

## **PROTECTING GHANA AND GHANA'S EMERGING**

### **OFF-SHORE CENTRE STATUS FROM**

#### **MONEY LAUNDERING**

*Notes of a lecture given by John Hardy QC at the British Council in Accra on Tuesday 9 March 2010.*

#### **I: BACKGROUND AND INTRODUCTION**

1. There is nothing new about money laundering. Ever since currencies were first introduced, they have been used for the conduct of legitimate trade, and to act as a representative mechanism for all legitimate economic activity. But they have also been vulnerable in two particular ways: first to dilution through counterfeiting, and, second to being used as a shield for criminal activity. That shielding or disguising is what we call money-laundering. It is so-called because that which is dirty is made clean through the process. The drug-trafficker, for example, wants to pay a builder to build him an extension to his house. He cannot pay him in drugs, because the builder is an honest law-abiding man who doesn't have anything to do with them. So instead he pays him in cash. But that cash is the proceeds of his sales of drugs. The builder isn't aware of this, takes the cash and spends it on a car. The car salesman puts the money into his bank account. The bank lends the money to a shop-owner, who opens a new business and buys new products to sell to his customers. The customers visit the shop and purchase the products. And so it goes on. With each successive transaction what was originally dirty money becomes clean, and the drug-trafficker profits from his crimes.
2. He also escapes detection if he can launder the proceeds of his crime successfully. But if there are obstacles and barriers to successful laundering, then as soon as he attempts to decontaminate his proceeds of crime, the more likely it is that he will be caught. Suppose, for example, that the builder declines to accept a large cash payment, and will only build the extension if he is paid by a cheque drawn on a high-street bank account. The drug-trafficker has to put his cash into the bank, in order to be able to pay by cheque. If the bank has appropriate internal controls the size of the sum of cash deposited may generate a STR - a suspicious transaction report.
3. In short, not only is he much more likely to be caught, but also the drug-trafficker cannot profit from his crimes. If the criminal fraternity cannot profit from their crimes, so the theory goes, they will have much less motive to commit them.
4. And so this – the fight to prevent the criminal from profiting from his crime - is the 21<sup>st</sup> century battlefield for societies and countries around the globe as they endeavour to contain, control, reduce, and eliminate crime.

5. From the 1988 UN Vienna Convention on drug-trafficking onwards, the effort to attack the economic foundations of crime began to be identifiably global in character. Not only have the economic foundations of crime come under prolonged and determined assault, so too has economic crime itself. One of the most prominent aspects of this trend has been the international effort to combat bribery – which, of course, will be covered in tomorrow’s lecture. Other aspects of economic crime – that is to say crime which distorts and imbalances the natural and proper performances of national economies – include insider dealing, and other criminal forms of interference with markets, as well as tax fraud. Money-laundering falls under this heading, since the absorption of funds from illicit sources into the mainstream economy distorts and contaminates that economy.
6. While efforts to control and contain organised crime have become global in character, so, too, organised crime has developed transnationally. One facet of this is the scourge of established democracies and emergent nations alike: terrorism. The terrorist seeks to impose doctrine. To do so he must undermine the institutions of the country he seeks to change through violence. He must disrupt the democratic process, and prevent the proper functioning of the courts. He must hamper the process of education. But his softest target is the economy. A bomb in a market-place is like a bomb on an aircraft: they deter travel and trade. The national, regional, and global authorities have three principal means of combating the terrorist. All three are used to a lesser or greater degree. The first is to fight him: but the terrorist conducts guerrilla warfare – he is difficult to detect, confront, and apprehend. The second is to educate him: but he is difficult to persuade, reform and rehabilitate him. The third is to cut off his funds at source. The terrorist needs funds – he needs training, weapons, means of communication, propaganda, and the ability to travel. Without those funds the terrorist is disabled. Thus, perhaps paradoxically, the battlefield is the same for both – the terrorist seeks to attack the economy, while the authorities seek to attack the terrorist economically. Hence in the USA, five weeks after 9.11, the so-called PATRIOT Act came into force. As I am sure we are all aware PATRIOT is an acronym: it stands for Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.
7. The economics of terrorism and money-laundering are similar in many respects, though there is one important distinction so far as combating them is concerned: funds directed towards terrorism are provided prospectively – they go to enabling the commission of offences, whereas money-laundering concerns funds that have been acquired as the result of the commission of offences. But the principle is the same: cut off the criminal from his funds – either those he needs to spend to commit crime, or those he wants to spend after acquiring them through crime.
8. Of course, the example I gave a little earlier of the drug-trafficker and the builder was deliberately a simple one. Money-laundering is often very much more complicated. It is not, of course, confined to cash. Securities, shares, and other instruments can be laundered just as cash can. The movement of the laundered proceeds is not constrained by national borders (though in some

countries exchange controls and prohibitions on the movement of capital – undesirable in themselves – can, perversely, have the effect of making movement more difficult) and where, as in the European Union, the majority of Member States share a common currency, the Euro, there is no need even to go through a process of exchange. The estimated cost to national economies is huge: as long ago as 1996 the IMF estimated the overall annual volume of money laundering in the Northern hemisphere as between, at the lowest, 690 billion US\$ (the then equivalent of the annual GDP of Spain) and, at the highest, 1.5 trillion US\$ (the then equivalent of the annual GDP of France). Granted, these are only estimates, and the nature of the estimating process yields widely divergent results. But despite these significant differences, the dimensions remain staggering.

9. In the light of the scale of the problem, it is little surprise that national, regional, and global governments agencies, institutions and NGO's sought to counter the problem. The UN, the EU, the G7, and the OECD through the FATF(Financial Action task Force), to name but a few, expressed declarations of principle and intent, and resolved to impose certain measures. Over the years the principles and intent have remained the same, but the measures have been revised, refined and reinforced. Rather than trawl through an extensive history of these stages, I propose my own summary: because money laundering is an international activity, it can only be restrained and restricted if anti-money laundering is conducted on the basis of international standards, internationally monitored, and international co-operation measures which are empowered internationally and simplified so as to work expeditiously and without bureaucratic hindrance. One of the principal difficulties in translating international declarations of principle and intent into effective domestic legislation was the tension between the need to promote transparency in banking transactions on the one hand and, on the other, the principle of client confidentiality which bound the banks. Hence in 1990 Recommendation 4 of the FATF's forty recommendations reads: "Countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations."
10. The 40 Recommendations are really the first decisive global step taken towards the effective combating of money laundering across the world. Put very simply, the Recommendations effectively created a division between those states who would join in the fight, and those who would not. The latter category would henceforth have much greater difficulty in conducting financial business within the jurisdictions of the former. The Recommendations (always remembering that they deal with universal *minimum* standards) include a definition of the scope of money laundering, and a requirement that contracting parties legislate to introduce confiscation procedures. Through the legislative systems of the contracting parties, financial institutions, non-financial businesses, and the professions are subject to due diligence requirements, including enhanced due diligence in cases involving PEP's (Politically Exposed Persons), STR duties and compliance. Other measures of deterrence include the prohibition of shell banks. In particular, with reference to the division I identified a little earlier, Recommendation 21 begins: "Financial institutions should give special

attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations.” The Recommendations go on to require contracting parties to establish competent authorities in the form of FIU’s (Financial Investigation units), which have the legal power to compel the production of documents and information for their investigations. Recommendation 30 is aspirational, but necessary: “Countries should provide their competent authorities involved in combating money laundering and terrorist financing with adequate financial, human and technical resources. Countries should have in place processes to ensure that the staff of those authorities are of high integrity.” The Recommendations next deal with transparency insofar as it relates to legal persons, requiring countries to ensure that beneficial ownership of laundered funds cannot be concealed behind the mask of an express trust. Finally the Recommendations require international co-operation between the contracting parties in the forms of mutual legal assistance and extradition.

11. The original Recommendations have been subject to review and revision, as money laundering typologies involved. As revised in 1996, they were endorsed by more than 130 countries and can therefore truly be said to set the international anti-money laundering standard. FATF expanded its mandate in October 2001 to deal with the issue of terrorist financing, and produced a further Eight Special Recommendations aimed at combating the financing of terrorism. In October 2004 a Ninth Special recommendation was added.
12. The introduction to the 40 Recommendations in their present form commences as follows: “Money laundering methods and techniques change in response to developing counter-measures. In recent years, the Financial Action Task Force (FATF) has noted increasingly sophisticated combinations of techniques, such as the increased use of legal persons to disguise the true ownership and control of illegal proceeds, and an increased use of professional to provide advice and assistance in laundering criminal funds.” This must always be the case in the sphere of criminal activity: as methods of detection evolve, so too do techniques of avoidance. But the more uniform those methods of detection become, and the more universally they are applied, the more they stand a realistic prospect of success. That prospect of success is that much greater according to the last paragraph of the introduction where countries recognise: “A key element in the fight against money laundering and the financing of terrorism is the need for countries systems to be monitored and evaluated, with respect to .... international standards. The mutual evaluations conducted by the FATF and FATF-style regional bodies, as well as the assessments conducted by the IMF and World Bank, are a vital mechanism for ensuring that the FATF Recommendations are effectively implemented by all countries.”
13. One particular aspect of the 40 Recommendations warrants further comment. It was evidently recognised that the creation and resourcing of agencies capable of investigating large amounts of complicated transactions without assistance from the banks and other institutions would have involved the establishment of huge, cumbersome, bureaucratic and ineffective

organisations at disproportionate expense to the public purse. Equally, the proscription of money laundering through legislation, without the establishment of effective means of enforcement, would have rendered the legislation toothless and futile. A radically different innovative approach was called for. This consisted of requiring the banks and institutions, on pain of criminal penalty, to police themselves. Thus the legislative onus is not on discovery and enforcement, but revelation and enforcement: hence the legions of compliance officers in banks and the like. There has been, so to speak, a compulsory recruitment – almost a press-ganging into service – of professionals engaged in the financial industry to police themselves and to have duties which may – at least in terms of perception - conflict with duties to their employers.

14. Although international standards are essential, that does not mean that anti-money laundering efforts must be applied uniformly across jurisdictions. Rather they must be targeted – concentrated upon areas and activities where particular vigilance is required. One such area is that of so-called off-shore vehicles.
15. Perhaps it is appropriate at this juncture to deal with the definition of an off-shore vehicle: in most cases the vehicle is neither off-shore nor a vehicle! The term is a term of art – but it does have some historical foundation, During the Middle Ages, the Kings of England sought either by war or diplomacy or marriage or a mixture of the three to re-assert their sovereignty over much of France, including the Channel Islands, notably Jersey and Guernsey. To the South and West of England, before the Norman Conquest, there were a number of Celtic real or *de facto* kingdoms: Brittany, Cornwall, Wales and the Isle of Man. Over time, through a combination of conquest and surrender, some of these were assimilated into the United Kingdom - i.e. Cornwall and Wales, while others became Crown Dependencies - i.e. self-governing, autonomous regions governed by the Crown, but not by the Parliament of the United Kingdom: Jersey, Guernsey, the other Channel Islands, and the Isle of Man. Each has its own legislature. In practice the legislatures mirror the legislation passed by the UK Parliament, save in one important respect. Each is entirely independent in financial terms, and sets its own level of taxation.
16. Thus these islands became known as off-shore tax havens, and deposit and other accounts held on the islands became known as vehicles, since they enabled the depositor to better protect his assets and achieve a more favourable taxation outcome than would have been the case had he invested on the mainland. In time other British Dependent territories (in practice all of them islands) were able to offer the same advantageous facilities: e.g. Gibraltar, Bermuda, the British Virgin Islands, and the Turks and Caicos islands.
17. Other countries have established “off-shore havens” or have autonomous regions within their borders that serve as such. For example, Lichtenstein is a small independent state bordering Switzerland and Austria. Its taxation advantages are well-known. But it is not in any literal sense off-shore since it

is landlocked! So, too, is Andorra. Monaco has a coast, but could not in any way be said to be off-shore.

18. Hence the term “off-shore” is in reality a term of art meaning, in this context, a territory where a different system of taxation on investment and income prevails, to the benefit of those able to take advantage of it.
19. The proposal by the Republic of Ghana to create an off-shore tax haven does not in any sense mean the literal creation of some small island off the coast. Rather it means the institution of a tax regime favourable and attractive to certain investors in certain circumstances. I shall have more to say about it later.
20. Suffice it to say for present purposes that a liberal, flexible, investor-friendly regime of taxation inevitably attracts investors of considerable wealth, and that that wealth can both be legitimate and illegitimate. The key to successful off-shore management is strong regulation and transparency. The concern expressed by the OECD at the Ghanaian proposal in my view is not some form of resurrected colonialism, but is borne of the fear that “off-shore Ghana” may become an instance of “soft-touch regulation.” The answer to that concern is to ensure that it does not.

## **II: MECHANISMS AVAILABLE TO STATES TO CONTROL AND RESTRICT MONEY LAUNDERING**

21. Each state needs to utilise its own legislative and enforcement apparatus to make conditions within its borders as unfriendly as possible for money laundering. That said, as explained above, the international thrust against it is based on universally recognised minimum standards.
22. We have already looked at what money laundering is, and why it is fundamentally wrong, as well as the history of efforts to control and restrict it. I use the word control, because money laundering is like a disease: unchecked it spreads and is alarmingly contagious. Countered effectively, it can be controlled, restricted, and perhaps in time more or less eradicated. Such a process will take many decades, if not longer.
23. The legislative and enforcement apparatus for states enabling them to control money laundering has been identified and put forward in the FATF Recommendations. Essentially they are as follows: first, there must be the necessary legislation – to criminalise money laundering. Secondly, the legislation must also provide for systems and resources to enforce that law.
24. But mere provision is not enough. There must also be genuine and deep-seated political will to enforce the legislation. That will is reflected in the provision of resources, and the effectiveness of the courts as institutions of enforcement.
25. Hence regulators, investigators, and judges all have their part to play. So, too, do compliance officers, and those charged with supervising the ethics of the banking and other financial industries.

26. It is, as noted earlier, vital that regulation is subject to external and independent monitoring if it is to conform to the necessary universal standards.
27. Where does Ghana stand today in respect of these various considerations?

### **III: GHANA: 2010**

28. It cannot escape notice that the FATF Recommendations are all consistent with principles of government of all mature democracies: democracy itself, and the rule of law. Put another way, freedom and justice.
29. The FATF Recommendations also envisage, as we have seen, the creation of FATF-style regional bodies, to encourage regional mutual monitoring. Ghana is a signatory State of the GIABA (the Groupe Intergouvernemental d'Action contre le Blanchiment d'Argent en Afrique de l'Ouest), which group comprises fifteen West African states, and came into being on 10 December 1999. In January 2006 it extended its mandate to combating the financing of terrorism (hence the abbreviations AML/CFT.)
30. In its statement of purpose GIABA proclaims: "GIABA members acknowledge that money laundering and financing of terrorism are issues of critical importance to the world community which require global action....." The objectives of GIABA include to "Protect the national economies and the financial and banking systems of signatory States against the proceeds of crime and combat the financing of terrorism ,,,,"
31. How has Ghana measured up to the task? Given its off-shore ambitions it is clearly vital that effective regulation, transparency, and external monitoring are in place if its off-shore centre is not going to be at risk of being a soft-touch magnet for a flood of dirty money. In terms of legislation, two important developments have occurred. The Anti-Money Laundering Act 2007 (in force from 22 January 2008) is, as its name suggests, a primary legislative tool in the AML/CFT struggle. It establishes a Financial Investigation Centre. By section 21 and Schedule 1 it defines a range of "accountable institutions" upon which, by successive provisions, it imposes a wide range of duties, including, by section 30, the obligation to report STR's. It establishes a regimen of compliance. So far so good.
32. A second core piece of legislation is the Banking Amendment Act 2007. This legislation came into being, as you know, in order to pave the way for Ghana's off-shore investment centre, It provides, amongst other things, for banking to be an activity only carried out under licence from the principal regulator – the bank of Ghana.
33. But is there the political will to make this legislation truly have an impact? That is not a judgment for me to make. I do, however, think it right to say this: in order to be effective this legislation must result in robust prosecution. At present, Article 88(4) of the 1992 Constitution reserves the power to instigate prosecutions to the Attorney General or her delegate. Full of admiration as I

am for the incumbent Attorney General, it seems to me that the establishment of an independent prosecution service, able to transparently prosecute on the basis of sufficiency of evidence and in the public interest, would both reduce the burden on the Attorney, who of course is a political appointee, and the Government's principal legal adviser, and would place the decision-making process in the hands of an independent executive whose term of office could be contractual, and hence not subject to the ebb and flow of the political system. This is particularly important where, sadly but inevitably given human nature, Ghanaian politicians and highly placed officials are from time to time the subjects of allegations concerning serious criminal offences. By way of example, in the United Kingdom there has recently been the massive scandal about MP's fabricating expenses claims. 4 are to be prosecuted. The decision to prosecute was taken by the most senior official in the legal system, the Director of Public Prosecutions, not by the Attorney-General. Whether his decision was right or wrong, bad or good, remains to be seen, But it cannot be said to have been in any way tainted by political considerations.

34. GIABA produced a report on Ghana's efforts in the AML/CFT fields in 2008. Amongst its conclusions, it found that:

“Money laundering is a problem in Ghana and its manifestations include

- (1) the perception of Ghana as a weak anti-money laundering jurisdiction;
- (2) the increasing incidence of drug trafficking and the huge inflows of cash into the country, which are strongly suspected to be laundered funds;
- (3) the surge in expensive real estate purchases paid for in cash in US dollars; and
- (4) the apparent lack of public awareness of the phenomenon of money laundering and its harmful effects. In particular, increased cases of drug trafficking and arrests at the various ports of entry, offshore interdiction, and related corruption cases are reported weekly in the media.

A scandal in November 2005 involving a parliamentarian in New York during the seizure of 62 kg of heroin, and the interdiction of the MV Benjamin, alleged to be carrying 77 parcels of cocaine (as much as 2 tons) and involving an Assistant Commissioner of Police in the Ghana Police Service and other known narcotic traffickers, raises serious concerns about Ghana's effort to combat illicit drug trafficking and related money laundering in the country.

A significant feature of the economy is that migrant worker remittances have been increasing consistently since 1990. Indeed, it has been reported that migrant worker remittances continue to be an important anchor of the Ghanaian economy. The inflow of remittances has been rising and continues to be an important source of foreign exchange to the economy, with its magnitude exceeding the amount of official development assistance to Ghana. It is unclear to what extent this development has been driven by the lax AML environment and the prognosis and implications under the envisaged more stringent regulatory/ supervisory regime. On November 6, 2007, the

Parliament of Ghana passed an AML law, but the necessary AML regulations are yet to be issued.

Apart from the AML law, other legislations and regulations relevant to the AML/CFT framework include: The Narcotics Drug (Control) Enforcement and Sanctions Law 1990 (PNDCL236); the Foreign Exchange Act 2006; the Banking (Amendment) Act 2007; the Criminal Code; and of course, the Anti-Money Laundering Regulations 2007. Thus Ghana has had to rely entirely on the Narcotics Drug (Control) Enforcement and Sanctions Law 1990 (PNDCL 236) to deal with drug-related cases of money laundering. Apart from the lack of a separate legislation (*sic*) on terrorist financing, there is no FIU in Ghana. In the absence of an FIU, Ghana does not meet the standards prescribed under Recommendations 25 and 26 of the FATF and thus would not be in a position to share financial reciprocal information with the international community. Fortunately, the recently passed AML law has provision for the establishment of this important AML/CFT structure. Similarly, the National AML/CFT Strategy framework with succinct procedures for implementation, developed with the participation of stakeholders from the Ministry of National Security, the Narcotics Control Board, the Ghana Customs, Excise and Preventive Service, the Bank of Ghana and Ministries of Interior, Justice and Finance, has not yet been approved by the Government of Ghana. These are some of the major challenges and priorities for action for this country in the coming year.

A Committee for Cooperation between Law Enforcement Agencies and the Banking Community (COCOLAB) was constituted in 1997 by the Bank of Ghana and the Inspector General of Police, with the support of the Government. Its initial membership was made up of representatives of the Bank of Ghana, licensed banks, and the Police, but it was later enlarged to include the Bureau of National Investigations, the Immigration Service, and the Customs, Excise and Preventive Service. The core mandate of the Committee was to provide a forum for exchange of ideas, knowledge and information on criminal syndicates' modus operandi and the process of obtaining evidence to track down prime culprits involved in ML-related schemes and crimes. The COCOLAB has since become dormant.

In 2006, a Technical Committee was established to draft the Anti-Money Laundering and the Proceeds of Crime Bills. The membership of the Technical Committee consisted of representatives of the Bank of Ghana, Narcotics Control Board, Ministries of the Interior, Finance, and National Security, Serious Frauds Office, Police, Revenue Agency Board and a private financial consultant. After producing the draft law, the committee seems to have fizzled. Other initiatives taken to strengthen the AML framework even before the AML Bill was passed into law included the Know Your Customer Guidelines of 2005 and the Foreign Exchange Act 2006. Two important provisions of the latter are the authority granted to the Bank of Ghana to impose restrictions on the import and export of foreign exchange, and the requirement that all foreign exchange payment transactions in Ghana must be through a bank. The coming of an AML law in Ghana has suffered inordinate delay, given that the country has been in the forefront of political and economic reforms in Africa.

Nonetheless, now that the law has been passed, the country can look forward to working hard for its effective implementation.”

35. What does this report mean for Ghana? Is it truly as bad as some may think it sounds? In my view, the answer is “no”. First, it shows that Ghana subscribes to an effective and critical monitoring system, Second, that monitoring system recognises where progress is being made, and identifies the potential for further progress. Third, as I have sought to make clear, money laundering is a pan-global problem, which can only be countered by co-ordinated international action.
36. However, what does appear to be a problem in Ghana is a combination of the slow rate of progress, a sense of dithering, and a lack of real political will. That lack of real political will is not confined to one party. In short, anti-money laundering should be thrust forward to the top of the governmental agenda on a non-partisan basis. If that can be done, Ghana will move forward.

*Copyright: John Hardy QC.*

*9 March 2010*





