement experts or resources to investigate transnational corruption. Evidence of weak governance, outdated laws¹⁴⁰ and legal procedures are impediments on effective and efficient performance of the Commission.

2.5. Critical Appraisals

The functions and authorities confer on the EFCC are similar to those confer on the Independent Corruption Practices and Other Related Offences Commission (ICPC); albeit section S.6 (j) of the EFCC Act provides for the Commission's collaboration with other government bodies within and outside Nigeria, in carrying out its functions. There appear to be conflicting functions, which currently cause the ICPC as well as its regulation scheme to be irrelevant¹⁴¹. For instance, the EFCC appears to be asserting a parallel power to investigate and prosecute corruption and other allied offences in Nigeria in spite of the ICPC.

140. For instance, the corrupt Nigerian Evidence Act is the same a copy of the 1945 Evidence Act of England.

141. Oluseye F. Arowolo, "In the Shadow of the EFCC: is the ICPC still relevant? Vol.9 No.2 *Journal of Money Laundering Control* (Thomas Reuter (Legal) Limited, 2006) pp.203-213 at p.204.

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There is thus the need to clearly define the functions of both agencies in order to avoid regulatory incompetency, ambiguity, inconsistency, inefficiency and duplication laws. Also, an amalgamation of both regulatory agencies into one, yet within different departments (each with specific functions), shall not only be cost effective but as well save one of the agencies from being rendered redundant.

2.5. Conclusions

Corruption has a long history in Nigeria and has assumed renewed dimensional phenomenon in the nation despite the creation of the Economic and Financial Crimes Commission in 2004. But anti-corruption regulations should be executed with caution because an extensive governmental control and regulation of economic resources may cause corruption at all societal levels; albeit corruption is most pervasive where the institution mechanism to combat it is weak or not used.

The problem in Nigeria is more of socio-cultural than legal and calls for the nation's general cultural transformation which can be achieved via active national public awareness and campaign programs against corruption. Anti-corruption strategies in Nigeria should thus focus on the corrupt system and not just the corrupt individuals.

Nevertheless, this does not imply that legal mechanisms against corruption are ineffective. Then fact is that legislation alone cannot tackle the problem of corruption in Nigeria. The phenomenon in the country calls for a multi-faceted approach of legal and socio-cultural mechanisms to address the malaise.

CHAPTER 3

Corruption in Financial Institutions

3.1. Introduction

Technology and communication advancement have fuelled development of the international financial market. Banks and other financial institutions now exchange mechanisms that engage in operation twenty-four hours a day and money can be transferred with speed and ease¹⁴². Financial institutions are thus supplementary tools for enforcing universal and national actions against corruption because of their strategic positions in international money transfers and the unwitting but major roles they play in aiding corrupt leaders of developing countries to launder corrupt money by concealing the true owners of assets, trust and corporations.

This chapter evaluates the relationship between money laundering and corruption; and critically examines the Financial Action Task Force (FATF) customers due diligence recommendation for financial institutions. It also examines the roles of financial institutions in the fight against corruption and money laundering; as well as the theory of 'good

142. Jack A. Blum et al, "Financial Havens, Bank Secrecy and Money Laundering" in UNODCCP

Handbook, New York: UNODCCP, 1998, P.19.

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governance' to the fight against corruption as prescribed by the World Bank, IMF and Africa Development Bank. However, the focus is on corruption in Nigerian bank sector.

3.2. Correlation between Money Laundering and Corruption

The origins of money laundering can be traced back to the organised criminal activities of the early 1930s¹⁴³. Although it is difficult to have an accurate definition¹⁴⁴, money laundering is the process by which the true ownership and proceeds of crime are concealed

143.Santha Vaithilingam and Mahendhiran Nair, "Factors affecting Money Laundering: Lesson for Developing Countries" Vol.10 No.3 *Journal of Money Laundering Control* (Emerald Group Publishing, 2007) pp.352-366 at 353.

144.Sandeep Savla, *Money Laundering and Financial Intermediaries*, Hague; London: Kluwer Law International, 2001 at p.7.

145.R. Barry Johnston and John Abbott, "Placing Bankers in the Front Line" Vol.8 No.3 *Journal of Money Laundering Control* (Henry Stewart Publication, 2005) pp. 215-219 at p.216.

146.Simpson and Weiner (eds.), *Oxford English Dictionary*, Oxford: Clarendon Press, 1989, Vol. VIII, p.702.

147.Torsak Buranaruangrote, *Money Laundering Control: evolution and effective solution to organised crime*, London: London Institute of International Banking, Finance and Development Law, 2003 at p.6.

148.Guy Stessens, *Money Laundering: a new international law enforcement model*, Cambridge, University of Cambridge Press, 2000 at p.3.

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or made opaque so that they appear to come from a legitimate source¹⁴⁵. It entails the transfer of funds of dubious or illegal origin (usually from a foreign country) and to recover them later from what seem to be legitimate source¹⁴⁶; albeit hiding unlawful funds without disguising their criminal origin is not money laundering¹⁴⁷. The fight against money laundering aims at effective enforcement of criminal law in relation to profit-oriented crime¹⁴⁸.

Money laundering has devastating socio-economic consequences that threaten national and transnational security¹⁴⁹; causes adverse macroeconomic consequences on fragile economies and erode the soundness and stability of financial institutions¹⁵⁰. Unchecked

149. Peter Aldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*, Oxford, Hart, 2003 p.22.

150. George Saitoti, "The fight against Money Laundering and Corruption in Africa" (12th November 2009) p.2: available at http://www.cmf.ch/events/crime_2009/assets/Discours/Saitoti.pdf, assessed on 21/01/2010.

151. Anthony Semellie, "Prosecutorial challenges in freezing and forfeiting proceeds of transnational crime and the use of international asset sharing to promote international cooperation" Vol.8 No.2, 2004 *Journal of Money Laundering Control* (Henry Stewart) pp. 104-114.

152. Kim-Kwang Raymond Choo, "Politically Exposed Persons (PEPs): Risk and Mitigation" Vol.11 No.4 *Journal of Money Laundering Control* (Emerald Group Publishing, 2008) pp. 371-387 at p.372.

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money laundering determines the ability of corrupt perpetrators to survive and prosper¹⁵¹ and thus encourages corruption¹⁵². Nevertheless, the fight against money laundering requires both multi-faceted and international approach; and effective cooperation between governments and private sector institutions is essential. Thus, the role of the Financial Action Task Force in international combat against money laundering is crucial

3.3. The Financial Action Task Force (FATF)

The FATF is an independent inter-governmental body, which was created in June 1989 by the G-7 Summit in Paris. Its priority is to develop and promote policies to protect the global financial system against money laundering and terrorist financing. Its forty-nine recommendations define criminal justice and regulatory measures of tackling money laundering and terrorist financing. They also include international cooperation and preventive measures to be taken by financial institutions and other such as casinos, real estate dealers, lawyers and accountants.

Although the FATF is an inter-governmental body, its recommendations are international tools to combatting money laundering and terrorist financing because they are endorsed by the boards of the International Monetary Fund (IMF), the United Nations (UN) and the World Bank¹⁵³. Yet cross-border exchange of information within and between financial institutions is a challenge in the combat against money laundering¹⁵⁴.

153. See www.fatf.org.

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To avoid criminal liability thus financial institutions and their employees are directed to assess prototypical money laundering typologies within the context of national and international legislation as well as regulatory pronouncements directed towards combating illicit money laundering. The FATF thus recommends Customers Due Diligence procedures as preventive measure for the financial industry

Recommendation 4 of the FATF provides for measures to be taken by financial institutions and non-financial businesses and professions to prevent money laundering and terrorist financing. It provides further that countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations.

Recommendations 5- 12 of the FATF forty-nine recommendations set leading international standard of procedures of controlling and reporting suspected money laundering in customers' accounts by financial institutions. These measures are to be applied on a risk-sensitive basis depending on the type of customer, business relationship or transaction. They include verification measures to be applied to all new customers. They require financial institutions to keep records of identification data obtained through the customer due diligence process and such records must be kept for at least five years after the customer's business relationship with the bank ended. The records must be sufficient to enable individual transaction to be reconstructed and to provide evidence for prosecution of criminal activity where required.

154. Alison Deitz and John Buttle, *Anti-Money Laundering Handbook*, Sydney, Thomson Lawbook, 2008, p.22.

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Recommendations 13- 16 require financial institutions to report any suspicion in their transactions with customers to relevant authorities and to comply with other best practices; albeit Recommendation 12 provides that the CDD procedures set out in Recommendations 5, 6, and 8 also apply to non-financial businesses and professions such as casinos, real estate agents, dealers in precious stones, accountants and lawyers.

The CDD principles are not new to financial industrial practices¹⁵⁵. Nevertheless, foreign financial institutions operating abroad are required by national laws to follow CDD procedures that are more often created to meet specific domestic needs. Some of these laws may be based on core FATF recommendations but they are the recommendations of pre-2003. In keeping with international standards, however, these financial institutions normally have a compliance function and compliance officers to advise their managements on compliance and to assist them to ensure that they and their employees comply with applicable national laws that may be technically different from current international standards. The procedure is both complex and expensive¹⁵⁶.

3.4. The Role of Financial Institutions in the Fight against Corruption and the IMF

155. *Ladbroke & co.v. Todd* [1914] 30 TLR 433.

156. Louis de Koker, "Money Laundering Control and Suppression of Financing of Terrorism" Vol.13

No.1 *Journal of Financial Crime* (Emerald Group Limited, 2006) pp.26-49 at p.38.

157. See *United States v. Campbell* 977 F.2d. 857 4th Cir. Ct. 1992. See also Fletcher N. Baldwin,

"Money Laundering Countermeasures with Primary Focus upon Terrorism and the USA Patriot

Act 2001" available at <http://www.imf.org/external/np/leg/sem/2002/cdmpl/eng/baldwin.pdf>.

158. See www.FATF-GAFI.ORG.

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Transparency Guidelines for Financial Institutions

What are financial institutions depends upon national and international concerns regarding the subject matter. In the European Union, for instance, financial institution is define as an undertaken order than a credit institution, which carries out one or more of the operations established in Directive 200/12/EC. Meanwhile, due to their involvements in money laundering, the US has included precious stones dealers and real estate agents in its definition of financial institutions¹⁵⁷. The FATF also extends its definition of the subject to include casinos and real estate dealers, accountants and lawyers¹⁵⁸ because such businesses and professions have been used by criminals to hide the illicit means of their wealth. In the Nigeria, however, the statutory definition of financial institution in Nigeria includes:

Banks, body, association or group of persons whether corporate or incorporate which carries the business of investments and securities, a discount house, insurance institutions, debt factorization and conversion firms, bureau de change, finance company, money brokerage firms whose principal business includes factoring, project financing equipment leasing, debt administration, fund management, private ledger services, investment services, local purchase order financing, export finance, project consultancy, pension funds management and other business as the Central Bank (Nigeria) or other appropriate regulatory authorities may from time to time designate¹⁵⁹.

It is pertinent to point out that the Nigerian definition of financial institutions does not reflect international standards. The involvements of professional accountants, lawyers and real estate agents in aiding Nigerian political officials to launder money stolen from the

159.S.46 Economic and Financial Crimes Commission (Establishment, Etc) Act 2004; S.2 Corrupt

Practices and Other Related Offences Act 2000; and S.61 Banks and Other Financial Institutions Decree.

160.[2007] EWHC 3053 QB.

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national treasury cannot be overemphasised. The fact of *Nigeria v. Santoliana Investment Corporation, Solomon & Peter Ltd., Depreye Alamiyeseigha*¹⁶⁰ is an example of this assertion. There is thus the need to revise the Nigerian statutory definition of financial institutions.

Transnational and nation adoption of laws recognize that organised criminals such as corrupt leaders and their accomplices use their proceeds of crime to insulate themselves from detection and arrest with the aid of financial intermediaries¹⁶¹; albeit the right to withhold financial information from competitors, creditor, suppliers and customers is a right that has its origin form the common law and assumed in business as critical component of the rules of the game in market oriented economies¹⁶². But safe havens are specifically undermining efforts of poor countries to ensure greater transparency and accountability.

The issue is not to eliminate bank secrecy and offshore financial services, but to ensure that the legitimate uses of financial facilities remain available while making it more difficult for criminal activities such as corruption. Thus, the financial sector is a major tool for enforcement authorities in effecting universal and national actions against organised crime

161. Art. 1 (c) of UN Resolution 1373; *United State v. Union Bank for Saving and Investments (Bank of Jordan)*, 487 F. 3^d 8 1st Cir. 2007.

162. Patrick Hardouin, "Banks Governance and Public-private Partnership in preventing and confronting Organised Crime, Corruption and Terrorism Financing" Vol.16 No.3, 2009 *Journal of Financial Crime* (Emerald Group Publishing) pp.199-209 at p.200.

163. Principle 6.1

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and corruption because it plays unwitting but major roles in aiding corrupt leaders to launder corrupt money by concealing the true owners of assets, trust and corporations.

Hence, the IMF in its Code of Good Practices on Transparency in Monetary and Financial Policies provides, *inter alia*, the following transparency guidelines for financial institutions:

- a. Financial institutions should make sure their policies are transparent, compatible with confidentiality considerations and in line with effective regulations¹⁶³;
- b. Officials of financial institutions should make themselves available before designated public authority to report on the conduct of their policies and performances¹⁶⁴; and
- c. Standards of conduct of personal financial affairs of financial officers and any general fiduciary duty should be disclosed in order to prevent conflict of interest and their exploitative activities¹⁶⁵.

3.5. Nigeria Bank Sector and Corruption

The word 'bank' is not defined in the Constitution of Nigeria. Neither is it defined in any statute nor the Interpretation Act of Nigeria¹⁶⁶. In *Wema Bank plc v. Osilaru*¹⁶⁷, the

164.Principle 8.1

165.Principle 8.4

166.See the Supreme Court of Nigeria decision in *A.D.H. Ltd. v. A.T. Ltd.* ([2006] 10 NWLR 635 at 640.

167.[2008] 10 NWLR 150: per Awala, J.C.A., at P.182, paragraphs A-C.

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respondent took loan and overdraft facility from the appellant bank and used his real property as collateral to secure payment. He however defaulted in payment. The Court of Appeal relied on the definition of 'bank' from the Black's Law Dictionary 8th edition thus:

A bank is a quasi public institution, for the custody and loan of money, the exchange and transmission of the same by means of bills and drafts and issuance of its own promissory notes (cheques) payable to bearer, as currency, or for the exercise of one or more of these functions, not always necessarily chartered but sometimes so, created to serve the public ends. It is a financial institution regulated by law. A bank is wholly the creation of statute to do business (for profit) by Legislative grace and the right to carry on a banking business through the agency of a corporation is a franchise which is depended on a grant of corporate powers by the state.

From the above definition, the court concluded that a bank is a profit oriented legal entity that can create its own legal tender or currencies in form of drafts and promissory notes (cheques) and it is statutorily regulated. However, this definition does not represent the status of the Central Bank of Nigeria (CBN). Thus, in *CBN v. Ukpong*¹⁶⁸, the Court of Appeal held that the purpose of establishing the CBN is for overall control and administration of the monetary and banking policies of the Federal Government and all the other sections of the CBN Act read together are geared towards the realization of those objectives. Furthermore, the CBN has no shareholders to whom it pays dividends and it is not subject to payment of income tax. It is the government bank that is, *simpliciter*, not established for commercial or profit making purpose.

168.[2006] 13 NWLR 555 at 561-62.

169.[2005] 3 NWLR152 at 165-166.

170. [2007] 7 NWLR 71 at 75.

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Determining the nature and responsibility imposed on CBN by section 27 (1) (u) of the CBN Act, 1991, the Court of Appeal in *CBN v. S.A.P. (Nig.) Ltd*¹⁶⁹ held that it is the main regulatory and supervisory authority of banks in Nigeria and in the court in *U.B N. Plc v. Ifeoluwa (Nig) Ent. Ltd*¹⁷⁰ held that the CBN is the bankers' bank, which is responsible for overall control and administration of the monetary policies of the Government: it prepares list of charges, guidelines and policy.

Thus, a bank is a public institution created by law for custody and loan of money; and exchanges and transmits bills, drafts, promissory notes etc; howbeit commercial banks are profit oriented entities that are owned by shareholder while the CBN is non-for-profit bank owned by the Federal Government for the purpose of supervising and regulating all banks in Nigerian and it controls and administers the monetary policies of the country.

Nigerian banking industry has a long history of corruption, which was partly responsible for the collapse of many banks in the 1990s and losses of many depositors and stakeholders. The failures were as result of fraud committed by bank owners and managers who had granted unsecured loans to themselves, their friends and family members, resulting in high level of bad debts and loss of liquidity. Some of them were even involved in outright embezzlement of public funds¹⁷¹. Investigations and trials by the EFCC in 2007, for instance,

171.Next News: "Nigerian banks are among the world most corrupt" Tuesday, February 2 2010:
available at <http://234next.com>.

172.The Guardian: "EFCC fingers 10 banks in looting by Ex Governors", Friday 28th December 2007
p.6.

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revealed that not less than ten Nigerian banks were linked with illegal transfer of public funds abroad by some former governors of the country¹⁷² and most recently, fifteen former directors, three CEOs and senior managers of some Nigerian banks were arrested for granting over N747 billion non performance loans and for their involvement in money laundering¹⁷³.

3.6. Regulation of Banks in Nigeria

173. Information provided on 10th February 2010 on the EFCC website – www.efccnigeria.org,
assessed on 21/05/2010.

174. A Brief on the Central Bank of Nigeria {CBN} Act, 2007: available at
www.cenbank.org/out/publications/pressrelease/gov/2007/pr3-7-07.pdf, assessed of the
12/06/2010.

175. Ioannis Kokkoris ET el, "Some Issues on Cross-Border Stock Exchange Mergers", Vol.29. No.2
Journal of International Law (Case Western Reserve Journal, 2007-2008) pp.455-528 at 466.

176. Lamido Sanusi: Next News, Tuesday, February 2, 2010: <http://234next.com> .

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The Nigerian capital market is regulated by the Securities Exchange Commission (SEC) while the Central Bank of Nigeria (CBN) is the main regulatory and supervisory authority of banks in Nigeria. Yet the bank sector continues to witness several important developments and challenges, which the CBN Act, could not meet¹⁷⁴. These challenges are propelled by recent developments in the international financial market¹⁷⁵; the global war on economic crime; and weak internal controls and corporate governance reform in Nigeria. For instance, there have been increase involvements of banks in stock brokerage, insurance and investment activities; and allegations of insider-manipulations¹⁷⁶.

In respond to these issues, the CBN announced a number of reforms aimed at strengthening the bank sector and complementing the economic reform program embarked upon by the Federal Government. The measures proposed by the CBN were then promulgated into the recent Central Bank of Nigeria {CBN} Act, 2007, which now clearly expresses the Bank's operational autonomy in line with international best practice.

In other to achieve and maintain it objectives, section 2 of the Act provides for price stability measures that are necessary to enable the CBN collaborate with the fiscal authorities in controlling inflation rate. The provision is imperative to keep a close watch on government spending. Section 12 established a Monetary Policy Committee to facilitate the attainment of the CBN's price stability objective and section 33 empowered the CBN to enter into arrangements for sharing and exchange of information with other regulatory bodies particularly those out-side Nigeria for supervisory purposes. The section also provides for

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the confidential treatment of such information and section 57 extends the CBN's regulatory powers to credit bureaux in Nigeria.

Nevertheless, the CBN is overburdened with too many responsibilities¹⁷⁷. Some of these burdens need to be delegated to other competent regulatory bodies and supervision of the financial sector needs to be consolidated. There is need to pass a legislative enactments that will domestic international financial treaties, convention and protocol on corruption in Nigeria.

The upsurge in adoption of international instruments on combating and preventing corruption did not only raise global focus on corruption in developing nations, but resulted into a change of approach and pressures by international financial institutions, like the World Bank, IMF, African Development Bank, on developing countries to implement anti-corruption laws within their domestic legal framework. But is governance the antidote for corruption?

3.7. Constitutional Framework to Tackle Corruption in Nigeria

'Good Governance' refers broadly to the exercise of power through a country's economic, social and political institutions in which institutions represent the organisational rules and routines, formal laws, and informal norms that together shape the incentives of public

177. Inam Wilson, "Regulatory and Institutional Challenges of Corporate Governance in Nigeria post Banking Consolidation" Vol.12 No.2 *Economic Indicators* (Nigerian Economic Summit Group 2006) pp.1-10 at p.4.

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policy-makers, overseers, and providers of public services¹⁷⁸. It ensures that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources¹⁷⁹.

The 1999 Constitution of Nigeria contains several provisions geared towards good governance, supported by the enactment and judicial validation of accountability and transparency; the augmented anti-corruption legislations¹⁸⁰. Yet the Constitution does not define corruption or give a list of acts that will amount to corruption. It only focuses on bribery within the public sector and does not thus reflect the complete nature of corruption in the nation, which involves the private sector and foreign enterprises.

Moreover, the nascent constitutional democratic government grapples with the problems of governance and how to effectively combat and prevent corruption¹⁸¹. The Fifth Schedule 33 of the Constitution imposes a duty to observe and conform to a Code of Conduct by Public

178. See Governance for Sustainable Human Development, UNDP Policy Paper, UNDP 1997 PP.2-3; Global Perspective on Governance at <http://magnet.undp.org/policy/default.htm>; and World Bank at www.worldbank.org/publicsector/overview.htm.

179. Adel M. Abdellatif, "Good Governance and its Relationship to Democracy and Economic Development" a paper presented at the Global Forum III on Fighting Corruption and Safeguarding Integrity, Seoul 20 – 31 May 2003, pp.4-6, available at www.GF3/wa/iv-3/S1.

180. See Chapter 2 of this work.

181. Oyelewo Oyewo, "Constitutions, Good Governance and Corruption: Challenges and Prospects for Nigeria", pp.1-21 at p.6. Available at www.enelsyn.gr/Papers/w16/Paper%20prof%20Oyelowo%20Oyewo.pdf; assessed on 19/07/2010.

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Officers. The Code of Conduct prohibits, inter alia, the giving and receiving of bribes, abuse of office by Public Officers, the operation of private foreign accounts and conflict of personal interest with official duties on part of Public Officers. Pivotal to the Code is the provision that every Public Officer shall declare his/her assets within three months of coming into force of the Code or immediately after assuming office and thereafter at the end of every four years, and finally at the end of term of office.

A Code of Conduct Bureau (CCB) is charged with the responsibilities of receiving, retaining custody of and examining assets declaration from filed by Public Officers; albeit the immunity clauses of S.308 of the Constitution restricts the institution of civil or criminal proceedings against the President, or Vice-President, Governor or the Deputy Governor; and this impedes the Code of Conduct Tribunal (CCT).

In *A-G Federation v. Abubakar*¹⁸², the respondent is the vice president of the federal republic of Nigeria. He assumed the office for the second term after his political party won the 2003 general elections. The CCB investigated certain corrupt allegations levelled against the respondent and proffered charges against him before the CCT. Upon service of the charge sheet and summons on him, the respondent filed a suit at the federal high court challenging the competence of the tribunal to try and convict him for any criminal offence on the ground that he is immune from prosecution. The court held that the CCT has no

182. Attorney-General of the Federation, Code of Conduct Bureau, and Code of Conduct Tribunal v

Alhaji Atiku Abubakar [2007] 8 NWLR (Pt. 1035) 117 at pp.154, para. B-C and 155, para. F-G; see also Taiwo Osipitan and Oyelowo Oyewo, "Legal and Institutional Framework for Combating Corruption in Nigeria" in University of Lagos Readings in Law E.O. Akanki (ed.) pp.271-274.

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power or jurisdiction to hear and determine allegations of contravention of any of the provisions of the code of conduct bureau and the tribunal Act or as contained in the 5th schedule of the constitution against a president, vice president, governor or deputy governor, while his tenure of office subsists.

The court further held that restriction on legal proceedings whether civil or criminal against any person to whom section 308 of the constitution applies is absolute during his period in office. Such a person shall not be arrested or imprisoned (while still in office) either in pursuant of the process of any court or otherwise and no process of any court requiring or compelling his appearance shall be applied for or issued.

The above constitutional provisions have the effect of protecting some public official from any civil proceedings or criminal prosecution relating to acts or practice of corruption¹⁸³.

183.S.308 of the 1999 Constitution

184.S.36 of the 1999 Constitution

185.[2005] 51 WLR 52, the Supreme Court validated the ICPC Act provisions by employing arguments based on the corruption rating of Nigeria in the world and its impact on the Nigerian citizenry.

See also, F.R.N v Anache [2004] 14 WLR 1 (SC) - p.7.

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Even the Fundamental Rights provisions on due process and Fair Hearing¹⁸⁴ have been sought to be employed by persons accused of corruption to “blanket” their actions.

Furthermore section 36 of the constitution provides that an accused is presumed innocent until the contrary is established in the Nigerian criminal justice; albeit this provision has been interpreted by the Supreme Court of Nigeria in manner that justified the prosecution provisions in the ICPC Act and in the EFCC Act. For instance, in *Olafisoye v. F.R.N*¹⁸⁵, the court validated the ICPC Act provisions by employing arguments based on the corruption rating of Nigeria in the world and its impact on the Nigerian citizenry.

3.8. Critical Appraisals

Nigeria has a prevalent value system that glorifies and endorses corrupt and illegal means as normal and sufficient means of living. This is a socio-cultural logic that underlies a number of common behavioural traits in Nigeria and provides favourable ground for generalizing and trivializing corruption. There is the general belief in Nigeria that public office/public service is for personal enrichment and accumulation of wealth, as part of every Nigerians share of the national cake for his/herself and for his/her family, tribe/ethnic group¹⁸⁶. Furthermore,

186. See Oyelewo Oyewo op. Cit., p. 6 where the author described in detail the nature and culture of corruption in Nigeria.

187. Barry Rider, “The Limits of the law: An Analysis of the Interrelationship of the Criminal and Civil Law in the Control of Money Laundering” Vol.2 No.4 *Journal of Money Laundering Control* (Henry Stewart, 1999) pp.209-224 at 216.

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the Constitutional framework for combating corruption is weak and narrow in practice; and thus good governance is not an antidote for corruption in Nigeria.

It is pertinent to note that even underground banking systems in most countries have history that reflects indigenous social and cultural factors¹⁸⁷ and Nigeria is not an exception. To combat and prevent corruption in Nigeria, therefore, a multi-faceted approach of legal and socio-cultural mechanisms must be engineered to address the malaise. More especially, there is need for effective public awareness and campaign programs against corruption in the country.

3.9. Conclusions

To attain an expected outcome in the fight against corruption, corruption should be confronted side by side with money laundering, which poses challenges in developing countries and particularly in Nigeria due to existing network between corrupt officials and financial institutions. Financial institutions are major tools for enforcing universal and nation actions against corruption because of their strategic positions in international money transfers. However, regulation must be adapted to the local realities of economic activities¹⁸⁸; albeit domestic response to treatment of international problem should be

188. Patrick Hardouin, op. Cit., p.201.

189. Robert Hubbard et al, *Money Laundering and Proceeds of Crime*, Toronto, Irwin Law Inc., 2004 at p.1.

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placed within the context of international expectations¹⁸⁹. There is also the need to bridge the gap between regulatory authorities in Nigeria and relief the CBN of some of its current responsibilities in order to attain effective and efficient regulation and supervision of the country's banks and financial institutions.

CHAPTER 4

Corporate Governance and Cultural Diversities

4.1. Introduction

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Political influence and corruption lead banks in many jurisdictions into high-risk lending and create favourable atmosphere for banks directors and managers to commit white-collar crimes. Financial institutions aid corrupt political officials in laundering wealth acquired through corruption without detection and successful prosecution. In Korea, for instance, bank loans continued to be made to well-connected companies after they experience serious financial difficulties because of payoffs made by such companies to powerful politicians who pressured the banks to continue making loans with no intention of repaying the funds; albeit the bankers themselves were also bribed¹⁹⁰. Recent international efforts represent willingness to combat transnational corruption, but there have not been effective results because the definition of corruption is a cultural-based and what is labelled 'corrupt' in some societies are often viewed as acceptable gift giving or tipping within another¹⁹¹. In other words, the perception of corruption differs from country to country and there is hardly an acceptable definition; and jurisdictional differences are thus challenged in combating transnational corruption, especially in regard to asset recovery.

Nevertheless, corporate governance is generally regarded as an effective means of controlling unethical or corrupt behaviours of board of directors and executives of corporations after the U.S market crash of the 1930s; albeit code of governance arrangements and regulatory systems vary widely between countries. This chapter represents an overview of: the concept of 'white collar crime; bank corporate governance

190.Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform*, Cambridge, Cambridge University Press, 1999, pp.10-11.

191.Susan Rose-Ackerman, *op. cit.*, p.110.

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control in Nigeria; and the correlation between law, culture and jurisdictional diversities in combating transnational corruption.

4.2. White Collar Crime

Many profit-driven crimes are business-related and are committed by those who manipulate business. Often, they are known as 'white collar crimes' and include commercial frauds. These crimes are difficult to detect, due to elaborate conspiracies in the form of networks that include politicians and law enforcement officials¹⁹². White collar crime is thus an organised crime¹⁹³.

Statistics in the recent past demonstrate an increase in the use of Limited Liability Companies possible connections with illicit purposes such as corruption and money laundering. It reported that nearly two million companies were incorporated in 2006 without identifying their owners¹⁹⁴. Nevertheless, larger proportions of white collar crimes

192.Laura Hansen, "Corporate Financial Crime: social diagnosis and treatment" Vol.16 No.1, 2009
Journal of Financial Crime (Emerald Group Publishing) pp.28-40, p.34.

193.Edwin Sutherland, *White Collar Crime*, New York, Dryden Press Inc., 1949, p.220.

194.Benton E. Gup and Navin Beekarry, "Limited Liability Companies (LLC) and Financial Crimes"
Vol.12 No.1, *Journal of Money Laundering Control* (Emerald Group Publishing, 2009) pp.7-18, p. 9.

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are committed by few individuals employed by legitimate organisations¹⁹⁵; but they do not conceive of themselves as criminals¹⁹⁶.

Development of the financial markets, displacement of industrial activity to less developed communities, de-unionisation and rapid expansion of financial markets have vastly increased opportunities for business deviance (especially in financial sectors), which has emerged at the forefront of socio-political stage as considerable social and ethical problems¹⁹⁷. Furthermore, financial institutions have been discredited by apparent merging of illegal and legitimate business interests evident in, for example, money laundering and corruption.

These crimes thus affect broad categories such as consumers, employees and members of the public: having impact on the everyday lives of individuals and communities. Ironically, the victims lack the awareness of the offence. Ignorance of the adverse effects of white collar crime and the view that it is primarily an economic phenomenon cause victimisation

195.N. Shover et al (Eds), *Crimes of Privilege: Reading in White-collar Crime*, Oxford University Press, Oxford, 2001 p.3.

196.Edwin Sutherland, *White Collar Crime: the Uncut Version*, New York, Yale University Press Inc., 1983 at p.230.

197.Hazel Croall, "White Collar Crime: an Overview and Discussion", Pamela Davies et al (ed.) *Invisible Crimes: their Victims and their Regulations*, London, Macmillan Press Ltd, 1999, pp.29-53 at pp.31-32.

198.E. Sutherland, 1949 at p.36).

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to appear less serious and also preclude reliable estimates of the extent of the offence¹⁹⁸.

The laws in regard to financial crime are generally based on the laws of fraud or breach of trust. Logistically, these are common laws that are adapted to modern social

organisation¹⁹⁹. According to Sutherland, the essential characteristic of crime is that it is

behaviour that is prohibited by the State as an injury to the State and against which the

State may act, at least as a last resort, by punishment²⁰⁰. The *Wolfenden Committee Report*

*of Homosexual Offences and Prostitution*²⁰¹, observed, *inter alia*, that the function of

criminal law is to preserve public order and decency; to protect the citizen from what is

offensive and injurious; and to provide sufficient safeguards against exploitation or

corruption or other forms of crimes²⁰². Nevertheless, empirical studies have proved that

criminalization of financial crimes (such as white collar crimes and corruption) is not an

ultimate solution²⁰³. For instance, nearly all of the corporate scandal-based reforms for the

199.E. Sutherland (1949), op. Cit., p.32.

200.E. Sutherland, *ibid*, p.31.

201.Cmnd.247

202.Janet Dine, James Gobert and William Wilson, *Cases and Materials on Criminal Law (5th ed.)*,
Oxford, Oxford University Press, 2006, pp. 139-157.

203.See chapter 1 of this work.

204.David Skeel, "Icarus and American Corporate Regulation" in John Armour and Joseph McCahery
edited *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe
and the US*, Portland, Hart Publishing Inc., 2006, p.136.

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past seventy years in the U.S came from the federal lawmakers and regulators²⁰⁴. But the roles of the federal and states lawmakers and regulators shifted towards modern pattern – corporate governance- after the crash of the 1930s and with the quest for good governance.

4.3. What is Bank Corporate Governance?

Governance is an act of controlling and directing the making and administration of policy²⁰⁵. Corporate governance refers to the way a company is governed and to what purpose²⁰⁶. It is the system by which companies are directed and controlled²⁰⁷: the legal and organisational framework within which corporations are governed; and the powers, accountability and relationships of those who participate in the direction and control of a company²⁰⁸.

Bank corporate governance is thus the system by which banks as profit entities are directed and controlled and the manner in which the banking business and affairs are governed by board of directors and senior management who: set the corporate objectives; operate the

205. Philip Babcock Grove, *Webster's Third New International Dictionary of English Language*

Unabridged, Massachusetts, Marriami, Inc. (1971) p.982.

206. Brian Coyle, *Corporate Governance (4th edition)*, London, ICSA (2006) p.4.

207. Cadbury Report, op. Cit., paragraph 2.5.

208. HIH Commission Background Paper II (November, 2001), para.76: available at

<http://www.hihroyalcom.gov.au>, assessed on 12/06/2010.

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bank's day-to-day business; meet the obligation of accountability to shareholders; take into account interests of other stakeholders; ensure the safe and sound operation of the bank; and protect the interests of depositors²⁰⁹. Nevertheless, corporate governance arrangements and regulatory systems vary widely between countries²¹⁰ and its objectives are faced with stumbling blocks²¹¹.

Generally speaking, a corporation has dual contract with two different groups within its constituency: an "economic contract" with its owners²¹² and a "social contract" with the wider constituencies, which obliges the board to take account of the interests of other stakeholders, especially its employees²¹³. Transparency and democracy are two fundamental principles of corporate governance; but absolute transparency and democracy in for-profit corporations like banks are farfetched because the board of directors and managements of corporations are primarily expected to discharge their duties in the interests of the shareholders²¹⁴. Moreover, empirical studies show that there is great limit

209. Basel Committee on Bank Supervision: Enhancing Corporate Governance for Banking

Organisation (February 2006) para.10.

210. Ibid, para.14.

211. Lawrence Fok, "The Relationship between Disclosure and Governance" (31st May 2000) p.1:

available at www.oecd.org/dataoecd/7/27/1913404.pdf, assessed on 10/06/2010.

212. *Sawyer V. Hoag*, 84 U.S. 610, 620 (1873).

213. Saleem and Chatterjee, "Perspective on Corporate Governance" in Sheikh and William Rees,

Corporate Governance and Corporate Control, London, Cavendish, 1988, p.3.

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to the extent transparency in financial institutions²¹⁵. There are limits of transparency even in governmental administrations because information may be kept secret for public interests. The level of transparency require by good governance can thus only be obtainable in Non-for-profit corporations.

Democracy means that collective decisions should be made by those whose interests are at stake. However, there are restrictions of employees' involvements in corporate decisions among most Anglo-American for-profit corporations; albeit recent assessments show that most multinationals in Britain have installed some form of workers' consultation in their corporate policies²¹⁶. True corporate democracy can thus be obtainable in for-profits corporate if employees are given chances of becoming shareholders by purchasing shares of the company. Then they can have inevitable 'rights' in regulating the policies of the corporation. It is thus unfortunate that profit-making corporate entities like financial

214. *Gaimon V. National Association for Mental Health* (1979) 3 WLR 42 at 54. See also the preamble of the UK Combined Code on Corporate Governance, 2008.

215. See Alistair Darling, "Reforming Financial Markets" (July 2009) HM Paper Presentation on the financial market crash.

216. Ewald Engelen, "Corporate Governance, Property and Democracy: a Conceptual Critique of Shareholder Ideology" in Thomas Clarke edited *Theories of Corporate Governance*, London, Routledge, 2004, pp. 310-14.

217. See Lord Cadbury's comments in the World Bank Corporate Governance Framework for Implementation- Overview (September 1999), p.vi. Available at <http://www.systemiclogic.net/artifacts/PUB/governance/gcgfbooklet.pdf>. Visited on 14/01/2010.

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instructions, by their nature and purpose of their creation, can hardly uphold corporate governance principles because of the ambiguity in balancing the interests of individuals, corporations and society²¹⁷

4.4. Corporate Governance in Nigeria

The history of corporate governance in Nigeria stretches to the colonial days when Nigerian private sector was dominated by the British companies and in accordance with the British interests²¹⁸. Although the observance corporate governance principles in Nigeria have been secured through combination of voluntary and mandatory mechanism, most of the extant laws and codes reflect some of the OECD and Basel principles²¹⁹. Only of recent did the CBN Code of Conduct for Directors of Licensed Banks and Financial Institutions and the Code of

218. Emmanuel Adegbite, "Political Analysis of Shareholders Activism in Emergent Democracies: a case study in Nigeria", CSGR Working Paper 265/10, p.9, available at www.warwick.ac.uk/fac/soc/csgr/pdf.

219. Inam Wilson, op. cit., p.2.

220. See part 1 para.1.7 of the CCGBN.

221. Para.2.3

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Corporate Governance for Banks in Nigeria Post Consolidation (both issued by the CBN in 2006)²²⁰ made compliance with bank corporate governance principles compulsory.

Paragraph 2 of the Code of Corporate Governance for Banks in Nigeria Post Consolidation, 2006 (CCGBN) identifies, *inter alia*, that: ineffective Board Oversight functions²²¹; fraudulent and self-serving practices among member of the board, management and staff²²²; weak internal controls²²³; passive shareholders²²⁴; abuses in lending²²⁵ and shareholder's appetite for high dividend and depositors quest for high interest on deposits as weaknesses in corporate governance of banks in Nigeria. Paragraph 4 provides, *inter alia*, that all directors should be knowledgeable in business and financial matters and also possess the requisite experience²²⁶; there should be a definite management succession plan and shareholders need to be responsive, responsible and enlightened²²⁷; there should be independent and competent external and internal auditors of high integrity²²⁸; and there should be internal

222.Para.2.3

223.Para.2.5

224.Para.2.8

225.Para.2.10

226.Para.4.11

227.Para.4.13

228.Para.4.16

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monitoring and enforcement of a well articulated code of conduct/ethics for directors, management and staff.

Paragraph 3 specifically points out insider-related lending and lack of transparency and adequate disclosure of information as some of the challenges of corporate governance for banks in Nigeria. The CCGBN states that if the code should fail to achieve transparency through diversification in bank ownership, the pervasive influence of family and related party affiliations may continue, resulting in huge levels of insider-abuses and connected lending²²⁹. It also identifies transparency and adequate disclosure of information as key attributes of good corporate governance. However, there are deficiencies in banks information disclosure system in Nigeria, particularly in the area of risk management strategies, risk concentration and performance measures. According to paragraph 6, the board of directors and companies, as service providers or suppliers to the bank, should be engaged in transparency, due process, data integrity and disclosure requirements and that full disclosure of such interests should be made to the CBN.

4.5. Critical Appraisals

Corporate governance in Nigeria is yet at a rudimentary stage and only 40% of companies, including banks, quoted on the Nigerian Stock Exchange had recognised codes of corporate

229.Para.3.9

230.CBN Code of Corporate Governance for Banks in Nigeria Post Consolidation 2006, para.1.3.

231.Uche Aniemenana, "Corporate Governance in the Banking System" (delivered at the 3rd Pan African

Forum on Corporate Governance, 8-10 November 2005 at Dakar, Senegal): available at

www.ifc.org, assessed on 11/06/2010.

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governance in place²³⁰. Nonetheless, not many Nigerian banks are noted for their strict observance of corporate governance, best practices and high ethical standards in their operations²³¹. Moreover, majority of shareholders in Nigeria are not well informed of the powers available to them and lack understanding of the reports given at the company meetings²³².

Recent survey shows that corporate governance practices and partisan political considerations in Nigeria intermingle. As a consequence, board and senior-managerial appointments are based on political affinities and loyalties as opposed to considerations of efficiencies and capabilities²³³. The relationship further resulted into a public-private corrupt collaboration as evident in the banking sector²³⁴.

Code of corporate governance has been recognised as the best way of regulating the behaviour and structure of firms' board of directors and management and as means of

232. Inam Wilson, op. Cit., p.5

233. Emmanuel Adebite, op. Cit., p.13

234. See discussion on roles of financial institutions in the fight against corruption and money laundering in chapter 3 of this work.

235. Amao Amaeshi, "Galvanising Shareholder Activism: A Prerequisite for Effective Corporate Governance and Accountability in Nigeria", Vol.82 No.1 *Journal of Business Ethics* (Thomson Reuters, 2008) pp. 119-130, p.128.

236. Emmanuel Adebite, *ibid* p.15

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protecting shareholders' rights. However, inadequacy of notices of statutory meetings, inappropriate conduct of meetings; and the lack of information and weakness of shareholders' activism impede sound corporate governance control in Nigeria²³⁵. Survey shows that executive members of shareholders' associations in Nigeria maintain close and personal relationships with executives of the firms they are meant to check²³⁶. This obstructs shareholders' activism and enables executives of shareholders' associations to participate in several executive corrupt behaviours, at the detriment of the shareholders they ought to represent. Thus, like in most developing jurisdiction, shareholder activism in Nigeria reflects the corrupt political culture of the country.

According to Raymond Fisman, Nigeria has a socio-cultural system that encourages bribery and corruption²³⁷; and the situation in the bank sector reflects the corrupt political culture of the country. Poor corporate governance is a major factor in virtually all known instances of distress experienced by the nation's banks and financial institutions²³⁸. All the same, it is not clear whether incorporating business ethics into corporate governance will improve behaviours and conducts of bank directors and senior managers for the long run²³⁹.

Corporate governance is thus not sufficient to deal with the phenomenon. Bank shareholders and stakeholders in Nigeria need to be enlightened about their rights. There is the need for general public awareness and campaign against corruption.

237. Raymond Fisman et al, op. Cit., pp.80-81.

238. Inam Wilson, op. Cit., p.1.

239. Laura Hansen, op. Cit., p.34

4.6. Law, Culture and Diversities

The *Webster's Third International Dictionary*²⁴⁰ defines 'culture' as a body of customary beliefs, social forms, and material traits constituting a distinct complex of tradition of a racial, religious or social group and the complex whole includes knowledge, beliefs, morals, law, customs, opinions or a complex type of behaviour or standardized social characteristics peculiar to a specific group, occupation, social class etc. The *Oxford Compact English Dictionary*²⁴¹ defines 'culture' simply as the customs of a particular nation, people, or group.

The *Black's Law Dictionary*²⁴² defines 'custom' as a practice that by its common adoption and long, unvarying habit has come to have the force of law; expresses itself not in a succession of words, but in a course of conduct. It defines 'Customary Law' as a law consisting of customs that are accepted as legal requirements or obligatory rules of conduct;

240. Edited by Philip Babcock Gove, 1971, p.552.

241. 2nd edition by Catherine Soanes, Oxford, Oxford University Press, 2003, p.262-3.

242. 9th edition, Thomson Reuters, 2009, pp.436-46.

243. Malcolm Wilkey, "The Practicalities of Cross-Cultural Arbitration", in Stefan Frommel and Barry Rider (edited), *Conflicting Legal Cultures in Commercial Arbitration: Old issues and New Trends*, London, Kluwer Law International, 1999, p.82.

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practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws. There is thus no clear cut distinction between culture and custom and both words are used interchangeably in this discussion.

The differences between legal cultures are often magnified when governments themselves or their administrative agency representatives are the litigants, mostly in matters regarding governmental economic policies²⁴³. The issue of cultural diversities in the transnational combat of corruption exists because of the differences in legal and socio-cultural perceptions of corruption among sovereign states.

The term “sovereignty” was introduced into political science in 1576 by Jean Bodin, who defined it as state supreme authority over citizens and subjects. Before Bodin, however, the word *souverain* was used in the Middle Ages in France for an authority that has no other authority above it; albeit Bodin gave the concept a meaning that was reflected in the Latin adage: *summa in cives ac subditos legibusque solute potest*: sovereignty is the supreme power over citizens and subordinates and which supreme power is not subject to the law²⁴⁴

244. Jackson Nyamuya Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome*, New York, Transnational Publishers Inc., 2003, pp. 8-9.

245. 1997, 68 BYIL 575. See Marin Dixon and Robert McCorquodale, *Cases and Materials on International Law (4th edition)*, Oxford, Oxford University Press, 2003, pp. 273-4.

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Speaking during the debate on the second reading in the House of Commons of the Jurisdiction (Conspiracy and Incitement) Bill, the United Kingdom's Parliamentary Under-Secretary of State, Home Office, Mr. Timothy Kirkhope, stated thus²⁴⁵:

When introducing legislation aimed at combating international crime, we should be careful to ensure that the United Kingdom does not simply export its laws to other countries. Foreign Governments are responsible for determining what actions should be prohibited within their territories and how such behaviour should be dealt with under their laws...The United Kingdom deals with those who commit offences within our territory. That is the principle on which the jurisdiction of our courts is based...the criminal law of this country sets out what we as a nation believe about the sort of society in which we want to live. The law defines the conduct that is or is not accepted: it defines the parameters and establishes the standard. We and we alone, can say what actions should be proscribed by the criminal law. No one can do that for us and nor, in the generality of cases, should we attempt to do it for anyone else.

The International Court of Justice in the case of *SS Lotus Case (France v. Turkey)*²⁴⁶ observed further:

Jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a Convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application on their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases...In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty...Though it is true that in all systems of law the principle of territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State.

246. PCIJ Ser A (1927) No. 9, Permanent Court of International Justice.

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Thus, jurisdiction is an aspect of sovereignty that refers to the general legal – judicial, legislative and administrative – competence of a state²⁴⁷; and transnational jurisdiction is an issue of rights of states rather than legal competence. Territorial jurisdiction can however be objective or subjective. The ‘objective’ territorial principle permits a State to exercise its jurisdiction over all activities that are completed within its territory, even though some element constituting the crime or civil wrong took place elsewhere²⁴⁸, while the ‘subjective’ territorial principle permits a State to assert jurisdiction over matters commencing in its territory, even though the final element may have occurred abroad²⁴⁹

In order to meet international standards, a state must in normal circumstances, maintain a system of judiciary that are empowered to decide civil cases that contain foreign elements; albeit foreign courts most times prefer to adhere to the territorial principle conditioned by

247. Ian Brownlie, *Principles of Public International Law (7th)*, Oxford, Oxford University Press, 2008 edition, p.299.

248. See Lord Diplock in *Treacy v. Director of Public Prosecution* [1971] AC 537.

249. Martin Dixon et al, op. cit., p.276.

250. Ian Brownlie, op. cit., p.300.

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the *situs* of the facts in issue²⁵⁰. Subject to certain limitations imposed by international law, however, every State has exclusive jurisdiction within its own territory²⁵¹; albeit they extend their jurisdiction to offences committed outside their territories and do so in ways that vary from state to state²⁵².

Crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order and every state has jurisdiction under customary international law to exercise extraterritorial jurisdiction in respect of international crimes which satisfy these criteria²⁵³. Howbeit, 'isolated' offences such as corruption, even if committed by public officials, would not satisfy these criteria; and thus jurisdiction over transnational corruption depends on national constitutions and criminal laws.

In dealing with recovery of ill-gotten assets from foreign jurisdictions, the court of *fori* normally takes account of the defendant's realisable property held abroad when making an

251.J.L. Brierly, *Law of Nations*, Oxford, Clarendon Press, 1963, p.222.

252.*Lotus case* ([1927] PCIJ, Ser.A., no.10 p.20.

253.See Lord Millett's dissenting judgement in Pinochet case ([1999] 2 WLR. 825, 911-12.

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order to confiscate such property or to repatriate stolen funds from outside and prevent any person from dealing with them worldwide. Such order however requires considerable international cooperation or treaty, which is difficult to obtain in face of divergent perception of corruption among nations.

The International Court of Justice emphasised in *Rights of Passage over Indian Territory case*²⁵⁴ that there is no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two states. The international Court of Justice thus upholds mutual or bilateral agreement between States as customary law even though it is a voluntary agreement that regulates the affairs or businesses between its signatories.

The extent and volume of organised crime like corruption remains blurred; and the efforts by international and inter-governmental organisations to 'measure' the scale of the phenomenon are limited by diversity²⁵⁵. Mutual legal assistance agreement to recovery of assets stolen via transnational corruption is, nevertheless, a way of avoiding the cultural diversities that exist among nations. This occurs where both the requesting state and the requested state are signatories to a bilateral treaty of assistance in investigating,

254.ICJ Rep. 1960 6.

255.Valsamis Mitsilegas, "From National to Global, from Empirical to Legal: the Ambivalent Concept of Transnational Organised Crime" in Margaret Beare (edited), *Critical Reflections on Transnational Organised Crime, Money Laundering and Corruption*, Toronto, University of Toronto Press Inc., 2003, p. 83.

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confiscating and enforcement of foreign judgement in regard to stolen assets kept aboard.

In the absence of any bilateral or multi-lateral agreements, assistance, enforcement and recognition of foreign order to repatriate stolen assets shall be subject to law of the *lex situs*²⁵⁶.

Furthermore, courts ought to take judicial notice of the socio-cultural perceptive of foreign states in matters with trans-cultural elements; albeit such element must relate to one of the parties in the case. In *Cleveland v. United States*²⁵⁷ for instance, the accused was charged with polygamy. Justice William Douglas observed thus:

We are dealing here with polygyny (polygamy), one of the basic forms of marriage....even today it is to be found frequently among certain...peoples of the world. We must recognize then that polygyny (polygamy) like other forms of marriage is basically a cultural institution rooted deeply in the religious and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of contemporary world condemn the practice as immoral and substitute monogamy in its place...but that does not alter the face that polygyny (polygamy) is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such.

However, the proposed international customary law towards combating transnational corruption should be applied with caution, especially where two jurisdiction with conflicting perception of corruption are involved in a matter. The law in such circumstances should be applied provided it is inconsistent with existing international conventions or its enforcement would not be contrary to the UN goals. Where two socio-cultural perceptions of corruption

256.Susan Taylor, "Criminal Law" in Andrew Keltie et al (edited), *International Tracing of Assets*, London, Sweet and Maxwell, 1997, G1.15 – G1.16.

257.(1961), 5 AJ, (1962), 805; ILR 36, 5

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are in conflict, the law which applies should be the law that is most appropriate to the facts of the case; albeit certain specific rules should apply in particular cases such as where parties belong to the same country.

Nevertheless, it is pertinent to emphasise that culture is dynamic and changes constantly²⁵⁸; albeit with creativity, ingenuity and great effort²⁵⁹. There is thus the need to constantly review states societal perception of corruption while public awareness and campaign against corruption should be encouraged in extremely corrupt nations in order to transform the perceptions of the citizenry against the phenomenon.

4.7. Conclusions

The quest for good governance dated back to 1930s when Berle and Means pioneered the subject 'corporate governance'. However, empirical study reveals that there are limits to which good corporate governance codes can control the unethical or corrupt behaviours of directors and senior executives of financial institutions, especially in countries where greed reigns supreme. Moreover, corporate governance arrangements vary from country to country; and the general public in most countries do not view white collar crime as crime. There is thus the need for an effective public awareness and campaign programs against corruption in such societies.

258.Susan Rose-Ackerman, *op. cit.*, p. 110.

259.Raymond Fisman et al, *op. cit.*, p.102.

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Jurisdictional diversity is a challenge in transnational combat of corruption. There is obviously a correlation between law and culture or custom; and international anti-corruption regulatory agencies should not ignore this fact. One viable solution to the jurisdictional challenge in transitional combat of corruption is mutual treaty agreement to combat corruption among nations.

Conclusions

Depending on the approaches taken by societies, “corruption” may be defined in various ways. It is a cultural phenomenon which is influenced by economic, psychological and social factors; and thus cannot be resolved only through legal mechanisms; neither is criminalization an absolute solution to the problem. The argument on criminalization of corruption is rather a distraction from the concerns of the adverse effect of the phenomenon to political stabilities and economic developments of nations.

Moreover, approaches to prevent corruption, such as passing laws, creating new institutions and conducting anti-corruption campaigns, have failed to make significant impact to control the phenomenon because in political environment where institutions, rules and norms of behaviour have adapted to corruption. Rather, there is the need for ‘curative measures’ in such circumstances; and public awareness and campaign programs against the phenomenon can produce expected results; albeit in the long-term.

In carrying out this research, it became manifest that there is need for a multi-faced approach to combating corruption and the following suggestions are put forward as means of combating corruption:

1. The combat against transnational corruption should be approached as an ‘international concern’ rather than as a crime. This approach shall not only reconcile

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the political and academic differences of what should and should not constitute corruption; but it shall as well channel all interests to the main issue: the adverse effect of corruption to the political stabilities and the economic development of States.

2. The correlation between law and culture and the consequential effect of cultural diversities in combating transnational corruption becomes a serious problem. Bilateral or multilateral treaties between and among States may be a step forward for combating corruption; and eventually may develop customary rules of combating transnational corruption.
3. Public awareness and campaign against the phenomenon may form effective 'curative measures'; and individual families as well as educational institutions should be actively involved in such programs.

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