The Role of Banks – and their Liabilities - in the Propagation of Corruption and Money Laundering

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ABSTRACT

There is a plethora of literature on the importance of reducing both corruption and money laundering and of the need for banks to be vigilant. However, far less has been written to date on Western corruption and less still on Western banks turning a blind eye to corruption and the laundering of its proceeds. An in-depth discussion is long overdue since by the handling of the proceeds of corruption through the services banks offer to their corrupt customers, they themselves engage in money laundering, further fuelling Western corruption and the inevitable consequences of it: in many cases, corruption kills. Although reforms are needed to combat corruption and to control money laundering, there is a fundamental problem of inadequate enforcement. This article offers suggestions for reform and the effect these will have on an issue of increasing concern where there is desperate need for change. Further, reforms should be applied not only to banks but also non-regulated services, since these, too are far from immune; indeed, they are increasingly vulnerable to the activities of launderers. Excessive focus purely on banks, to the exclusion of all other sectors, is misguided and regulatory bodies need to be more aware of the change in tactics of perpetrators of financial crime.

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1. INTRODUCTION: COROLLARIES OF CORRUPTION, MONEY LAUNDERING AND THE WESTERN WORLD

The debate on the effects of corruption and money laundering has been particularly fervent in recent times, increasingly so in regard to corruption perpetrated by institutions based in developed countries. This latter has attracted vehement protest, particularly from the developing world, but also, more recently, also within the developed world itself. At one time, the developed world, with the partial exception of the United States,[1] did not regard overseas bribery as a problem, so much so that, until quite recently, bribes paid to foreign officials were regarded across the entire European Union as a tax-deductible business expense. Although the international community has now taken action with the passing of first the OECD Convention On Combating Bribery of Foreign Public Officials in International Business Transactions in 1997[2] and then the United Nations Convention Against Corruption in 2005,[3] meaningful implementation on the ground has sometimes been slow to follow. In the United Kingdom, for example the OECD Convention came into force in February 1999, but bribery of a foreign public official was not actually prohibited for almost another 3 years[4] and the first prison sentence not imposed for another 9.[5]

[1] Although the United States, with the Foreign Corrupt Practices Act (15 U.S.C. §78dd-1 et seq.), was one of the first jurisdictions to criminalize the bribery of foreign public officials, the Act does exempt "facilitation payments": payments made not in order to influence a person to act in conflict with their duty per se, but to "grease the wheels", to encourage them to carry out their duty more quickly and efficiently than they might otherwise do. Examples might include the issuing of a permit which the corporation would have received in any case or the more efficient customs clearance of an import consignment.

[2] The Convention has currently been ratified by 38 jurisdictions, the most recent being Israel, where it entered into force in May, 2009.

[3] The Convention currently has 155 parties, the most recent being the Cook Islands, which acceded in October, 2011.

[4] In section 108 of the Anti-Terrorism, Crime and Security Act 2001, a statute introduced in response to the terrorist attacks of September 11, 2001 and which came into force in December, 2001. The section has now been replaced by section 6 of the Bribery Act 2010, which came into force in July, 2011.

[5] *Mabey & Johnson director David Mabey jailed over Iraq bribes*, (2011) THE TELEGRAPH, February 24, 2011, http://www.telegraph.co.uk/finance/newsbysector/industry/engineering/8343965/Mabey-and-Johnson-director-David-Mabey-jailed-over-Iraq-bribes.html. Last accessed, April 5, 2012.

Reading the regulatory materials, guidelines and indeed academic literature, one is confronted with a paradox. There is a plethora of literature on the importance of the prevention of both corruption and money laundering. A similar abundance has been written on the importance of banks in being vigilant and the pivotal role they play, particularly in the early stages of money laundering control. However, far less has been written about Western corruption and less still on the banks of the developed world frankly turning a blind eye to corruption and money laundering in order to profit from the proceeds. All too often, this topic has been left to conference and seminar speeches in the developing world – and also all too often, the power of their message, important though it is, has been diluted by, frankly, the speaker's own agenda.[6] Similarly, the importance of banks' reputation on their ability to do business and the obligations they have to comply with the regulatory requirements imposed on them has been discussed in great detail, again and again, in conference presentations, training programs, guidance statements from regulators as well, to a lesser extent, as in academic literature.[7] Implicit in these discussions has been the role banks play in corruption and money laundering and how this impacts upon their obligations to meet their regulatory requirements. However, the literature falls short in providing a thorough debate on the subject. The need for this is clear. The proceeds of corruption constitute criminal property within the meaning of the legislation of most, if not all, jurisdictions worldwide.[8] Therefore,

[6] A notable example is Femi Falana, President of the West African Bar Association. Falana has repeatedly spoken about the harm caused to Nigeria by Western financial institutions receiving the proceeds of the corruption of Nigerian leaders, past and present, saying that "If all the money stolen from us and held in Western banks were returned to Nigeria, we would not need a single kobo [smallest currency unit of Nigeria] in foreign aid." (GIABA / West African Bar Association Anti- Money Laundering Training Workshop, Cotonou, Benin, September, 2009.) However, Falana's remarks have often been made in the context of his protesting against institutions in Nigeria (and indeed West Africa in general) being required to comply with international anti- money laundering standards.

[7] Relatively few academic journals, particularly in the United Kingdom, have dealt regularly with these topics at all; among those that have are the Journal of Financial Crime, Journal of Money Laundering Control and the Company Lawyer.

[8] Indeed, corruption is a "Designated Category of Offence" under the FATF Recommendations, meaning that compliance with the Recommendations will include classifying it as a predicate offense under the money laundering legislation: Financial Action Task Force (2012) *General Glossary*, *The FATF Recommendations*.

by the handling of these proceeds, through the services which they offer to their corrupt customers, the banks engage in money laundering. They also become corrupted themselves.

Ironically, the Western world has traditionally been viewed as a paragon of good governance and corruption control, particularly since the prevalence of blatant and illegal forms of corruption have for some time been considerably less common than in much of the developing world. Western politicians, if they engage in corrupt practices, risk paying with their careers at the very least and, in severe cases, with their liberty as well.[9] The securing of a business contract in, for example, the United States, United Kingdom or Germany is not normally considered to be dependent on providing cash and/or entertainment to the relevant government officer. Visitors to these countries are not asked, let alone compelled,[10] to offer any kind of gift to immigration or customs officers, nor do law enforcement officers arrange for evidence against criminal defendants to "disappear" in return for payments,[11] let alone extort payments on the basis of trumped-up charges. This is traditionally contrasted with emerging economies, where the perception of governance and corruption has been that the challenges posed are particularly daunting.[12] However, increasing evidence suggests that

[9] In 2009, William J. Jefferson, former member of the U.S. House of Representatives, was sentenced to 13 years' imprisonment for a series of corruption offenses, while the same year saw a wide-ranging investigation in the United Kingdom into the abuse by Members of Parliament of their official expenses. That said, in the United Kingdom, in contrast to the United States, no politician has at all recently been sent to prison for corruption, although several have seen their careers end after allegations of corruption have arisen.

[10] Methods of such coercion have included the threat of a prison sentence for violation of the immigration rules – which can be avoided by payment of an on-the-spot "fine". Another is the demand that the arriving traveler be vaccinated against a particular disease on the spot in fairly insanitary conditions – again, with the alternative of a "fine". However, the latter should not be confused with the entirely legitimate practice of providing such a vaccination at the point of arrival, in sterile conditions, for travelers who have not already complied with well-publicized entry requirements – Benin is an example.

[11] There have been rare occasions where this has taken place, but such officers have faced the serious risk of a lengthy prison sentence. An example was Detective Constable John Donald of the Metropolitan Police (the police force covering most of London), jailed for 11 years in 1996 for accepting bribes from major criminals in return for destroying key evidence against them, as well as passing on details of the ongoing police investigation. *Corruption uncovered at the heart of the Met* (1996) INDEPENDENT, June 29, 1996, http://www.independent.co.uk/news/corruption-uncovered-at-heart-of-the-met-1339249.html. Last accessed, March 24, 2012.

[12] D. Kaufmann,. *Corruption, Governance and Security: Challenges for the Rich Countries and the World* (2004) The Brookings Institution, p.89. Available online at: http://mpra.ub.uni-muenchen.de/8207/1/Corruption_Governance_Security.pdf. Last accessed, March 6, 2012.

wealthier countries, including member countries of the Organization for Economic Co-operation and Development (OECD), face considerable challenges related to corruption and poor governance.[13] Research suggests that the governance and corruption challenges faced by many emerging economies have encouraged a sense of complacency amongst the developed world[14]. Indeed they have shown to be hypocritical by preaching standards they themselves do not follow and go against. This is highlighted in the Executive Opinion Survey (EOS) of the World Economic Forum.[15] Although, traditional corruption levels in the Western world are not particularly high at first glance, for instance in regard to bribery payments, they do add up to a sizeable amount, due to the economic power of OECD member countries. Indeed, OECD countries account for approximately 80% of the world's output.[16] The relevance of this is that despite considerable research highlighting the importance of combating and preventing corruption and money laundering, member countries of the OECD, which by virtue of their membership should be doing more, are instead propagating financial crime to the detriment of the developing world in particular. This warrants investigation.

A key aim of this article is to underline the increasing frustrations of the developing world in regard to grand corruption perpetrated, or at least assisted, by the West. The need for better regulation and clearer incentives in the prevention of corruption is well documented; however the paradox of Western corruption is largely an untouched area. The developing world looks to the West to take the lead and instigate much needed change and instead the Western world

[13] For example, a number of countries in Southern Europe: corruption is still recognized to be major problem in Italy, while the British pharmaceutical corporation Smith and Nephew entered into a Deferred Prosecution Agreement with the U.S. Department of Justice in February 2012 in relation to bribes paid by its U.S. and German subsidiaries to government-employed doctors in Greece. *SEC Charges Smith and Nephew PLC With Foreign Bribery* (2012) U.S. Securities and Exchange Commission Release 2012-25, February 6, 2012, www.sec.gov/news/press/2012/2012-25.htm. Last accessed, March 6, 2012. *Smith and Nephew Reaches $22 Million Settlement*, The FCPA Blog, February 6, 2012, www.fcpablog.com/blog/tag/biomet. Last accessed, March 6, 2012. (This article also lists several other bribery cases involving the pharmaceutical industry.)
[14] D. Kaufmann, *supra*, p.89.
[15] *Ibid*., p.89.
[16] *Ibid*., p.90.

serves as a negative role model for imitators in the developing world. Analysis will begin with what grand corruption entails and why it is a problem, with particular emphasis on the part banks play in facilitating grand corruption particularly in regard to the services they offer to Politically Exposed Persons (PEPs). This article will argue that banks play a significant role in perpetuating the problem of corruption and money laundering and will attempt to identify weak links and areas for reform in the handling of corruption and money laundering control. Going beyond existing literature in unwrapping this uncomfortable issue, this article will explore the taboo that is Western corruption in the detail that it has so far escaped.

2. COROLLARIES OF CORRUPTION

2.1 WHAT IS CORRUPTION AND WHY IS IT A PROBLEM?

There is no single or universally accepted definition of corruption. Nevertheless, a useful description of corruption is provided by the Wolfsberg Group, a group of 11 global financial institutions that came together to set up industry standards to combat money laundering and other forms of financial crime. The Group has published a number of documents concerning corruption; the current document, the Anti-Corruption Guidance, issued in August 2011. refers to bribery in the following terms:

> "Bribery is commonly described as involving the promise, offer/acceptance or transfer of an advantage either directly or indirectly, in order to induce or reward the improper performance of a function or activity. It may occur in a commercial arrangement (so called commercial bribery) or involve the misuse of public office or

> public power for private gain in order to obtain, retain or direct business or to secure any other improper advantage in the conduct of business."[17]

The definition in the U.K.'s Bribery Act 2010, which came into force in July 2011, is similar. It states that a person ("P") commits bribery where:

> "(a) P offers, promises or gives a financial or other advantage to another person and
>
> (b) P intends the advantage –
>
> (i) to induce a person to perform improperly a relevant function or activity, or
>
> (ii) to reward a person for the improper performance of such a function or activity."[18]

P is also guilty of an offense where they know that the acceptance of the gift by the person would in itself be improper.[19] Similarly, it is an offence for a person to receive a gift in such circumstances.[20]

The literature on money laundering and corruption demonstrates the very close link between money laundering and the quality of governance within a jurisdiction[21] This justifies a focused look at the importance of corruption and money laundering control, with the issues of money laundering integrated with those of governance and corruption. Having said this, it would be inaccurate, at the very least too simplistic, to assume that corruption is limited to

[17] Wolfsberg Group Anti-Corruption Guidance, August, 2011, p.1, http://www.wolfsberg-principles.com/pdf/Wolfsberg%20Anti%20Corruption%20Guidance%20Paper%20August%2018-2011%20(Published).pdf. Last accessed, March 24, 2012.
[18] Bribery Act 2010, s.1.
[19] Bribery Act 2010, s.1(3).
[20] Bribery Act 2010, s.2.
[21] D. Kaufmann, *supra*.

areas where governance is poor. Hence, an in-depth analysis of corruption in the stereotypically developed governance systems of the West is necessary.

As noted above, the outright taking of bribes by senior politicians is relatively rare in developed countries, although it does on occasion happen: as seen above, former U.S. Representative William Jefferson was convicted in 2009 of doing precisely this. Less overt abuse of office is, however, more frequent. For instance, David Blunkett made the decision to resign as U.K. Home Secretary in 2004 after it emerged that he had pressured the Immigration and Nationality Directorate[22] to fast-track a visa application for his then lover's nanny. Although this seems to be a minor transgression, the problem lies at the heart of much of the developing world. In certain countries, particularly in Africa, but also in large parts of Asia, the tolerance for corruption is much higher. However, this is not to say that citizens of these countries are not dissatisfied with the level of corruption in their own countries and more than frustrated at the lack of change and gumption on the part of the Western world in combating it.[23] Femi Falana, President of the West African Bar Association has repeatedly spoken out against what he sees as the rank hypocrisy of the West in condemning his country, Nigeria, for corruption yet doing little to return funds looted by its former leaders. At the time of writing, as Nigerians celebrate the conviction of James Ibori, former Governor of Delta State, for corruption and money laundering,[24] they are all too aware of the extent of his assets located in the United Kingdom[25] and look to have them returned.[26]

[22] Now part of the U.K. Border Agency.
[23] D. Kaufmann, *supra*.
[24] *Nigeria ex-Delta state governor James Ibori guilty plea*, BBC News Africa, February 27, 2012, http://www.bbc.co.uk/news/world-africa-17181056. Last accessed, March 6, 2012. Ibori is due to be sentenced on April 16, 2012.
[25] *James Ibori – "The Thief In Government House" And His Loot*, NIGERIA DAILY NEWS, February 28, 2012, http://www.nigeriadailynews.com/latest-additions/30258-photonews-ibori-quot-the-thief-in-government-house-quot-and-his-loot.html?print. Last accessed, March 6, 2012. The U.K. assets listed are reported as having a total value of well over £2.5 million.
[26] *Delta awaits return of Ibori's loot* (2012) GUARDIAN NIGERIA, February 29.2012.

As for corruption in the developed world, the concern with the Blunkett episode is: given that Blunkett was a close ally of then Prime Minister Tony Blair, if the story had stayed behind closed doors and not entered the public domain, would he in fact have kept his job? Put bluntly, would he have been forced to resign had he not embarrassed the Government? We suggest that he would indeed have remained in office, just as many of his counterparts in the developing world do. Indeed, as it was, Blunkett briefly returned to office the following year, although he was forced to resign a matter of months later following revelations that he had failed to follow rules relating to the taking up by Government Ministers of company directorships. The comment on the episode by Lord Nolan, former Chair of the Commission for Standards in Public Life, is telling: "I think he [Blunkett] has more or less admitted that he should have followed the rules. But I think it's the fault of the Government that he has been allowed to see if he can get away with it."[27] This sends a message: corruption is fine as long as you are not publicly exposed. Thus this somewhat minor transgression is a symbol of rather greater problems in the West, which should be setting positive examples to the developing world.

Crucially, combating corruption and money laundering is fundamental to the economic wellbeing of a country. There are a number of key reasons why corruption is such a concern.

The first reason is the cost associated with corruption: both the social and the economic cost, impacting upon the development of nations where such crime is rampant. Indeed, Shleifer and Vishny argue that corruption tends to lower economic growth[28]. Corruption results in macroeconomic instability: it diverts resources from the poor to the rich, increases the costs

[27] *Labour may lose votes over Blunkett* (2005) YORKSHIRE POST, November 2, 2005.
[28] A. Shleifer and R. Vishny, *Corruption* (1993) QUARTERLY JOURNAL OF ECONOMICS, Vol. 109, p.599, cited in P. Mauro, *Corruption and Growth* (1995) QUARTERLY JOURNAL OF ECONOMICS, Vol. 110, p.681.

of running businesses, distorts public expenditure and deters private investment, often in an already deprived state. These are all inter-linked. If a company, whether domestic or foreign, needs to pay bribes in order to operate, these are, quite simply, additional costs. The company will be compelled either to pass those costs on to its consumers (the most likely option), making its goods or services that much more expensive, or to accept a lower level of profitability than would otherwise be the case. Domestic businesses have little choice but to accept this, but potential foreign investors do. They may regard the increased cost as acceptable if the overall profits are high enough: it is an old adage that "60% of something is better than 100% of nothing." But in many cases, they may simply choose to invest elsewhere.[29] This, added to the diversion of funds into the private pockets of the leadership (and, frequently, subsequent transfer out of the country), fuels the poverty of the majority of the population.

Corruption will also ensure that laws and regulations which should properly protect the country are not passed or, if they are, not enforced. Foreign businesses which do invest may start off by paying bribes in order to secure contracts but may then go on to pay further bribes in order to prevent effective laws that would result in further costs to them. An important area where this applies is environmental protection.[30] It is increasingly recognized - albeit that little if any action has to date been taken to remedy it - that a major cause of the ongoing insurgency in the Niger Delta of Nigeria is not only the exclusion of the local population

[29] They may also be encouraged, or even compelled, to disinvest where the level of corruption in the jurisdiction concerned leads to increased scrutiny by regulators in the corporation's home country, let alone formal financial sanctions. Even if there is no official action, the reputation of the jurisdiction and its government may make it difficult for the corporation to continue to do business with it; financial institutions, in particular, are strongly encouraged to consider a jurisdiction's rating on the current Transparency International Corruption Perceptions Index when assessing the risk of transactions with counterparties there. J.C. Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (2011) CORNELL UNIVERSITY PRESS, Part 2, 2nd edition.

[30] J.P.Wesberry, *International Financial Institutions Face the Corruption Eruption: If the IFIs Put Their Muscle and Money Where Their Mouth is, the Corruption Eruption May be Capped* (1998) NW. J. INT'L L & BUS, 18, 508.

from the wealth produced by the oil companies operating there but also the devastation caused to the physical environment in which that population has to live.[31]

Arguably most destabilizing of all, corruption undermines the trust that citizens have in their government and in their legal system. If it is perceived that laws mean little in practice and that the protection of the government and of the legal system is a privilege offered only to those with the resources to pay for it, two consequences will result. Firstly, the population will be the more inclined to seek its own redress. The Niger Delta, mentioned above, is a particularly well-publicized example; others include the Zapatista insurgency in the far south of Mexico[32] and indeed several current terrorist campaigns.[33]

It would therefore follow that countries with high levels of corruption are politically less stable. This in fact reinforces the problem. Firstly, the government may depend on the support of the military and security forces to remain in power; a long list of examples include former Presidents Suharto of Indonesia, Ferdinand Marcos of the Philippines, Sese Seko Mobutu of Zaire (now Democratic Republic of Congo) and Sani Abacha of Nigeria. Although this provides an appearance of political stability, it is ultimately artificial since it depends entirely on force. The availability of that force, through the support of the military, may be withdrawn at any time. It may be withdrawn in favor of the introduction of a civilian,

[31] See, e.g., Violet Aigbokhaevbo, *Environmental Terrorism in the Niger Delta: implications for Nigeria's developing economy* (2009) INTERNATIONAL ENERGY LAW REVIEW, Vol. 2, p.40.

[32] See Chris Arsenault, *Zapatistas: The War With No Breath?* AL JAZEERA, January 1, 2011, http://www.aljazeera.com/indepth/features/2011/01/20111183946608868.html.

[33] It is, for example, increasingly recognized that the corruption practiced by the Afghan government is a significant factor in the Taliban's appeal to the general population. *Hearts and Minds: Afghan Opinion on the Taliban, the Government and the International Forces* (2007) United States Institute of Peace, http://www.usip.org/publications/hearts-and-minds-afghan-opinion-taliban-government-and-international-forces. *It was less corrupt under the Taliban* (2010) INDEPENDENT, January 20, 2010, http://www.independent.co.uk/news/world/asia/it-was-less-corrupt-under-the-taliban-say-afghans-1873169.html. Last accessed, March 7, 2012. Similarly, the perceived corruption of the Fatah leaders of the Palestinian Authority markedly increased support for Hamas. *Corruption will let Hamas take W. Bank* (2010) JERUSALEM POST, January 29,2010, http://www.jpost.com/MiddleEast/Article.aspx?id=167194. Last accessed, March 7, 2012.

democratic regime, as occurred in Portugal and Greece in 1974 and in Argentina in 1982. More frequently, however, it is simply transferred to another military dictator, causing a rapid turnover in government, which manifests itself through frequent military coups. Sierra Leone is a particularly striking example of this: since its independence in 1961, its political history was, for some 40 years, in the words of Rafal Swiecki, "characterized by a constant turnover of governments and frequent military coups."[34] Swiecki points out that conflicts in the country have been fuelled by "political manipulation and mismanagement, ethnic politics and economic deprivations, political disenfranchisement, and the struggles for the diamond control".

A linked group consists of regimes which, although democratically elected (to a greater or lesser degree), are seen as vulnerable to being removed through a military coup or general insurgency. The recent governments of Pakistan have been a striking example. While it is undoubtedly true that groups such as Al Qaeda and the Taliban exploit the situation in order to further their own agendas, the fact remains that popular despair at the corruption of the current regime has made it considerably easier for them to do so.[35]

Even where both military rule and significant terrorist campaigns are absent, corruption is still a destabilizing factor. Italy is an example. Its score in the 2011 Transparency International Corruption Perceptions Index was 3.9, ranking it in 69th place, jointly with Ghana, FYR Macedonia and Samoa, slightly below such countries as South Africa and

[34] R, Swiecki (2008) *Diamonds: Liberia, Sierra Leone Wars," Alluvial Exploration & Mining* http://www.minelinks.com/alluvial/diamondWars.html. Last accessed, March 7, 2012. Since 2002, however, civilian rule in Sierra Leone has proven more resilient, albeit with external military assistance, particularly from the United Kingdom, with the most recently elected government continuing in office to the present day.

[35] *Corruption helps Taliban win recruits: Holbrooke* (2010) THE NATION, July 29, 2010, http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/International/29-Jul-2010/Corruption-helps-Taliban-win-recruits-Holbrooke. Last accessed, March 7, 2012.

Montenegro and only a little higher than Brazil, China and Romania.[36] Although it has enjoyed democratic rule since the end of World War II, few of its governments have even approached completing their elected term of office.

The consequence of this is that leaders, whether they be the President him- or herself, or the senior officials under them, know that they could be removed at any time. Moreover, if and when they are removed, their ability to earn any kind of income for themselves and their families, certainly in their own country, will in many cases be over.[37] Indeed, they may well need to flee swiftly into exile in order to escape at best prosecution for their abuses and at worst (and often more likely) elimination by their successors.[38] They will therefore consider it prudent to amass large amounts of personal wealth while in office and deposit it outside the country, to be drawn on to finance a comfortable exile if and when the need should arise. Linked to this is the need, particularly real in the cultural context of many of the jurisdictions

[36] This is not an isolated score. The highest score Italy achieved in the previous 10 years was a modest 5.5 (2001) and its score has fallen consistently since 2007 to 2010 (save for the period 2010-2011, in which it remained unchanged.) This reflects the consistent open acknowledgment of the prevalence of corruption throughout the country.

[37] Clearly, this is less applicable to leaders in democratic countries, but even for them, it holds true to a certain extent.

[38] There are exceptions to both. The former Chilean military dictator, Augusto Pinochet, was able to negotiate an immunity from prosecution (at least in Chile itself) as part of his departure from power, while certain Nigerian military leaders, notably Ibrahim Babangida, not only survived their removal from office but returned later to the country's political scene. These remain, however, the exceptions, not the general rule. More typical are Alberto Stroessner of Paraguay, forced to seek exile in Brazil, Uganda's Idi Amin, who fled to Saudi Arabia, Sese Seko Mobutu, referred to above, who fled to France, and, more recently, Tunisia's Zine El Abidine Ben Ali, in exile in Saudi Arabia since his removal from office in January 2011 in the first revolution of the "Arab Spring". Of those who remained in the country following their removal from office, Argentina's Leopoldo Galtieri was prosecuted, stripped of his military office and jailed under the new civilian regime, while Egypt's Hosni Mubarak, at the time of writing, awaits sentence following the end of his trial for a range of crimes linked to his time of office. *Egypt Court to Issue Verdict in Mubarak's trial in June* (2012) NEW YORK TIMES, February 24, 2012, http://www.nytimes.com/2012/02/25/world/middleeast/egypt-court-sets-mubarak-verdict-for-june.html. Last accessed, March 7, 2012. Other former dictators have faced a rather starker fate. Aside from the many executed in the course of a further military coup, Romania's Nicolae Ceausescu was executed following his trial in December, 1989 (*1989: Romania's 'first couple' executed* ,BBC HOME, ON THIS DAY, http://news.bbc.co.uk/onthisday/hi/dates/stories/december/25/newsid_2542000/2542623.stm, last accessed, April 5,2012) while, most recently, Libya's Moammar Gadhafi was put to death very shortly after his own capture in October, 2011: *Moammar Gadhafi Dead: How Rebels Killed The Dictator* (2011) ABC NEWS, October 21, 2011. http://abcnews.go.com/International/moammar-gadhafi-dead-rebels-killed-dictator/story?id=14784776#.T321D_BWq_g. Last accessed, April 5, 2012. Indeed, Mubarak could yet face the death penalty when sentence is passed on June 2, 2012. *Egypt court to deliver Mubarak trial verdict on 2 June* (2012) BBC News. February 22, 2012, http://www.bbc.co.uk/news/world-middle-east-17120915. Last accessed, March 7, 2012.

in question, of ensuring that their families also continue to be provided for, not merely adequately but in comfort. The simplest means of achieving this is, quite simply, corruption, whether through receipt of bribes or outright theft. A vicious circle is therefore created: a corrupt political system tends to be unstable and that instability then encourages further corruption.

The ultimate consequence, however, is even more serious. Corruption kills. First and foremost, the instability described above comes at a cost of human lives as ever increasing numbers are killed and maimed, both in the crossfire itself and in the violent measures that the governments feel compelled to take in order to keep themselves in power. Libya and, to a lesser extent, Yemen, were recent cases in point; Syria remains another.[39] This is, however, only one aspect: corruption also kills in a range of other ways that, though direct, are no less real.

When building regulation and inspection are easily bought, the very infrastructure of the country does not stand solidly when it is needed most. Natural disasters such as earthquakes reveal the catastrophic consequences of corruption in construction. Corruption is endemic to Turkey,[40] which is also one of the most earthquake prone areas in Europe and the Middle East. The Marmara earthquake in Istanbul in 1999 resulted in the deaths of over 17,000

[39] In early September, 2011, it was estimated that 30,000 had already been killed in the Libyan civil war: *Libya: 'civil war not over'* (2011) THE TELEGRAPH, September 8, 2011, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8750961/Libya-civil-war-not-over.html. Last accessed, April 5, 2012. Other figures put the death toll considerably higher: *Libya: Civil War Casualties Could Reach 100,000* (2011) INTERNATIONAL BUSINESS TIMES, October 26, 2011, http://www.ibtimes.co.uk/articles/237895/20111026/libya-conflicting-death-toll-raises-questions-about-what-truly-happened.htm. Last accessed, April 5, 2012. In Syria, where the opposition has, to date, been considerably less well-armed than its Libyan counterpart, and indeed has not received external military assistance, the number of deaths were reported at the time of writing to have reached almost 8,500: *Baroness Amos arrives in Syria as death toll climbs towards 8,500* (2012) THE TELEGRAPH, March 7, 2012, http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9128047/Baroness-Amos-arrives-in-Syria-as-death-toll-climbs-towards-8500.html. Last accessed, March 7, 2012.

[40] In the 2011 Transparency International Corruption Perceptions Index, Turkey had a score of 4.2.

people. A further 44,000 were injured and 600,000 were made homeless. However, rather than the earthquake itself, poor quality building stock as a result of corrupt construction practice was identified as the cause.[41] Furthermore, there is no evidence to suggest that even since the Marmara earthquake, the necessary precautions and procedures to mitigate earthquake damage have been carried out.[42] Countries where corruption is rampant are littered with cases such as these, where, rather than the earthquake itself being the main culprit, avoidable construction failings due to corrupt practices and bribery are to blame.

Nor is the construction industry unique. In July 2007, the former head of China's State Food and Drug Administration, the equivalent of the United States' FDA, was executed for receiving bribes of over $800,000 in return for approving sub-standard medicines; a major factor that led to the imposition of the death penalty was that a number of patients had died from taking the drugs in question. A year later, it was reported, also in China, that food quality inspectors had ignored high levels of melamine contamination in milk; the contaminated milk ultimately led to the deaths of 6 infants and illness in some 300,000 others.[43]

Shocking though this state of affairs is, it is arguably even worse that the West, in its failure to attempt to help, all often appears to be more part of the problem than the solution.

[41] It may be contrasted with the Landers earthquake in California 7 years previously, which, although similar in magnitude, resulted in 3 deaths and 400 injuries.
[42] J, Lewis, *Corruption and earthquake destruction: Observations on events in Turkey, Italy and China* (2008, revised 2010), DATUM INTERNATIONAL, http://datum-international.eu/node/26. Last accessed, March 7, 2012.
[43] *Chinese figures show fivefold rise in babies sick from contaminated milk* (2008) GUARDIAN, December 2, 2008, http://www.guardian.co.uk/world/2008/dec/02/china. Last accessed, March 7, 2012.

As well as the harm to society itself, however, corruption tarnishes the reputation of banks[44] and other financial institutions which handle the proceeds, the very institutions whose foundations are built on trust. When the integrity of professional institutions is questioned, their very survival may be placed in doubt with it. There have already been cases where other forms of financial crime have led to the downfall of financial and allied institutions. A notable example was the Enron debacle in 2001. The discovery, as the scandal was investigated, that Arthur Andersen had colluded in the fraud led ultimately Arthur Andersen's dissolution; it had previously been the fifth largest audit and accountancy partnership in the world.

It would appear, however, that the lessons of Enron have not been learned. Over 2007 and 2008, it was discovered that, even as the Enron case was being reported across the world's media, Siemens was continuing to pay bribes of millions of euros in order to win commercial contracts. Convictions followed, first in Germany and then elsewhere, with record fines that ultimately totalled $1.6 billion,[45] making this the largest corruption scandal to date in German history.[46] Around the same time, a U.S. bank, Wachovia was investigated first for processing fraudulent checks linked to a telemarketing fraud and then the laundering of at least $110 million from Mexican drug cartels, with failures to monitor transactions with a value of up to $420 billion.[47] The latter was the largest money laundering case involving a bank in U.S.

[44] J.P.Wesberry (1998), *supra*.

[45] *2 Former Siemens Officials Convicted for Bribery* (2007) NEW YORK TIMES, May 15, 2007, http://www.nytimes.com/2007/05/15/business/worldbusiness/15siemens.html; *Siemens to Pay $1.34 Billion in Fines* (2008) NEW YORK TIMES, December 15, 2008, Last accessed, March 7, 2012. The $1.34 billion fine referred to in the latter headline was in addition to the fines that had earlier been imposed.

[46] Global Ethic, (n.d.) *Siemens Scandal: Corruption and Slush Funds*, http://www.global-ethic-now.de/gen-eng/0d_weltethos-und-wirtschaft/0d-01-globale-wirtschaft/0d-01-205-siemens-skandal.php. Last accessed, March 7, 2012.

[47] See *Bilking the Elderly, With a Corporate Assist* (2007) NEW YORK TIMES, May 20, 2007, http://www.nytimes.com/2007/05/20/business/20tele.html?pagewanted=all; *Wachovia to Pay $160 Million In Drug Money Case* (2010) NEW YORK TIMES DEALBOOK, March 17, 2010, http://dealbook.nytimes.com/2010/03/17/wachovia-to-pay-160-million-in-drug-money-case/. Last accessed, March 7, 2012. While the fine appears very low, compared to the amounts found to be involved; a major factor

history. Wachovia ultimately entered into a settlement with the U.S. Government, admitting part of the wrongdoing and paying substantial fines. More significantly, however, during the course of the investigation, the bank collapsed and was taken over by Wells Fargo in a U.S. Government supported rescue bid in 2009. Although its losses were in part due to the crisis affecting the U.S., and indeed global, banking industry as a whole at that time, Wachovia's situation was seriously exacerbated by the investigations into the two scandals. The reputational impact of the scandal may be seen from the fact that, following further revelations that, while the laundering was taking place, Wachovia's head office had repeatedly ignored, indeed tried to silence, concerns from the bank's U.K. compliance officer regarding the source of the funds,[48] Wells Fargo felt compelled to discontinue the use of the Wachovia brand name, replacing it, less than 3 months later, with the Wells Fargo name and logo used by the rest of the group.[49]

It may therefore be seen that the risks associated with the involvement in financial crime are neither minor nor short lived. Rather, they can inflict considerable collateral damage. Further, if institutions in the developed world behave in such a fashion, there is concern that they would be seen as an example to follow by imitators in developing countries. To date, no banks have been convicted of laundering specifically the proceeds of corruption; a major purpose of this article is to argue that some should be. The Wachovia affair, in particular, however, suggests that banks need now to heed their smoke alarms (rather than simply removing the battery) and open their noses to the smell of burnt toast before they find that the whole building has burnt down as the fall-out from corruption and money laundering

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was that Wachovia had, by the time of the settlement, already been taken over by Wells Fargo, whose management was itself found to have had no part in the wrongdoing.

[48] *How a big US bank laundered billions from Mexico's murderous drug gangs* (2011) OBSERVER, April 3, 2011, http://www.guardian.co.uk/world/2011/apr/03/us-bank-mexico-drug-gangs. Last accessed, March 20, 2012.

[49] The revelations were published in the U.K.'s Observer newspaper in April, 2011; the change of brand name and logo was implemented over a weekend in late June, 2011.

escalates beyond repair. Governments and law enforcement agencies have their own part to play: it is arguable that, if banks felt similar repercussions of corruption to those suffered by Siemens, and to a similar extent, they would take rather more action than they are doing at present.

2.2 Corruption: Kleptocrats, Corrupt Politically Exposed Persons (PEPs) and Banks

Corruption can be divided into various categories: political or grand corruption, bureaucratic or small corruption and electoral corruption. Political or grand corruption is the category with which this article is principally concerned and takes place at very senior levels of authority. It occurs when, in the words of Victor Dike, "the politicians and political decision-makers, who are entitled to formulate, establish and implement the laws in the name of the people, are themselves corrupt."[50] In such instances, unsurprisingly, "policy formulation and legislation is tailored to benefit politicians and legislators... [which is] similar to 'corruption of greed' as it affects the manner in which decisions are made, as it manipulates political institutions, rules of procedure, and distorts the institutions of government."[51]

Grand corruption, high-level and large-scale, committed by public officials is often also referred to as "kleptocracy". As democracy means "government by the people"[52] and meritocracy means government or advancement by the deserving, so the literal meaning of kleptocracy is "government by thieves". This is an accurate description of what grand corruption is: government leaders whose highest priority is to amass wealth for themselves, whether through the receipt of bribes, outright theft or, frequently, both. In this context, the

[50] V. Dike, *Corruption in Nigeria: A New Paradigm for Effective Control* (2005) AFRICA ECONOMIC ANALYSIS, http://www.africaeconomicanalysis.org/articles/gen/corruptiondikehtm.html. Last accessed, March 9, 2012.

[51] *Ibid*.

[52] From the ancient Greek *demos*, meaning "people", and *kratos*, meaning "power" or "government".

remarks of Nuhu Ribadu, the first Director of the Nigerian Economic and Financial Crimes Commission, made at the Fourth National Seminar on Economic Crime in Abuja, Nigeria in June 2004 are salutary: "In this country, you cannot expect advancement unless you are a thief." Subsequent history would suggest that these remarks were, at least at the time, justified: soon after his protector, President Olusegun Obasanjo, left office in 2007 after his constitutional maximum of two terms, Ribadu was first removed from office and then forced into exile, accused of treason on the basis that he had, as Director of the EFCC, shared information with the U.K.'s Metropolitan Police in the course of an anti-corruption investigation into the former Delta State Governor, James Ibori.[53] Whilst corruption in general is not limited to any one country, and indeed no jurisdiction can truly describe itself as corruption-free, developing countries are particularly vulnerable to the type of threat that a kleptocracy imposes. The senior officials involved, latterly referred to as "politically exposed persons" or PEPs, have been the subject of increasing concern in recent years over money laundering cases involving high net-worth individuals.[54] The term, "PEP" is a complex one and no universally accepted definition of it exists; however, that offered by the Wolfsberg Group, one of the leading bodies in the promotion of anti- money laundering standards, is useful:

[53] Ribadu himself not only denied that he was guilty of treason but further denied disclosure of the information on Ibori: *Ribadu May Face Treason Charges* (2009) NIGERIAN COMPASS, September 11, 2009, accessed through www.nairaland.com: http://www.nairaland.com/nigeria/topic-322164.0.html. Last accessed, March 9, 2012. All charges against him were ultimately dropped after the death of President Yar'Adua led to a further change of government and he was appointed by President Goodluck Johnson as Chairman of the Petroleum Revenue Special Task Force in February, 2012. *Nigeria drops corruption fighter Nuhu Ribadu charges* (2010) BBC NEWS, May 5, 2010, http://news.bbc.co.uk/1/hi/world/africa/8663236.stm. Last accessed, March 9,2012. *Jonathan Appoints Nuhu Ribadu To Head Petroleum Revenue Special Task Force* (2012) SAHARA REPORTERS, February 7, 2012. http://saharareporters.com/news-page/jonathan-appoints-nuhu-ribadu-head-petroleum-revenue-special-task-force. Last accessed, September 21, 2012. Further, as noted above Ibori himself ultimately pleaded guilty to corruption and money laundering in February 2012, albeit a trial in the U.K., not Nigeria.

[54] It should, however, be noted that the term "politically exposed person" or "PEP", particularly as used in international instruments, refers merely to a person's position; it does not per se infer that they are corrupt. See below.

> "a natural person and might include Heads of State, Heads of Government and Ministers, Senior Judicial Officials, Heads and other high-ranking Officers holding senior positions in the armed forces, members of ruling Royal Families with governance responsibilities, Senior Executives of state-owned enterprises and Senior Officials of major political parties. Even holders of public functions who do not meet the above-referenced standards of seniority, prominence or importance according to the Guiding Principles, could still represent a heightened reputational or money laundering risk for Financial Institutions. Thus the Principles set out that such individuals should be assessed using appropriate risk factors." [55]

The definition offered by the Financial Action Task Force is similar:

> "…individuals who are or have been entrusted with prominent public functions … for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials."[56]

FATF Recommendation 12[57] also states that:

> "The requirements for all types of PEP should also apply to family members or close associates of such PEPs."

[55] The Wolfsberg Group (2008), *Wolfsberg Frequently Asked Questions ("FAQs") on Politically Exposed Persons ("PEPs")*, http://www.wolfsberg-principles.com/pdf/PEP-FAQ-052008.pdf. Last accessed, July 29, 2010.

[56] Financial Action Task Force, General Glossary, The FATF Recommendations. Note that the 2012 edition of the Recommendations extends the definition to cover persons who hold such offices domestically as well as in a foreign jurisdiction.

[57] Note that the 2012 edition of the FATF Recommendations, as well as revising the actual contact, significantly revised the numbering of the Recommendations from the previous (2004) edition. The Nine Special Recommendations (which previously covered terrorist finance) have now been incorporated into the main Recommendations, while the numbering of the Recommendation dealing with a particular issue is often different to that in the edition.

It should be noted, however, that the FATF explicitly confines the term to high ranking individuals, stating, "The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories."[58] It is submitted that this is unfortunate. Although middle-ranking, let alone junior, officials do not have the opportunity to engage in the kinds of grand corruption that leaders do, their own opportunities are no less real. A judge of a first-level appeal court,[59] or even a court of first instance, makes judgments with very real effect, including in cases involving considerable sums and hence could be influenced by a bribe if he / she so chose. Similarly, a middle-ranking government official may well hold the key to access to their more senior colleagues and hence may well be tempted to charge corporate representatives for it. If, as is clearly the case, the measures prescribed in the FATF Recommendations concerning PEPs[60] are there in order to guard against the laundering of the proceeds of corruption, the definition should extend to all officials in the appropriate categories, not merely the most senior ones.

Another definition, offered by R.K. Choo, is: individuals who have been "entrusted with prominent public functions and whose wealth is obtained by illegal means,"[61] i.e. corruption. This is, however, rather less satisfactory. Although public officials and bureaucrats hold positions of authority and power which make them potentially vulnerable to grand corruption (because they are able to offer services which someone offering a bribe may want and also, in the case of the most senior figures, because they have unfettered access to state funds), they are not by definition corrupt. International standards, whether the various Principles

[58] *Ibid.*
[59] In a confidential interview with the author, a practitioner in one jurisdiction stated it was his personal experience that appeal court judges there routinely expected lavish entertainment by the parties' representatives and would often decide the case on the basis of it.
[60] FATF Recommendation 12.
[61] R.K.Choo, *Politically Exposed Persons (PEPs): Risks and Mitigation* (2008) JMLC, 11(4), 371-387.

documents of the Wolfsberg Group, the Recommendations of the Financial Action Task Force or the European Union's Third Money Laundering Directive, therefore define PEPs in terms solely of the positions they hold, regardless of their perceived integrity or lack of it.[62] Barack Obama is a PEP, Mitt Romney arguably is also,[63] while President Bashir al-Assad of Syria, Prime Minister John Key of New Zealand and President Kim Jeong-un of North Korea definitely are.[64] The definition is generally also extended to those who have recently left such offices, such as former Ivory Coast President Laurent Gbagbo, Tunisia's Zine El Abidine Ben Ali and Egypt's Hosni Mubarak, as well as Gordon Brown of the U.K. and Kevin Rudd of Australia.

PEPs may represent increased risks due to the possibility that individuals holding such positions may misuse their power and influence for personal gain or for the benefit of their family and close associates (or at least have done so in the past).[65] Those PEPs who engage in corruption and money laundering do so for illicit personal enrichment or to engage in repressive behavior. Funds can be diverted from state treasuries into the bank accounts of corrupt leaders with disconcerting ease. As discussed above, corrupt PEPs deposit large

[62] This is emphasized in the Wolfsberg Group's "Wolfsberg Frequently Asked Questions ('FAQs') on Politically Exposed Persons ('PEPs'): "It is important to understand that the majority of PEPs do not abuse their position …" (p.1), http://www.wolfsberg-principles.com/pdf/PEP-FAQ-052008.pdf. Last accessed, March 9, 2012.

[63] Although he is, at the time of writing, merely the Republican Party nominee for the U.S. Presidential election, an election which will not take place until November 2012, Romney was Governor of Massachusetts and a United States Senator until 2007. As noted below, PEPs not include current holders of senior political office but also those who have held office in the recent past. Similarly, although Rick Perry withdrew from the nomination race, he remains Governor of Texas. This latter position makes him a PEP.

[64] New Zealand and North Korea are listed as, respectively, the countries perceived as least and most corrupt in Transparency International's 2011 Corruption Perception Index.

[65] "While all .holders of public functions are exposed to the possibility of corruption or the abuse of their position to a certain degree, those holding senior...positions with substantial authority over policy, operations or the use or allocation of government-owned resources have much more influence and therefore normally pose greater risks for an Institution and should accordingly be categorised as PEPs for purposes of control and oversight frameworks." The Wolfsberg Group (2008) *Wolfsberg Frequently Asked Questions ('FAQs') on Politically Exposed Persons ('PEPs')*, *supra*, p.2. "Such individuals may also use their families or close associates to conceal funds or assets that have been misappropriated as a result of abuse of their official position or resulting from bribery and corruption. In addition, they may also seek to use their power and influence to gain representation and access to, or control of legal entities for similar purposes." *Ibid*., p.1.

sums of money into offshore bank accounts for a time when they may need to rely on those deposited funds, perhaps if and when they are ousted from power and left to seek refuge in a foreign country. Successor governments, however, are left to play catch-up, chasing down the money and other assets stolen by their predecessors, who moved them offshore through banks that served as critical links and, often, repositories.[66]

This is where the role of banks becomes most important. Senior officials who deposit substantial sums of money into offshore accounts do so in order to control the funds without (generally) drawing attention to the underlying criminal activity or to those involved in generating the funds, by disguising the original source and true ownership of the funds; easily achieved through changing their form or moving them elsewhere.[67] The funds may be kept abroad or laundered through a series of international transfers and investments before coming back into the country.[68]

Importantly, the traditional notion of corruption being the "abuse of public office for private gain" has implied, especially in a legal sense, that an illegal act must be committed.[69] However, through the "creative use of legal loopholes" or in instances where the laws and general functioning and systems of institutions in a country have been molded in a way that would, at least in part, benefit those PEPs with certain vested interests at the expense of the

[66] A. Ramasastry, *Odious Debt or Odious Payments? Using Anti-corruption Measures to Prevent Odious Debt* (2006-2007) N.C.J. INT'L L. & COM. REG ,32, 819-839.

[67] In the past, this was not always the case: certain leaders were blatant enough to steal funds and siphon them abroad openly. Mobutu, referred to above, was one example, openly charging a 10% fee on all international contracts; former Emperor Jean-Bédel Bokassa of the Central African Empire (now Republic) was another. With increased international measures to combat money laundering, however, including the handling of the proceeds of corruption, more recent leaders have needed to conduct their illicit financial affairs with rather more circumspection.

[68] M. Levi, M. Dakolias and T.S. Greenberg, *The Many Faces of Corruption: Money Laundering and Corruption* (2007) WORLD BANK, p. 389. http://sate.gr/nea/The%20Many%20Faces%20of%20Corruption.pdf#page=423. Last accessed, March 9, 2012.

[69] Corruption often involves "collusion between at least two parties, typically from the public and private sectors... more broadly speaking, implicit in this definition is the exclusive focus on the public sector." D. Kaufmann, (2004), *supra*.

broader public welfare, some forms of corruption may officially be legal.[70] The focus of this article is the role of banks in illegal acts of corruption; there therefore follows a discussion on, in turn, bribery, theft and embezzlement.

2.3 BRIBERY

The Bribery Act 2010 is the most recent piece of legislation in the U.K. regarding bribery and related crimes. Although the Bill received Royal Assent on April 8, 2010, the provisions only came into force in July, 2011.[71] Now in force, the Act sets out the following four offenses: "offering, promising or giving a bribe", "requesting, agreeing to receive or accepting a bribe", "bribing a foreign public official" and "failure of a commercial organization to prevent bribery". It is this last provision that may indeed prove to be in practice the most radical part of the legislation and companies have already needed to review their procedures and practices in light of it.[72]

Although bribery is only one type of corruption – hence the common term "bribery and corruption" – it remains a highly important one. Bribery in regard to grand corruption is often associated with international business transactions, usually involving corporations paying bribes to politicians and officials in order to gain a commercial advantage. Notable examples involving U.K. corporations have included the BAE Al-Yamamah scandal,[73] which

[70] A notable example is nepotism, or other forms of favoritism, where a "transparent and level playing field may be absent, without necessarily involving illegal bribery." *Ibid*.

[71] The Act's coming into force was originally postponed from October, 2010 to April, 2011, in order to give corporations more time to draw up codes of practice that would constitute a defense to a new offense, under section 7, of failure of a commercial organization to prevent bribery. At the beginning of 2011, however, a major lobbying campaign, including press articles, was mounted, calling for the Act to be repealed before it ever came into force. That campaign was ultimately unsuccessful, but it would appear that it caused the Government to pause.

[72] G. Brown and others, *The Bribery Act 2010: Bribery and Corruption* (2010) CSR, 5(34), 38. Indeed, the Ministry of Justice, in a press release in May 2010, stated that a major reason for the delay in bringing the Act into force was to give businesses time to draw up appropriate procedures to comply with it: http://www.justice.gov.uk/news/newsrelease200710a.htm . Last accessed, January 14, 2011.

[73] Involving bribes to senior members of the Saudi royal family in connection with the sale of military aircraft.

came to light in the early years of this millennium, although it was alleged that the bribes had been paid over a considerably longer period. Although the U.K. investigation, by the Serious Fraud Office, was halted in December, 2006 on the very strong "advice" of then Prime Minister Tony Blair,[74] investigations by the U.S. Department of Justice continued, leading, in February 2010, to fines being imposed of $400 million.[75] Other, more recent, U.K. cases have included those against Mabey & Johnson in 2009[76] and Innospec in 2010.[77] Indeed, the Mabey & Johnson case led subsequently to the first prison sentences imposed in the U.K. for corporate bribery, when its Sales Director (and major shareholder) was jailed for 8 months and its Managing Director 21 months[78]. Although this was a welcome development, it should be noted that the maximum sentence available at the time for bribery of a foreign public official was 7 years.[79] The extent of the United Kingdom's commitment to punishing corporate corruption overseas may therefore be questioned, particularly when the sentences are compared to those imposed under the Foreign Corrupt Practices Act in the United States.[80]

[74] See *R (on the application of Corner House Research) v. Director of the Serious Fraud Office* [2008] EWHC 714 (Admin.) (2008). See also: *Halt to bribe probe ruled unlawful* (2008) FINANCIAL TIMES, April 11, 2008; R. Alexander, *Corruption as a financial crime* (2009) 30(4) COMPANY LAWYER 98.

[75] *BAE fined $400m over Saudi payments* (2010) THE TELEGRAPH, February 5, 2010, http://www.telegraph.co.uk/finance/newsbysector/industry/defence/7169485/BAE-fined-400m-over-Saudi-payments.html. Last accessed, April 5, 2012.

[76] *Mabey & Johnson fined £3.5 million over bribes* (2009) THE TELEGRAPH, September 25, 2009, http://www.telegraph.co.uk/finance/newsbysector/industry/6232760/Mabey-and-Johnson-fined-3.5m-over-bribes.html. Last accessed, April 5, 2012.

[77] *British chemical firm Innospec fined for Indonesia bribes* (2010) THE INDEPENDENT, March 26, 2010, http://www.independent.co.uk/news/world/asia/british-chemical-firm-innospec-fined-for-indonesia-bribes-1928508.html. Last accessed, April 5, 2012. The U.S. parent company was fined in separate, U.S., proceedings the following year: *Innospec To Pay $45 Million To End Lawsuit Over Bribery* (2011) WALL STREET JOURNAL BLOGS, September 27, 2011, http://blogs.wsj.com/corruption-currents/2011/09/27/innospec-to-pay-45-million-to-end-lawsuit-over-bribery/. Last accessed, April 5, 2012.

[78] *Mabey & Johnson director David Mabey jailed over Iraq bribes* (2011) THE TELEGRAPH, February 24, 2011, *supra*.

[79] Under §§1 and 2 of the Public Bodies (Corrupt Practices) Act 1889, as amended by section 108 of the Anti-Terrorism, Crime and Security Act 2001. The offense now, under §6 of the Bribery Act 2010, carries up to 10 years' imprisonment.

[80] For example, Douglas Murphy and David Kay, former President and Vice-President of American Rice, Inc, were sentenced to, respectively, 63 and 37 months' imprisonment in July 2005 in relation to the bribery of Haitian customs officers to falsify documentation as part of a scheme to commit tax evasion in the United States: *U.S. v. David Jay and Douglas Murphy*, No. 01-cr-00914, S.D. Tex. It has, further, been suggested that, under Federal sentencing guidelines introduced since, their sentences would have been higher still. F. Joseph

The benefits acquired as a result of bribes varies considerably and the extent of the benefits gained can be differentiated between grand or wholesale corruption and small or petty corruption. Incidentally, although this article is concerned with grand corruption only, it is important to note nevertheless that the volume of small corruption is so huge that its aggregate costs in monetary and economic terms are likely to be at least as great as those of grand corruption.

The rewards offered to corporations for paying bribes can be classified in a number of ways; these include government contracts, government benefits, lower taxes, the granting of a license, and even influencing legal outcomes.[81] Another reward is that certain procedures may be sped up, the gray area of so called "facilitation payments". Although certain jurisdictions, such as the United States, [82] permit the paying of these, their receipt is prohibited worldwide.[83] Further, such payments are strongly discouraged under the OECD Anti-Bribery Convention[84] and prohibited outright in the United Nations Convention Against Corruption.[85] In some cases, it has been alleged, the paying of bribes is essential if a business

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Waring and Patrick F. Speice, Jr., *Go Directly to Jail: Sentencing of Individual Criminal Defendants in Foreign Corrupt Practices Act Cases* (2008) BLOOMBERG LAW REPORTS: RISK AND COMPLIANCE, Vol. 1, No. 6, http://www.gibsondunn.com/publications/Documents/Warin-FCPAByline.pdf. Last accessed, March 9, 2012. Although this may be attributed in part to the rather harsher sentencing culture, in general, of the United States as compared to the United Kingdom, it does show that U.S. courts are more prepared, indeed explicitly encouraged under sentencing guidelines, to use the full range of sentencing options provided in legislation than are their English counterparts. (Within the United Kingdom, the sentencing culture of Scottish courts tends to be harsher than that in England.)

[81] J.P.Wesberry (1998), *supra*.

[82] 15 U.S.C. §78dd-1(b).

[83] *The End of the FCPA Facilitation Payment Exception?* (2010) FCPA COMPLIANCE AND ETHICS BLOG, November 11, 2010, http://tfoxlaw.wordpress.com/2010/11/11/the-end-of-the-fcpa-facilitation-payment-exception/. Last accessed, March 9, 2012.

[84] OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, paragraph 9. Although this makes clear that the Convention does not call for such payments to be criminalized, it does describe them as "corrosive" and calls for them to be addressed "by such means as support for programs of good governance."

[85] At least in relation to public officials. Article 15 of the Convention calls for the criminalization of "the promise, offering of giving, to a public official … of an undue advantage .., in order that the official act or refrain from acting in the exercise of his or her official duties." Since there is no reference (in contrast to Article 21, relating to the private sector) to the official's act being in breach of his/her duties, this clearly covers undue payments to an official for the performance of an act which they should perform in any case – in other words, facilitation payments.

is even to be considered for a contract at all.[86] Bribery in relation to government contracts can influence the government's choice of firms to supply goods and services; thus banks, like any other business, can bribe governments in order to win contracts. Once they have succeeded, they can then continue to bribe governments to ensure that any contractual breaches are tolerated.[87]

The importance of this is that contracts which would benefit society and public services are rejected in favor of those in support of which bribes are paid. Hence the corrupt contract is chosen regardless either of the detriment that it will cause or of the benefit that a competing contract would otherwise bring to society as a whole. Even more frustratingly, bribes can influence the allocation of government benefits, whether they are monetary, such as business subsidies to enterprises or individuals, or in-kind benefits, such as access to certain schools, medical care and stakes in enterprises that are in the process of privatization. Further, they can be used to manipulate the amount of tax that needs to be paid, which in many countries is negotiable. In Italy, this latter reached an extreme point whereby no domestic corporation, nor indeed many foreign ones, declared to the tax authorities the full amount payable. The tax authorities of course knew this and would therefore, as a matter of course, challenge the tax declaration; the final tax demand would then be reached after a process of negotiation, in which corruption was often involved. The losers included not only the Italian state, which as a result of this did not receive the full tax revenue to which it was entitled, and therefore had less funds available for public spending, but also those corporations which either took a more ethical approach or simply did not "know the system". Either way, these would declare their

[86] Indeed, one of the major factors that led the U.S. Government to press for global measures to prohibit the bribery of foreign public officials was the frequent complaint from U.S. corporations, who were subject to the Foreign Corrupt Practices Act, that they were losing business to competitors from jurisdictions with a more tolerant approach.
[87] J.P.Wesberry (1998), *supra*.

full tax liability, which the tax authorities would challenge in the normal way - and then react adversely when the company refused to negotiate.[88]

Bribes can also be demanded or offered for the issuance of a license, conveying an exclusive right such as a concession on the development of land or in exploiting natural resources. In addition, bribes are offered to speed up government's decision making process of granting permission to carry out legal activities including the registration of companies and permits for carrying out construction work. Indeed, this often goes beyond the simple facilitation payments, referred to above; the payments may be extorted by the threat of delay in issuing such permits, or even outright refusal. Perhaps most destabilizing of all for countries where corruption is rife is the lack of faith citizens can have in their legal systems, where bribes can affect legal outcomes by inducing governments to ignore illegal activities such as pollution and even drug dealing, or to favor one party over another in court cases and other legal proceedings.[89]

Although, bribes can be offered or demanded in such instances, it is often the case that such policies were created especially so that bribes of this sort could take place, allowing for extra profits to be made by the politicians and bureaucrats. Evidently bribes are powerful and immoral and one of the main tools of corruption. Where it takes place outside a given country, bribery complicates the existing problems with jurisdiction and acquisition of evidence.[90] The problem of bribery is not limited to developing countries: as already stated, corruption in general is a global problem from which no jurisdiction is completely immune. What is shocking, however, is that, as is considered later in this article, OECD countries that

[88] This was, of course, never admitted in public; the source is a representative of a corporation that suffered in this way, who spoke in confidence.
[89] J.P.Wesberry (1998), *supra*.
[90] *Ibid*. It is for this reason that international anti-corruption measures such as the United Nations Convention Against Corruption contain specific measures for inter-jurisdictional co-operation.

condemn these very acts have banks incorporated and headquartered in them which arguably become involved in such activities as a matter of routine.

2.4 THEFT AND EMBEZZLEMENT OF PUBLIC FUNDS

Corruption can take the form of theft and embezzlement "of state assets and financial resources, meant for the procurement of public goods to the detriment of the public administration, by officials charged with their stewardship".[91] The matter is not helped by the fact that typically, "accounting and control systems are weak or non-existent, as is the institutional capacity to identify and punish wrongdoers."[92]

The Fraud Act 2006 is also relevant as when the Serious Fraud Office (SFO), the agency in the U.K. which takes primary responsibility for investigating major corruption cases (including international ones), is required to bring a charge in respect of a specific offense, the Act allows for the application of an "adaptable and wide-ranging" definition.[93] Most pertinent in the context of embezzlement of public funds is the offense of abuse of position under §4 of the Act. This states:

> "(1) A person is in breach of this section if he –
>
> (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
>
> (b) dishonestly abuses that position, and
>
> (c) intends, by means of the abuse of that position –
>
> (i) to make a gain for himself or another, or
>
> (ii) to cause loss to another or to expose another to a risk of loss."

[91] *Ibid*.
[92] *Ibid*.
[93] T, Howse (2009) *SFO Investigations: The New Era*, JIBFL, 11(685).

(2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act."

The offense, as with the other crimes under the Act, is punishable with up to 10 years' imprisonment.

2.5 COROLLARY OF CORRUPTION: NIGERIA – A CASE IN POINT

There is no doubt that corruption is a global problem; to assume that it is limited to developing countries would be naive to say the least. The poor, however, are disproportionately affected[94] and in order that social and economic development is sustained, corruption must be controlled. Furthermore, corruption puts support for aid programmes at risk since those who fund such projects cannot be sure where the money goes.

Nigeria is a popular example of the damaging effects of corruption on a nation and the role it plays in slowing down a country's development. Although the country is plagued with many unresolved problems, the upsurge of corruption, particularly noticeable following the transfer of power from Presidents Olusegun Obasanjo to Umaru Musa Yar'Adua and continuing under at least the first part of the Presidency of Goodluck Johnson, is troubling. One of the most widely discussed consequences of corruption on the political and economic wellbeing of a country such as Nigeria is the distortion of governmental expenditure caused by corruption. Often, the more necessary public services such as health and education are neglected and public money is instead spent on large-scale projects, typically military or infrastructure projects.[95] Among the many problems corruption as a whole causes, this leads to smaller (in comparison), but equally damaging, "slow movement of files in offices, police extortion tollgates and slow traffics on the highways, port congestion, queues at passport offices and

[94] J.P.Wesberry (1998), *supra*.
[95] F. Falana (2007) *Global Measures Against Corruption: Implications For Governance In Nigeria*, SAHARA REPORTERS, October 15, 2007, http://saharareporters.com/interview/global-measures-against-corruption-implications-governnance-nigeria-femi-falana. Last accessed, March 10, 2012.

gas stations, ghost workers syndrome[96] and election irregularities."[97] It can be seen that the rationale behind such distortion of governmental expenditure is that, with large-scale and expensive projects, there are greater opportunities available for the corrupt use or diversion of misappropriated funds.

The detrimental effect corruption has on the citizens of Nigeria is apparent. A member of the Organization of Petroleum Exporting Countries (OPEC), Nigeria has a GDP of $353.2 billion and growth of 3.8%. Nonetheless, 70% of the population live below the poverty line, life expectancy is only 47.24 years, ranking 220th in the world, and there is "very high risk" of being infected with a variety of food and waterborne diseases such as bacterial and protozoal diarrhoea, hepatitis A and E, and typhoid,[98] as well as insect-borne diseases such as malaria.[99] From these figures it is evident that rather than funds being used for the improvement of public services, they are being squandered by corrupt officials who then launder the proceeds of their crimes. The citizens are screaming: at their individual governments and at the Western world, covered in the filth of its own corruption, for not helping.

3. THE MISUSE OF THE FINANCIAL SYSTEM

3.1 CORRUPTION AND MONEY LAUNDERING – AN INTIMATE RELATIONSHIP

The implicit and explicit role that banks play in perpetuating corruption was discussed in the previous section. It was suggested that banks are on a par with kleptocrats and corrupt PEPs,

[96] I.e. a form of fraud where workers appear on the books and are paid accordingly, but do not actually exist. This is by no means confined to Nigeria.
[97] *Ibid*.
[98] CIA *The World Factbook* (2009)
[99] In 2010, the most recent year for which figures are available, Nigeria had almost 3.9 million reported cases of malaria. KAISER FAMILY FOUNDATION, *Global Health Facts*, http://www.globalhealthfacts.org/data/topic/map.aspx?ind=30&gclid=CK_ZtYX1z6wCFQMPfAodqnfy6g#table. Last accessed, March 10, 2012. Perhaps a starker statistic: a Unicef report the previous year estimated that around 250,000 children die from malaria in Nigeria each year. Unicef, *Partnering to roll back malaria in Nigeria's Bauchi State*, April 22, 2009, http://www.unicef.org/infobycountry/nigeria_49472.html. Last accessed, March 10, 2012.

in their engaging in bribery to influence governments, win much desired contracts and ensuring that contractual breaches are tolerated among other significant benefits. All this without regard to the detriment and lack of benefit to public services, morale and national development. What is most disappointing is that these banks are Western banks, belonging to OECD member states and yet, despite this, they sport a lackadaisical attitude towards corruption.

With regard to the relationship between corruption and money laundering, the two are inextricably linked and the role that banks play here is very significant. Money laundering is "a phenomenon with both ex-ante and ex-post links to corruption"[100]. It is a rarity for PEPs and other corrupt individuals or institutions to pay significant bribes using their own legitimately acquired funds; the funds which they use is itself derived from some form of unlawful activity. (Similarly, where commercial companies pay bribes to PEPs in order to secure a contract, the proceeds of that contract are derived from an illegal source: bribery.) In either case, the fact that funds, deposited in accounts at Western financial institutions, have a corrupt origin makes them criminal in nature. Those involved in corruption therefore take steps to conceal the existence, illegal source and illegal application of income and then disguise that income in such a way that it would appear to be legitimate. Without an effective process through which the transfer of illegal proceeds of corruption offshore could take place, it is arguable that much of the current grand corruption would essentially be a redundant activity.[101]

Although banks are inevitably manipulated by money launderers, the argument here is that banks actually facilitate the process through which the laundering of proceeds of corruption

[100] M. Levi, M. Dakolias and T.S. Greenberg (2007) *supra*, p. 392.
[101] As seen above, smaller-level corruption, by more junior officers, often does not require laundering, let alone removal from the jurisdiction.

can take place. As money laundering is at the heart of all profit-driven crime, including corruption, it facilitates it. Thus, banks are at the heart of money laundering by not being proactive in implementing preventative measures. They are therefore not involved in a by-product of corruption, but in fact part of its cause. This is a concept that will be discussed throughout this article.

3.2 Money Laundering [102] and the Services Banks Provide: Lending and Concealing

The crime of money laundering can generally be defined as the process by which one conceals the existence, illegal source and illegal application of income, then, much like an art form, disguises that income in such a way that it would appear to be legitimate.[103] Importantly, money laundering is not limited to criminals successfully avoiding detection and enjoying the proceeds of corruption without revealing their origins, but also creates obstacles for law enforcement and regulatory agencies in identifying illegal proceeds, tracing the funds back to the criminal activities, and forfeiting the assets.[104]

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[102] The United Kingdom's money laundering offenses are set out in §§327-329 of the Proceeds of Crime Act 2002. §327 of the Act provides that it is an offense to "conceal", "disguise", "convert", "transfer" and "remove from the jurisdiction" criminal property. A "person similarly commits an offense if he enters into, or becomes concerned in, an arrangement which he knows or suspects facilitates, by whatever means, the acquisition, retention, use or control of criminal property by or on behalf of another person". "Criminal property" is in turn defined as a benefit, in whole or in part, whether directly or indirectly, knowingly, or with suspicion that it was from criminal conduct, while "criminal conduct" is conduct which constitutes "an offence in any part of the United Kingdom", or "would constitute an offence in part of the United Kingdom, if it occurred there." Proceeds of Crime Act 2002 s.328(1); s.340 (2) (3). A more detailed analysis of these offenses is set out R.C. Alexander (2011), '*Cost Savings' As Proceeds of Crime: A Comparative Study of the United States and the United Kingdom* 45(2) THE INTERNATIONAL LAWYER 749, Fall 2011.

[103] D.E.Alford, (1993-1994) *Anti-Money Laundering Regulations: A Burden on Financial Institutions*, N.C.J. INT'L L. & COM. REG, 19, 437-468.

[104] M, Levi, M. Dakolias. and T.S. Greenberg, (2007), *supra*.

Financial institutions, typically banks, are the most frequently used instrument by money launderers.[105] Banks' vulnerability to exploitation is largely as a result of the services they provide; in particular, the diversified financial instruments which they offer provide a great number of ways for transfer/transformation of financial resources. However, banks wittingly act as agents for odious regimes by helping political elites hide away their misappropriated funds. It was found in several studies that banks were in fact party to the conspiracy; providing fund accounts, helping to transfer capital through transferring accounts or any other form of settlement, and helping to remit funds to any other country.[106] History is littered with examples of ex-dictators who have plundered their national treasuries with the help of financial institutions and offshore banking facilities, subsequently leaving successor governments to try to recover stolen funds. The most commonly cited examples include, the Phiippines after Fernandind Marcos, Haiti after the Duvalier family, Nigeria after Sani Abacha and Zaire after its dictator Mobutu Sese Seko.[107] The Wolfsberg Group sets out the ways financial institutions may be misused to propagate acts of corruption:

a) "By accommodating a customer directing or collecting funds, for the purpose of paying a bribe;
b) By accommodating for a recipient of a bribe placing proceeds of the illicit bribe payment into the financial system;
c) Allowing the deposit of misappropriated state assets; or
d) By the clearing of transactions in any of the above cases."[108]

[105] R.A. Araujo, (2008) *Assessing the Efficiency of the Anti-Money Laundering Regulation: An Incentive-Based Approach*, JMLC, 11(1), 67-75.
[106] P.He, (2010) *A Typological on Money Laundering*, JMLC, 13(1), 15-32.
[107] A. Ramasastry, (2006-2007) *supra*.
[108] The Wolfsberg Group (2008) *The Wolfsberg Statement against Corruption*, *supra.*

Like a drop of ink in a tank of clear water, this tainted money cannot be differentiated from the clean. In addition, as a result of the globalization of financial services in an increasingly integrated financial market, money can be transferred across international borders both conveniently and promptly. Thus, in the first stage of the money laundering process; the placement stage in which illegal funds or assets are introduced into the financial system or converted into monetary instruments, banks are crucial. It is arguable that this is the only real opportunity that they have to affect the activities of corrupt individuals and money launderers.

Pertinent to the debate on corruption and the role of banks in its propagation and involvement in money laundering are the services they wittingly provide to repressive PEPs. A case in point is the United Kingdom based Barclays bank, which made loans to South Africa during the apartheid era, when the then South African government was engaged in human rights abuses and other forms of systematic oppression. In addition, sovereign bond offerings may also be used by repressive governments to raise capital to fund their activities. Commercial banks may, for instance, provide trade finance which would enable corrupt governments to import weapons and the like for the purposes of warfare. This problem, however, is not limited to banks alone and includes international financial institutions in general.[109]

In addition to the financial services provided by banks directly, conflict commodities such as timber, cobalt, diamonds, gold and oil, generate "hard currency" which can be used to fund repressive regimes. In some cases conflict commodities such as these are used for loan repayment. An example is that of Sierra Leone's civil war, where conflict diamonds were sold by the government, as well as other corrupt groups, to finance the conflict.

[109] A. Ramasastry, (2006-2007) *supra*.

Unfortunately this is not an isolated incident; the connection between international financial markets and conflict commodities has been well established, with international human rights non-governmental organizations having identified several large banks through the years to evidence this link.[110]

Cases such as that of the banker Jardine Fleming,[111] who was dismissed for providing financial advisory services to the Papua New Guinea government, which at the time was pursuing questionable methods in order to contain a popular uprising, offer some reassurance that banks do to some extent have a moral compass. However, it can be argued that a greater number of such cases are necessary in order to provide a sufficient deterrent.

Measures against money laundering require a synchronized international effort. This effort involves two key action points. First, a crackdown on money laundering requires a detailed consideration of why some countries are viewed as corruption havens: why these countries are not enforcing tougher regulatory standards and how they can go about implementing the necessary controls. Secondly, at the heart of the problem is the role of those who propagate corruption: banks and other financial institutions. Banks need to be more careful about who they lend to. The case of Asif Ali Zardari, current President of Pakistan, illustrates why: he has commonly been referred to as "Mr Ten Per Cent"[112] after the millions he is rumored to skim in bribes and recompenses. In Pakistan, 19% of the population are malnourished,[113] 87

[110] *Ibid*.
[111] *Ibid*.
[112] E.g. *Asif Ali Zardari, life and style of Pakistan's Mr. 10 Per Cent* (2010) THE TELEGRAPH, August 3, 2010, http://www.telegraph.co.uk/news/worldnews/asia/pakistan/7923479/Asif-Ali-Zardari-life-and-style-of-Pakistans-Mr-10-Per-Cent.html. Last accessed, March 18, 2012.
[113] . (RAD-AID.org (2011) *Pakistan Country Report*, http://www.rad-aid.org/UploadedFiles/RAD-AID%20Pakistan%20Health%20Care%20Radiology%20Report%202011.pdf. Last accessed, March 18, 2012.) The report states the average for developing countries as being 17%.

children per 1,000 live births die before the age of 5[114] and the gross national annual income per capita is $2,680,[115] equating to $7.34 per day. The wealth disparity in the country means that most Pakistanis have an income considerably below this. Despite being President of such a country, and despite having spent between 1997 and 2004 in jail, Zardari was reported in 2010 as having assets in real property alone of a value of almost $1.6 billion.[116] A number of scams point to his involvement. In 1998, he was investigated by both the Pakistani and Swiss authorities in relation to an alleged 6% commission paid into accounts linked to Zardari in return for awarding a pre-shipment inspection contract to Société Générale Surveillance. The investigation was later dropped, but not due to lack of evidence but rather under the Pakistani National Reconciliation Ordinance: a statute, aimed at achieving national reconciliation after Pakistan's turbulent political past, which provided widespread immunity from prosecution for past and present political leaders. The allegations remain, to which Zardari remarked in January, 2012 that he would be leaving office in 2013 and if the next government wished to ask the Swiss courts to review the matter, it was open to them to do so.[117] In another alleged arrangement, in which Zardari is reported to have given Abdul Razzak Yaqub, a Pakistani gold trader based in Dubai a monopoly on gold imported to Pakistan, a New York investigation revealed that £6 million was transferred from the merchant's company to Citibank deposit accounts linked to Zardari.[118] The alleged part of

[114] As of 2009, the latest year for which figures are available. World Health Organization (2012) *Pakistan Statistics*, http://www.who.int/countries/pak/en/. Last accessed, March 18, 2012. This is worse than the regional average (72) and significantly worse than the global average of 60.
[115] *Ibid*. This may be compared to a regional figure of $5,880 and a global figure of $10,599.
[116] "Asif Ali Zardari, life and style of Pakistan's Mr. 10 Per Cent," (2010) DAILY TELEGRAPH, *supra*. The report gave a figure assessed in British pounds of almost £1 billion.
[117] *Next government can approach Swiss courts: Zardari* (2012) MSN NEWS, January 8, 2012, http://news.in.msn.com/international/article.aspx?cp-documentid=5734832&rrurt=0&rrcontrolId=ratCntrlBinary. Last accessed, March 18, 2012.
[118] *House of Graft: Tracing the Bhutto Millions* (1998) NEW YORK TIMES, January 9, 1998, http://www.nytimes.com/1998/01/09/world/house-graft-tracing-bhutto-millions-special-report-bhutto-clan-leaves-trail.html. Last accessed, March 18, 2012. See also: Stateof Pakistan.org (2010) *Mr. Zardari and Citibank Dubai Account No.342034*, June 11, 2010, http://www.stateofpakistan.org/citibank-dubai-account-no-342034. Last accessed, March 18, 2012. *Can Pakistan Be Governed?* (2009) NEW YORK TIMES MAGAZINE, March 31, 2009, http://www.nytimes.com/2009/04/05/magazine/05zardari-t.html?pagewanted=all. Last accessed, March 18, 2012.

Citibank in the affair demonstrated the role that banks and other financial institutions undeniably play in helping these political leaders launder vast sums of money.

It is therefore clear that banks need to be more careful about whom they lend to and consider carefully the strings they should attach to the loans they provide. In the case of Zardari and the other corrupt leaders, banks continue to assist to increase the personal wealth of these leaders at the expense of a country that has to struggle to make ends meet. The immorality of this is even more pronounced in times of turmoil such as those of the disastrous floods that periodically affect large areas of Pakistan, most recently in both 2010[119] and 2011.[120]

The need for reform of anti-money laundering regulations and improved governance of banks is vital. Weak links in the fight against corruption and money laundering need to be weeded out, whether they are individual institutions or an entire country.[121] This is not a new, or revolutionary, concept. As early as 1999, members of the U.S. House of Representatives Committee on Banking and Financial Services discussed openly the concept of "shutting down" financial centers that were deemed, through poor regulation, to promote money laundering. More recently, J.C. Sharman discusses the pressure that can successfully be brought on jurisdictions to introduce measures in line with international anti- money laundering standards.[122] Although he questions the usefulness of such measures in general terms, he does note that they could be used considerably more effectively than they are at present in order to combat corruption.[123]

[119] *Pakistan flood crisis as bad as African famines, UN says* (2011) GUARDIAN.CO.UK, January 27, 2011, http://www.guardian.co.uk/world/2011/jan/27/pakistan-flood-crisis-african-famines. Last accessed, March 20, 2012.
[120] *Pakistan floods: BBC reporter joins relief air mission* (2011) BBC NEWS SOUTH ASIA, September 20, 2011, http://www.bbc.co.uk/news/world-south-asia-14994663. Last accessed, March 20, 2012.
[121] See the discussion in K. Hinterseer, *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (2002) KLUWER LAW INTERNATIONAL, pp.223-24; R.C.H. Alexander, *Insider Dealing and Money Laundering in the EU: Law and Regulation* (2007) ASHGATE, pp.28-29.
[122] J.C. Sharman (2011) *supra*, chapter 4.
[123] *Ibid.*, pp.175-80.

It is arguable that without countries such as the United Kingdom putting in place not just tough regulations, as it has done already, but tougher enforcement of those regulations, money laundering will remain an attractive activity, perpetuating corruption, worsening the standard of living of the developing world and the global debt they face and indeed will threaten the confidence citizens in the Western world, also, have in their government, law enforcement agencies and regulatory bodies.

Furthermore, paying heed to the argument that money laundering may be the cause of corruption, it is arguable that if money laundering control was strengthened, corruption levels would decline as a result; this negative correlation would be the result of increased difficulties in transferring illegal funds offshore. However, the apparent lack of motivation on the part of banks in adopting a proactive attitude can be explained by the fact that corrupt PEPs who are high net-worth individuals signal greater profits for banks. This is never more so than in a time of financial crisis, as at present: banks can be more concerned with maintaining profit levels in order, as they see it, to survive the crisis, than with where the funds assisting them to maintain those profit levels come from.[124] It is therefore not a surprise that change and the reformation needed of the banking system in regard to AML regimes has been sluggish. However, in regard to their efficacy, a look at the key pieces of legislation is necessary in order to offer specific suggestions for reform.

4. GUIDANCE ON THE ROLE OF BANKS IN COMBATING CORRUPTION

[124] A telling example, albeit one where the illegal funds derived from narcotics trafficking rather than corruption, is that of Wachovia, ultimately found to have laundered $378.4 billion on behalf of the Sinaloa cartel. The bank's senior management repeatedly not only ignored but outright discouraged the submission of Suspicious Transaction Reports sent by their U.K. money laundering reporting officer on the basis that this was not a time to question where such funds had come from. *How a big US bank laundered billions from Mexico's murderous drug gangs* (2011) *supra*.

With the increasing realization of the pivotal role banks should play in combating corruption and in money laundering control and the role they play in reality, i.e. pursuing profits ruthlessly, it is perhaps fair to say, superficially at least, that the days of the "three wise monkeys policy" towards corruption of see no evil, hear no evil, speak no evil are fading. The combination of international measures, whether technically soft law, such as the Financial Action Task Force Recommendations, or formally legally binding such as the Money Laundering Directive of the European Union, with domestic legislation play a key part, as do guiding principles such as those issued by the Wolfsberg Group. However, this article will focus on the United Nations Convention Against Corruption and the Bribery Act 2010 as these in particular go some way in providing the legal framework necessary to address issues of transparency, accountability and institutional capacity of banks.

4.1 UNITED NATIONS CONVENTION AGAINST CORRUPTION

The United Nations Convention Against Corruption (UNCAC)[125] was the result of a determined bid to combat corruption and money laundering globally. The Convention required signatory countries to criminalize the laundering of the proceeds gained through a range of corrupt activities, including bribery of domestic and foreign public officials and the embezzlement and misappropriation of property. Importantly, the Convention provides for international cooperation in investigation, prosecution and, crucially, asset recovery. Furthermore, it incorporates a new and more sophisticated approach to the key issue of the ultimate disposal of confiscated criminal proceeds, including in cases where there has been no criminal conviction.[126]

[125] Adopted by the General Assembly of the United Nations in October 2003, it came into force on December 14, 2005. As of January 6, 2012, it had 140 signatories and 159 States Parties. United Nations Office on Drugs and Crime, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html. Last accessed, March 21, 2012.
[126] M, Levi, M. Dakolias and T.S. Greenberg. "The Many Faces of Corruption: Money Laundering and Corruption," (2007) *supra*.

The Convention highlights the importance of good international relations, together with procedures and systems that work in harmony with each other; these make the laundering of funds ever more difficult. However, a criticism of the Convention is that it merely encourages state parties to assist each other in investigations and proceedings in civil and administrative matters relating to corruption, rather than requiring them to do so. Further, it can be argued that the introduction of the Convention has not so far made a noticeable dent in the rate of corruption and in the activities of money launderers: the laundering of criminal proceeds remains a major problem and a key issue with regard to white collar crime. This illustrates the complacency of the signatories in addressing these matters. If the apparently more sophisticated Western world is incapable of doing so, the question is: what hope is there of the developing world getting their act together?

4.2 THE BRIBERY ACT 2010

The U.K. signed up to the OECD Convention on Combating Bribery of Foreign Public Officials in 1999. The Convention made it an international obligation on signatories to make it a criminal offense for a person either directly or indirectly to bribe a foreign public official; a move in the direction that the United States had already taken in the Foreign Corrupt Practices Act of 1977. Given that this move was made in 1999, it is disappointing that the U.K. failed for so long to implement the Convention into domestic law[127] and indeed, even once it had done so, did not prosecute a single company for a further 7 years.[128]

[127] Bribery of a foreign public official was only criminalized in the U.K. in the Anti-Terrorism, Crime and Security Act 2001, a statute introduced in direct response to the 9/11 attacks on the United States and brought into force in December, 2001. Although it is laudable that the Government took this opportunity also to move against overseas corruption, the fact still remains that the Act was passed almost 3 years after the OECD Convention came into force. (Part 12 of the Act, which dealt with bribery of a foreign public official was subsequently replaced by §6 of the Bribery Act 2010, which came into force on July 1, 2011.)

[128] S, Akhtar (2009) *Bribery: The UK To Embark On US-Style Crackdown: Why No UK Company Can Afford To Be Complacent* JIBFL 5(268). The first major prosecution was that of Mabey and Johnson. *British firm Mabey and Johnson convicted of bribing foreign politicians* (2009) WWW.GUARDIAN.CO.UK, September 29, 2009. http://www.guardian.co.uk/business/2009/sep/25/mabey-johnson-foreign-bribery. Last accessed, April 5, 2012.

The inadequacies on the part of the U.K. in combating corruption at that time were compounded by the abandonment of the investigation, referred to above, into British Aerospace (BAE) by the Serious Fraud Office, prompting considerable international criticism. As a result, in 2008 a report, "Reforming Bribery", was published by the Law Commission,[129] advocating a repeal of existing legislation and paved the way for the new Bribery Act 2010, bringing the U.K. in line with the OECD Convention.

The Act, as it was intended to do, goes further than the previous legislation in providing the necessary impetus for banks and their employees in regard to combating corruption. The Act sets out the following offenses: "offering, promising or giving a bribe,"[130] "requesting, agreeing to receive or accepting a bribe,"[131] "bribing a foreign public official,"[132] and perhaps the most radical part of the Act, "failure of a commercial organisation to prevent bribery."[133] This is the offense to which banks should pay particular heed, especially given the close to strict liability that it entails.[134] Section 7 simply states:

> "A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending -
>
> (a) to obtain or retain business for C, or
>
> (b) to obtain or retain an advantage in the conduct of business for C."

[129] Law Commission (2008) Reforming Bribery, LAW COM. No. 313, http://lawcommission.justice.gov.uk/docs/cp185_Reforming_Bribery_report.pdf. Last accessed, April 5, 2012.
[130] Bribery Act 2010, §1(2), (3).
[131] *Ibid,*, §§2(2), (3), (4).
[132] *Ibid.*, §6
[133] *Ibid.*, §7. A "commercial organisation" as defined under s7(5) of the Act, will be guilty of the corporate offense of bribery, where it fails to prevent an "associated person" from bribing another person with the intention of obtaining business, or an advantage in the conduct of business, for that commercial organization. In this context a "person" could either be a legal or a natural person.
[134] There is a defense where the organization takes specific steps to prevent bribery taking place on its behalf: see below.

That is all. There is no requirement to prove that any person with any kind of control function within C instructed A to pay the bribe; if A simply takes it upon himself to pay the bribe because he believes that it is in C's interests, C will be liable. This contrasts with the general principle of English criminal law that, for an organization to be corporately liable, the criminal act must have been carried out, or at least approved, by a "directing mind" (i.e. control person.)[135] It was explicitly stated that:

> "It is not every 'responsible agent' or 'high executive' or … 'agent acting on behalf of a company who can by his actions make the company criminally responsible."[136]

Section 7 of the 2010 Act departs from this principle completely. Even if A never informs his superiors of the bribe, possibly believing that, in this instance, ignorance is protection, or even that they would not approve, C will be liable. Not even a lack of willful blindness will save it.

A case that usefully illustrates, through comparison, the extent to which the 2010 Act will impose liability for failure to prevent bribery, is the investigation into bribes totaling some $24 million paid by Wal-Mart de México, the Mexican subsidiary of Wal-Mart, during 2005 in order to obtain permits to build a large number of new stores in different parts of the country, in order, in turn, to establish dominance in the Mexican market.[137] Although the investigation is ongoing and the full facts will likely only emerge over time, it does seem clear that the bribes were paid at Wal-Mart de México's own initiative, not that of its parent

[135] *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd.* [1957] 1 QB 159, 172 per Denning LJ (1956, Court of Appeal,) affirmed in *Tesco Supermarkets Ltd. v. Nattrass* 153, 171 per Lord Reid (1971, House of Lords.)

[136] *R v. Andrews Weatherfoil Ltd.* [1972] 1 WLR 118, 124 per Eveleigh J (1971, Court of Appeal (Criminal Division).) This was in fact a corruption case, applying (at the time) §1 of the Public Bodies Corrupt Practices Act 1889. Were, therefore, a case on similar facts brought now, the company would very likely be held to be liable.

[137] *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle* (2012) NEW YORK TIMES, April 21, 2012, http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html. Last accessed, April 23, 2012.

company.[138] The key question is whether or not Wal-Mart, as parent, when it learned of the bribes, sought to cover the matter up as further bribes continued, as the New York Times report alleges, or whether, as its management claim, it promptly reported its internal investigation into the matter to the U.S. Department of Justice and the U.S. Securities and Exchange Commission and thereafter sought to cooperate with them. If it did not collude in any wrongdoing, albeit that the New York Times report suggests that this is unlikely,[139] it itself will not be liable (although this will not change the Mexican subsidiary's liabilities). In contrast, were there to be a similar case now, involving a British corporation, it would be liable, even if there were no cover-up, for failure to prevent the bribery by its overseas operations.[140]

It should also be noted that this offense refers merely to the case where the associated person "bribes another person." It is not confined to foreign public officials, or indeed to public officials anywhere: any bribe paid, to anyone, in order to further the company's interests will render the company criminally liable and hence subject to an unlimited fine. In addition, the proceeds from the business gained will be liable to confiscation under Part 2 of the Proceeds of Crime Act 2002.[141] The organization will also, if it engages in any kind of transaction with the funds, be guilty of money laundering,[142] which will also lay it open to the much wider confiscation regime applicable to defendants with a "criminal lifestyle," discussed in the next section of this article.

[138] Indeed, it has been reported that the subsidiary deliberately sought to conceal the bribes from the group's headquarters in the U.S. *Ibid.*
[139] For one thing, the parent management was informed in 2005, but only filed reports with the Department of Justice and SEC in December, 2011. *Ibid.*
[140] A parent company is not, in English law, liable for the misdeeds of its subsidiary per se unless it exercises a significant degree of control over it. However, in the Wal-Mart case, the fact that an officer of the Mexican subsidiary sent a report by email to the company headquarters in Arkansas does indicate significant control.
[141] See R. Alexander (2009), *supra*, pp.103-4.
[142] In contrast to the position in U.S., the money laundering offenses under Part 7 of the Proceeds of Crime Act 2002 do not require any element of intention or purpose. (Therefore, they are closer in nature to the U.S. offense of money spending, under 18 U.S.C. §1957, than to the money laundering offenses of §1956.) See R.C. Alexander (2011), *supra*.

However, there is a defense, under §7(2) of the 2010 Act, where the company, at the time the bribe was paid, had in place "adequate procedures" to prevent persons associated with it from engaging in bribery. It will be for the company to prove that, albeit to the civil standard of the "balance of probabilities", the English equivalent of the U.S. "preponderance of the evidence."[143] But "adequate procedures" mean exactly that: a mere awareness that "the manager would not approve if he knew" will not suffice. There must be a clear policies and procedures in place. Although the Ministry of Justice advises that the precise nature of these policies and procedures should reflect the actual risk of bribery that the organization faces, this is one of six principles that it sets out in a guidance document to assist businesses.[144] But more generally, the practice adopted is that the organization's anti-bribery procedures should form part of its code of practice. Further, all staff, or at least those who have any dealings with customers or business counterparties should be trained in the anti-bribery procedures. This is specifically referred to in Principle 5 of the Guidance:

> "The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces."[145]

For most British corporations, this is a new regime, hence the significant time period given to allow them to put policies in place. But for banks, "adequate procedures" designed to prevent bribery were required even before the Act was passed. An example was the case of of Aon Limited, which was fined £5.25 million fine by the Financial Services Authority for failure to have adequate controls in place to prevent bribery; this failure was held to have

[143] Ministry of Justice (2011) *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing*, para. 33, http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf. Last accessed, April 11, 2012.
[144] *Ibid*.
[145] *Ibid*., Principle 5.

resulted in suspicious payments being made to a number of firms and individuals in 6 different countries, totaling around US$7 million.[146] Although the FSA, in its Decision Notice imposing the fine,[147] accepted that Aon had acted neither willfully nor recklessly, it did nonetheless find that it had violated the requirement, under Principle 3 of the Core Principles for Businesses,[148] to "take reasonable care to organize and control its affairs responsibly and effectively, with adequate risk management principles." Although this was merely a regulatory fine, the point was made: "adequate risk management principles" included measures to protect against the risk of bribery. The case received significant publicity, not only through the notice on the FSA's website, referred to above, but also in the British media.[149] Further, in November, 2007, the FSA had written to all British financial institutions, reminding them that they were required, under the FSA Regulations, to have in place measures to prevent bribery and corruption. Therefore, if they are found in the future to have violated §7 of the 2010 Act, banks and other financial institutions will have even less excuse than most.

The offenses apply to "relevant commercial organizations." This covers all corporations or partnerships, including limited partnerships that are incorporated/registered in the U.K. and which carry on a business.[150] However, this latter criterion adds little, since, for a §7 offense

[146] *FSA fines Aon Limited £5.25m for failings in its anti-bribery and corruption systems and controls* (2009) FSA Press Notice 004/2009, January 8, 2009, http://www.fsa.gov.uk/library/communication/pr/2009/004.shtml. Last accessed, April 23, 2012. See also S, Akhtar. (2009) *Bribery: The UK To Embark On US-Style Crackdown: Why No UK Company Can Afford To Be Complacent*, JIBFL, 5(268). In total,

[147] 6 January, 2009. Accessible online at http://www.fsa.gov.uk/pubs/final/aon.pdf. Last accessed, April 23, 2012.

[148] Part of the FSA Regulatory Handbook.

[149] E.g. *Aon fined record £5.25m* (2009) THE TELEGRAPH, January 8, 2009, http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/insurance/4177552/Aon-fined-record-5.25m.html; *FSA hits Aon with £5.25m fine* (2009) THE INDEPENDENT, January 9, 2009, http://www.independent.co.uk/news/business/news/fsa-hits-aon-with-163525m-fine-1242618.html; *Aon fined for suspicious payments* (2009) BBC NEWS, January 8, 2009, http://news.bbc.co.uk/1/hi/business/7817651.stm. All three reports last accessed April 23, 2012.

[150] Bribery Act 2010, §7(5).

to be committed, the bribe must have been paid in order to obtain/retain a business advantage, or actual business for the organization in question. Where they are so incorporated/registered, they will be covered, whether the business in which they are engaged is in the United Kingdom or anywhere else. This will not only cover the overseas operations of business organizations based in the U.K., but also those whose operations may be carried on abroad but which happen to be incorporated/registered in the U.K.[151] for some other reason. Examples would include U.S.-based corporations which chose to incorporate in London as they found the accounting/auditing requirements of the U.K.'s Companies Act 2006 preferable to those of the Sarbanes-Oxley Act in the United States.

The United Kingdom does not include either the British Overseas Territories[152] or the Crown Dependencies of Jersey, Guernsey or the Isle of Man, although citizens of all of these are covered by the provisions of §§1, 2 and 6 of the 2010 Act, as noted below. Therefore, corporations and partnerships incorporated/registered there will not be covered by the first limb of §7. However, they will be covered by the second limb. This extends the offense's jurisdiction to corporations and partnerships, incorporated anywhere in the world, which carry on a business or "any part of a business" in the U.K.[153] Hence a bank incorporated in, say, Dubai, but which has a branch in London, will be covered by the offense of failure to prevent bribery. So will a bank which conducts business in the U.K., but seeks to avoid the Act's jurisdiction by operating from an office located in an offshore jurisdiction. However, the reach extends further still. The phrase "any part of a business" is telling. It is not necessary that the organization conducts most, or even a large part, of its activities in the U.K.: any part of its business will suffice to bring it within the reach of the section. The

[151] Or, to be accurate, English/Welsh, Scottish or Northern Irish companies, since all British companies are incorporated in, and under the laws of, one of these three constituent jurisdictions.
[152] The principal examples are Gibraltar, Bermuda, the Falkland Islands and a number of Caribbean islands, including the Cayman Islands, British Virgin Islands, Turks & Caicos Islands and Anguilla.
[153] Bribery Act 2010, §7(5)(b), (d).

Ministry of Justice, in its Guidance to the 2010 Act,[154] has stated that a "common-sense" approach is likely to be taken: that a corporation that has no other presence in the U.K will be unlikely to be considered to be "doing business in the U.K." merely on the basis that its shares are listed on the London Stock Exchange. Likewise, a British parent company will be unlikely to be held liable for the actions of its foreign subsidiary (or vice versa) where the two have separate control and operations.[155] However, a corporation which does do actual business in the U.K., however small, will be covered. Likewise, the inclusion in the definition of "relevant commercial organisation" of "a body which is incorporated under the law of any part of the United Kingdom" makes it clear that, although a corporation which is merely listed in the U.K. may not be covered, one which is incorporated there certainly will be.

This applies as much to non- bank organizations who may be customers of the bank as to banks themselves. Although this article focuses on those customers who receive bribes, i.e. corrupt politicians and officials, those customers who pay them should not be overlooked. A bank which knowingly launders the proceeds of a customer's commercial contract, obtained through corruption, is no less guilty than the one who keeps the accounts of the officials to whom those bribes were paid. Just as the likes of Abacha, Zadari, Ben Ali et al. have accounts with British banks, so do the likes of BAE, Siemens and Innospec.

[154] Ministry of Justice (2011) *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing*, *supra*, para. 36.

[155] This is in keeping with the general principle of separate legal personality under English corporate law: a company is a legal entity in its own right, separate from its members: *Salomon v. A. Salomon & Co.* [1897] AC 22. It is established that this extends to subsidiaries having separate legal personality from their parent companies, save where degree of control exercised by the parent over the subsidiary is so great as to render the two in practice a single economic unit. Although the Guidance states that the interpretation of what will and will not constitute presence in the U.K. for the purposes of the 2010 Act will ultimately be one for the courts to decide, the fact that, under §10 of the Act, the consent of the Attorney-General is required for any prosecution, means that the view of the Ministry of Justice is likely to remain decisive.

The Act's territorial application is wide-reaching. Any of the offenses which it contains may be prosecuted in the United Kingdom if it occurs there.[156] It is irrelevant whether all or any of the persons involved, whether individuals or legal entities, are British nationals. If an Australian citizen, on behalf of a corporation incorporated in the United Arab Emirates, pays a bribe to an Egyptian politician in London, the Australian and the Egyptian and may both be prosecuted in the English courts.[157] So may the UAE corporation on whose behalf the bribe was paid. If it is found that its management knew and approved of the bribe, the standard "directing mind" test for corporate criminal liability will be satisfied and the corporation may be prosecuted in England under §1 or §6 of the 2010 Act, whether or not it does business there. Even if they did not, if the corporation does engage in business, on any scale, in the U.K., and it is found that the corporation did not have in place adequate procedures to prevent bribery on its behalf, it may be prosecuted under §7.

Where the act took place outside the U.K., a prosecution may still be brought in the U.K. if the defendant "has a close connection with the United Kingdom."[158] For an individual, this means either a British citizen,[159] a citizen of a British Overseas Territory[160] or a person who, regardless of their nationality, is ordinarily resident in the U.K.[161] Corporate entities incorporated in any part of the United Kingdom[162] are also covered, as are Scottish

[156] *Ibid*., §12(1).
[157] For these purposes, it will not be important whether or not the Australian is resident in the U.K.; since the bribe was paid in London, the English courts will have jurisdiction.
[158] *Ibid*., §12(2), (3).
[159] *Ibid*., §12(4)(a). This includes citizens of Jersey, Guernsey and the Isle of Man. Although these neither form part of the United Kingdom, nor are British Overseas Territories, their citizens are British citizens under §§1 and 50 of the British Nationality Act 1981 and therefore are covered by §12(1) of the 2010 Act.
[160] *Ibid*., §12(4)(b).
[161] *Ibid*., §12(4)(g). A comparison may be made to the concept of "U.S. persons" in U.S. Federal law. Certain other categories are also covered, largely comprising persons who previously held a form of British nationality through being nationals of a then British colony/overseas territory and who continued to hold this after that territory ceased to be governed by the U.K., either through gaining independence or, in the case of Hong Kong, becoming a Special Administrative Region of China.
[162] *Ibid*., §12(4)(h). I.e. in England and Wales, Scotland or Northern Ireland.

partnerships.[163] British citizens, residents and legal entities may therefore be firmly brought to book before the English courts[164] for any acts of bribery in which they engage overseas.

The above relates to the offenses of bribing, receiving a bribe or bribing a foreign public official under §§1, 2 or 6 of the 2010 Act respectively. For the corporate offense of failure to prevent bribery under §7, the Act explicitly states that this applies whether the acts or omissions constituting the offense took place "in the United Kingdom or elsewhere."[165] Therefore, for this offense, the jurisdiction test applied is that of whether or not the business is a "relevant commercial organisation," considered above.

The threat of up to 10 years' imprisonment for individuals and an unlimited criminal fine for institutions may well in themselves prove to be a significant deterrent; for example, it may be noted that the provisions of the Foreign Corrupt Practices Act in the United States carry a maximum prison sentence of only 5 years.[166] However, a further sanction is contained in Regulation 23(1) of the Public Contracts Regulations 2006.[167] This provides that where a company has been convicted of an offense either under the 2010 Act or the anti-corruption legislation that preceded it,[168] it will be ineligible for any contract with a U.K. public body. No time limit is prescribed for the debarment, although, under Regulation 23(2), the debarment may be lifted if there are "overriding requirements in the general interest" for the public body to select that particular contractor.[169] The debarment similarly applies where

[163] *Ibid*., §12(4)(i).
[164] Or indeed the Scottish or Northern Irish courts. Where the act took place abroad, the courts of any part of the United Kingdom will have jurisdiction. *Ibid*., §12(3)(b).
[165] *Ibid*., §12(5).
[166] 15 U.S.C. §78dd-2(g)(2).
[167] SI 2006/5.
[168] I.e. §1(2) of the Public Bodies Corrupt Practices Act 1889 or §1 of the Prevention of Corruption Act 1906.
[169] A comparison may be made to the provision in the United States, under the Guidelines of the White House's Office of Management and Budget, for a natural or legal person who violates the Foreign Corrupt Practices Act to be debarred from any contract with a Federal Government agency. However, it was noted by the Office's Director, Jacob J. Lew, in November, 2011 that "too many Federal agencies have failed to adequately use the suspension and debarment tools that are placed at their disposal." (Memorandum to all executive departments

any director or other "person who has powers of representation, decision or control" in the company has been convicted of a bribery offense. However, in many cases, this will be superfluous since, in practice, a company director who is convicted of an indictable offense[170] related to, inter alia, the management of a company is likely, as part of their sentence, to be disqualified as a director under §2 of the Company Directors Disqualification Act 1986. Such an order prohibits the subject from acting in any management position in a company, on pain of criminal penalties.[171] Nonetheless, there will be occasions when the separate debarment provisions for managers under the 2006 Regulations will be applicable. The disqualification under the 1986 Act is not indefinite: as with any other criminal sentence, it is for such period as the sentencing judge may impose, up to a maximum of 15 years.[172] Further, although the Act does not state in terms that a disqualification order may only be imposed where the defendant, at the time of the offense, held a management position, it is very unlikely that one will be imposed why they did not.

The Serious Fraud Office, under its Director, Richard Alderman, has indicated a serious intention to "give teeth to the new legislation by significantly increasing its resources, taking on 100 additional staff to deal specifically with corruption investigations". In addition, it is "actively encouraging professional advisers to blow the whistle on corrupt practices that come to their attention". Consequently, if the new offenses are correctly enforced, with the intention of being tough on bribery and corruption, banks, like other commercial

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and agencies, November 15, 2011, available on the White House website, http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-02.pdf. Last accessed, April 23, 2012.) The Memorandum therefore requires all Federal agencies to put in place debarment policies. However, even with these policies adopted, this may be contrasted with the statutory, automatic debarment provisions of the U.K.

[170] I.e. one of the more serious categories of criminal offense, broadly equivalent to a felony in U.S. criminal law.

[171] Up to 2 years' imprisonment and/or an unlimited fine: §13.

[172] Company Directors Disqualification Act 1986, §2(3)(b). Where the sentence is imposed by a Magistrates' Court, the maximum period for a disqualification order is 5 years: §2(3)(a). However, in practice, a prosecution for an offense under the Bribery Act 2010 is likely to be before the Crown Court, England & Wales' principal form of criminal court.

organizations, will have no other choice but to sit up, take note and make considerable changes to their "internal codes and procedures, as well as their training and monitoring programmes and investigation and disciplinary procedures," in light of the wide ranging new requirements.[173]

The new measure of criminal liability of senior officers under the Act will go a considerable way forward in the prevention of corruption. An unlimited fine and a maximum prison sentence of ten years in themselves provide a significant sufficient deterrent, together with the further threat, for corporate officers, of disqualification as a director and the wide-ranging debarment from public contracts provisions. But this will not be the end of the matter. Especially relevant for banks, there are the additional money laundering provisions contained in Part 7 of the Proceeds of Crime Act 2002 and indeed the criminal forfeiture[174] provisions of Part 2.

4.3 PROCEEDS OF CRIME ACT 2002

The Proceeds of Crime Act 2002, for the most part, entered into force in early 2003,[175] although certain parts of it have since been modified. For the purposes of this article, it consists of three key elements: provisions for confiscation (the U.K. equivalent of criminal forfeiture[176]) in Part 2, provisions for civil recovery (the equivalent of civil forfeiture) in Part 5 and the measures relating to money laundering in Part 7.

[173] S. Akhar (2009) *supra*.

[174] Termed "confiscation" in English criminal law; see note 175 below.

[175] The Act in fact came into force piecemeal over a period of some months, lasting from December 30, 2002 to March 24, 2003.

[176] In English law, the term "forfeiture" has a much more restricted meaning than in the United States. It refers to the removal of property in three sets of circumstances. First, where the property is in itself unlawful.

To address, money laundering first, the Act defines this in similar terms to the international instruments such as the Financial Action Task Force Recommendations. However, it goes rather further than these actually require. First, §340 of the Act designates all criminal offenses, including the most minor, as predicate crimes, although, given the seriousness of the crimes contained under the Bribery Act 2010, this has little impact on the topics of this article. But second, for many of the offenses, no intent is required. The key test is knowledge or suspicion. Did the person who engaged in the transaction, know or suspect that it was criminal property, i.e. property derived from a criminal offense?[177] Note that suspicion is sufficient for liability. This is wider than the U.S. concept of willful blindness; it has been defined as follows:

> "… the defendant must think there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or based upon 'reasonable grounds'."[178]

Examples include narcotics, contraband goods of any description (including those which are legal per se but on which customs duty is evaded) or unlawfully-held firearms. (The United Kingdom has some of the strictest gun control laws of any jurisdiction on earth.) Second, where the property consists specifically of a vehicle, ship or aircraft that is used to carry narcotics, contraband goods or to facilitate the illegal entry of persons into the U.K.. Both these categories are discussed in R. Alexander (1998) *Confiscation orders: do the UK's provisions for confiscation orders breach the European Convention on Human Rights?* 5(4) J.F.C. 374. Although some of the provisions referred to in that article have since changed, the principles remain the same. Third, cash, but not any other form of property, may be forfeited under §298 of the Proceeds of Crime Act 2002, where it is shown, on the balance of probabilities (the English term for preponderance of the evidence), either that it could be liable to civil recovery or that it is intended to be used in unlawful conduct. Civil recovery broadly equates to civil forfeiture in the United States.

[177] That the person knew or suspected that the property was derived from a crime is a core element of definition of criminal property itself under §340. See R.C. Alexander (2011), *supra*, p.761.

[178] *R v. Da Silva* [2007] 1 WLR 303, 309 per Longmore LJ. (2006, Court of Appeal (England & Wales)). Although this case dealt with the previous money laundering provisions, under the Criminal Justice Act 1988, the Court explicitly referred also to the provisions of the 2002 Act (p.307).

This will certainly cover cases of willful blindness, but it will also cover cases that fall short of this. If this test is satisfied, then, for most of the money laundering offenses, no further intent need be proven. (Those that do, such as concealment or disguising of criminal property are straightforward.) If a person transferred, converted or even simply received,[179] criminal property,[180] they will be guilty of money laundering. Conversion means transforming the asset from one type of property to another. Although it can have a sinister motive, closely linked to another money laundering offense, disguise, this will not always be the case. Since, in English law, money deposited by a customer in a bank account is deemed not to be actual cash, but merely a debt owed by the bank to the customer,[181] receiving funds into an account will often comprise conversion: from cash into a chose in action.[182] Likewise if the person removed the property from any part of the United Kingdom,[183] either by transferring it abroad or simply from one of the U.K.'s three constituent jurisdictions to another, for example from Manchester, England to Glasgow, Scotland.[184] Their reasons for receiving, transferring or removing the property will be irrelevant for the purposes of criminal liability, although a person who deliberately and intentionally transferred criminal property with the purpose of assisting the criminals behind it will face a more severe sentence than one who was merely negligent. This may be contrasted with the U.S. Federal money laundering offense under 18 U.S.C. §1956, for which a particular intent must be proven by the Government.

[179] Proceeds of Crime Act 2002, §329.
[180] *Ibid.*, §327.
[181] *Foley v. Hill* (1848) 2 HL Cas. 28, House of Lords (England & Wales), 1848; *Joachimson v. Swiss Bank Corporation* [1921] 3 KB 110, King's Bench Division, High Court (England & Wales), 1921.
[182] But this will not apply where the funds are transferred into the account from a bank account elsewhere: in this case, they will remain a chose in action throughout and only the offense of receipt will apply.
[183] *Ibid.*
[184] Such an action would in fact constitute two separate offenses: transferring the property and removing it from a part of the United Kingdom. However, since English criminal courts, in contrast to those in the United States, rarely pass consecutive sentences, a prosecutor would be unlikely to bring both charges in relation to the same facts. Further, both offenses carry identical sentences. In practice, therefore, the offense of removal of criminal property from the jurisdiction will often be more useful in relation to cash or other tangible forms of property: it is worth emphasising that, despite the name, money laundering relates to any type of property, not just money or financial instruments.

Although the related offense of "money spending", under §1957, is closer to the U.K. provisions, even here, there are differences. §1957 carries a maximum prison sentence of 10 years, in contrast to the 14 year sentence provided for under Part 7 of the Proceeds of Crime Act 2002. But more fundamentally, §1957 will only apply where the property in question has a value of at least $10,000. No such value threshold exists under the 2002 Act: a person who receives or transfers £10 which they suspect to have a criminal origin, regardless of their intentions, will be as guilty of money laundering as one who receives or transfers £10 million.[185]

The effect that this has in relation to the proceeds of corruption is twofold. First, a bank that assists a corrupt leader or official in laundering the funds that they have received in bribes, embezzlement or outright theft is not only morally culpable, it is legally guilty of money laundering. It may therefore be prosecuted together with its customer. The consequences are clear. It will no longer simply be up to a developing country, which almost by definition has severely limited resources - reduced further by the amounts that its leaders, past or present, have stolen – to bring a civil action to recover the proceeds. Nor even to make a request to the authorities of a developed country to recover the proceeds on its behalf – a request that, in the experience of many developing countries, has all too often been met with a slow response at best.[186] In addition, the bank's home jurisdiction may bring separate criminal proceedings. If a bank finds it embarrassing, as a number have, for the media to report civil actions brought against it in relation to the

[185] The sentence imposed for the former will be considerably less, and indeed resources mean that it is unlikely that, in practice, a prosecution would be brought in relation to as little as £10, but as a matter of law, it could be. And decisions concerning the application of resources can change swiftly if government policy sees fit.

[186] In meetings in Nigeria with the new generation of government officials and practitioners, a common complaint was that, when looted funds were discovered in a developed country, the government of that country would often, as a condition of assistance, demand to know what the funds would be used for if they were returned. Although the latter saw this as simply a reasonable assurance that they would not expend time and resources on returning assets only to have them stolen once again by a new group of corrupt leaders, many in developing countries saw it as deeply insulting to be asked what they planned to do with their own money.

funds of its corrupt customers, it will find reports of a criminal prosecution for money laundering even more so. The effect will be re-doubled when their name appears again, some time later, as media footage show their senior executives themselves led into court.

Second, the same will apply to a bank which handles funds of a commercial customer which it knows or suspects engages in bribery in order to win contracts. If one asks how a bank may be expected to know in detail how its customers behave, it should be considered that "know your customer" now includes the additional duty to "know your customer's business".[187] Banks receive, sometimes convert, possess and transfer funds for their commercial customers, by receiving the company's income into the account, holding it and then paying part of it out to its employees as monthly salary and to suppliers and contractors in payment for goods/services received, transfers to other accounts held by the customer elsewhere, perhaps in other jurisdictions, etc. If the bank knows that part of the customer's business is conducted in a jurisdiction known to have a high level of corruption, where bribes are commonly expected, even demanded, from those seeking commercial contracts, it may be deemed to suspect that some, at least, of the customer's funds deposited with it are the proceeds of a contract obtained through payment of bribes. If it then, especially without asking any questions, proceeds to undertake any or all of the above transactions it may be viewed as receiving, converting

[187] Although Reg. 5 of the Money Laundering Regulations 2007 (SI 2007/2157) defines Customer Due Diligence (CDD) merely as establishing the identity of their customer and any third party beneficiary of the account, as well as the purpose of the business relationship (between the client and the institution), this is supplemented by the further requirements concerning the application of CDD and ongoing CDD. Reg. 7(3)(b) requires that an institution be able to demonstrate to its regulator that its measures are adequate to prevent money laundering. For UK financial institutions, at the time of writing, this is the Financial Services Authority, although this is due to change, in 2013, to the newly-created Financial Conduct Authority (Financial Services Bill 2011, clause 5, amending the Financial Services and Markets Act 2000). Both the FSA now and the FCA in the future will certainly expect a bank to be familiar with its customers' business, not least in order to comply with the provisions of the Conduct of Business Sourcebook, part of the FSA's Regulatory Handbook. However, Reg. 8(2) is most explicit, stating that the required ongoing CDD includes scrutiny of the customer's transactions in order to ensure that they are consistent with the relevant person's knowledge (i.e that of the officer of the institution) of "the customer, ***his business*** and risk profile" (author's emphasis). If institutions are to be able to ensure that a transaction is consistent with the customer's business, it must know what that business is!

(where applicable), transferring and removing from the jurisdiction criminal property. The liabilities that follow will then be the same as those discussed in relation to the laundering of the bribes themselves. It need not only be the next corporation in the line of BAE, Mabey & Johnson and Innospec to be prosecuted, it could be their bank as well.

Also to be considered is the offense, under §328 of the Act, of entering into, or becoming concerned in, an arrangement which a person knows or suspects facilitates another to acquire, retain use or control criminal property. To date, most of the cases involving banks that have cited this section have involved banks seeking guidance as to how to tread the fine line between cooperating with law enforcement, on the one hand, and avoiding various kinds of legal liabilities on the other.[188] However, the case of *R v. McIlravey* in November, 2011 [189] demonstrates how widely §328 can be applied in relation to funds held in a bank account. In this case, the defendant received £26,406 into her bank account from her son. The money was derived from the son's drug dealing business; although the mother did not know this, she did suspect that it was derived from some kind of criminal activity. She later transferred the entire contents of the account (which also contained further funds of around £35,000, which were accepted as having a legitimate origin) to the account of her son's wife in order to enable them to buy a house. On this basis, she was charged with, and pleaded guilty to, entering into an arrangement to facilitate her son to retain or use criminal property under §328 of the 2002 Act. By the same token, a bank which receives funds into an account which it suspects to be derived from corruption may be held liable under the same provision, whether those funds be

[188] E.g. *Squirrell Ltd. v. National Westminster Bank* [2006] 1 WLR 637, High Court of England & Wales, Chancery Division (2005); *K Ltd. v. National Westminster Bank* [2007] 1 WLR 311, Court of Appeal of England & Wales, Civil Division (2006).

[189] *R v. McIlravey* [2011] EWCA Crim. 2815, Court of Appeal of England and Wales (Criminal Division) (2011); 2011 WL 5903078. Although, as discussed below, the Court of Appeal hearing concerned the defendant's liability to a confiscation order, the facts of the case also demonstrate the extent to which the money laundering offenses can be applied.

bribe money transferred from a corrupt politician or the proceeds of a contract, obtained through payment of bribes, from a commercial company.

None of the above offenses will apply where the person makes a disclosure, either to law enforcement or to a designated senior officer of their institution, that they suspect that the transaction relates to criminal proceeds.[190] However, this article is concerned with those in the financial sector who assist the corrupt, not those who cooperate in the fight against money laundering.

The prospect of an unlimited fine, or up to 14 years' imprisonment for those of the bank's officers found to be personally involved, could be daunting enough. However, this may not be the end of the matter. The proceedings, if they result in a conviction, may then lead to a confiscation order under Part 2 of the Proceeds of Crime Act 2002. This is broadly similar to the U.S. measure of criminal forfeiture,[191] although there are certain differences. One is that in the U.K., a single set of provisions, in one statute, provides for the confiscation of the proceeds of any crime, in contrast to the crime-specific approach of the U.S. provisions.[192] This will mean that not only may the funds themselves be seized as part of a confiscation order against the customer, any "benefit" received by the bank may be seized as well in relatively straightforward proceedings.

[190] Proceeds of Crime Act 2002, §§327(2), 328(2), 329(2).
[191] The term "confiscation" is commonly used in the terminology of European jurisdictions to refer to what in the United States would be termed criminal forfeiture. In some jurisdictions, it goes further: the Italian term *confisca* covers all types of forfeiture, criminal, civil or administrative.
[192] A detailed chart, setting out the various forfeiture provisions, criminal and civil, under U.S. federal law in relation to the proceeds of the different criminal offenses is provided as a CD supplement to S.D. Cassella, *Asset Forfeiture Law in the United States*, JURIS NET, 2007.

The extent to which this may be applied is considerable. Clearly, the benefit will include the charges typically levied by banks for operating a business account,[193] as well as the considerable charges levied for foreign exchange transactions and indeed overseas transfers.[194] However, the funds themselves will be deemed to be a benefit. This was emphasized in the case of *R v. McIlravey*,[195] considered above. In that case, the money held by the defendant in her bank account on behalf of her son was held to be a benefit to her within the meaning of Part 2 of the 2002 Act. This despite the fact that it was not disputed that she did not personally benefit from it. She never withdrew any of the funds for herself, she never used them, she never made any personal gain. Although the judgment makes no reference to any interest paid on the funds, as would be likely with an account with a balance of this size, the fact that the entire balance was transferred to her daughter-in-law demonstrates that, if there was any interest, the mother did not receive that either. Nonetheless, the £26,406 was held to be a benefit to her and was therefore confiscated, a decision upheld by the Court of Appeal. It held that the money, once paid into the mother's account, became a debt owed by the bank to the mother and thus a benefit to her.

In reaching its decision, the Court of Appeal referred to two previous cases, heard together and jointly reported (together with two further cases) under the name of *R v. Allpress*.[196] One, *R v. Martin*, it distinguished. Here, the Court of Appeal had quashed a

[193] Banks in the U.K. typically do not levy the same range of charges to their personal (i.e. non-business) account holders that their U.S, counterparts do Even for the increasingly popular "premium" accounts, usually only an annual flat fee is charged for the holding of the account; fees are not charged for such individual transactions as processing a check or transferring funds (other than internationally). In contrast, business accounts do typically attract such charges.

[194] These are often charged as a percentage of the value of the transaction; hence, for a major commercial payment/transfer, they can be considerable.

[195] *R v. McIlravey* [2011] EWCA Crim. 2815, Court of Appeal of England and Wales (Criminal Division) (2011); 2011 WL 5903078.

[196] Reported, jointly with a number of other cases, as *R v. Allpress* [2009] 2 Cr. App. R (S) 58, Court of Appeal of England and Wales, (Criminal Division), 2009.

confiscation order made by the Crown Court[197] against a defendant who had merely stored cash, which he knew to be derived from the drug trafficking activities of his brother, at his premises on his brother's behalf. Martin was convicted of entering into an arrangement to facilitate another to retain criminal property, but it was found that he had not received any benefit from doing so.[198] He had merely stored the money. To distinguish the two cases is surely right. At no time was the cash held on Martin's premises in any sense the property of Martin; it was the property of his brother, just as any other property left by one person with another for safe keeping would be. In contrast, the funds in Ms. McIlravey's bank account were, in law, a chose in action belonging to her. In receiving them from her son, therefore, she had indeed obtained a benefit, regardless of the fact that she chose never in fact to make any use of it.

The other case, *R v. Morris*, fell the other side of the line and the Court in *McIlravey* therefore affirmed it. This involved a solicitor[199] who received funds, which he suspected to be derived from criminal activity (in fact, a form of tax fraud) by his client, into the client account of his firm. To disguise their origin, he further arranged for the funds to be paid into the account in the name of a number of companies and held them, ostensibly, on those companies' behalf. He then transferred the funds on, to the benefit of this client, to various accounts overseas. He, too, was convicted of a §328 offense and, like Martin, received a confiscation order before the Crown Court, which he appealed. He argued that he, too, had merely held property belonging to another on that person's behalf. This is what a solicitor's client account is for; the solicitor is, under the Solicitors Accounting

[197] The first instance criminal court in the English legal system dealing with the more serious crimes.
[198] Although Martin's conviction for a §328 offense would have triggered the criminal lifestyle provisions, discussed below, this was not an issue raised either at first instance in the Crown Court or on appeal.
[199] The English equivalent of an attorney. Although there are differences between the structures of the English and the U.S. legal professions, these are not relevant here.

Rules, prohibited to make use of the funds in these for himself.[200] Hence, claimed Morris, he himself had never received any benefit. The Court of Appeal, however, disagreed. It pointed out that the funds were held in a bank account belonging to the firm and, further, that Morris was the partner with principal control over that account. Therefore, it said, the Solicitors Accounting Rules were irrelevant and Morris had indeed received a benefit. It did acknowledge that there might be some cases of a private person holding funds purely on behalf of another, for example a husband on behalf of his wife. But this contrasted with the position of a professional such as Morris; such as person could not be said to be a trustee or bare nominee. Hence, the funds could be seen as a benefit and they were liable to confiscation.

If such a ruling could be made of a solicitor in relation to funds in the firm's client account, the principle is even clearer in relation to banks. With a solicitor, it is debatable to what extent he is free to use money held in the client account for other purposes, let alone for his own benefit. Although the Court of Appeal in *Morris* found the Solicitors Accounting Rules to be irrelevant, a distraction even, they are there and solicitors are obliged to comply with them. While solicitors do have control over the funds – the rationale of the *Morris* ruling – they are not free to do with them whatever they please. Indeed, it may be noted that, although the transactions which Morris carried out in relation to the account were illegitimate, in that they facilitated money laundering, they were all carried out for the benefit of his client. In contrast, the funds deposited with a bank are the property of the bank. While the customer, owns a chose in action, a debt, the bank owns the money itself. As such, the bank, unlike the solicitor, is free to use the

[200] Funds paid to the the solicitor for his own use, e.g. fees, are held in an "office account", which must be kept strictly separate from the client account.

funds for precisely whatever it wants. This was emphasized in the House of Lords' dictum in *Foley v. Hill*:

> "The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit he can, which profit he retains for himself."[201]

The actions of a bank that receives funds into a customer account where it suspects those funds to be derived from any form of criminality, be it the taking of bribes or theft or embezzlement or securing a commercial contract through payment of bribes, will therefore be no different to those of Morris or McIlravey. It should be emphasized in this context that, to be guilty of money laundering and then liable to a confiscation order, it is not necessary that the defendant be proven to have suspected that the property was derived from any specific crime; if they suspected that it had a criminal origin, even if they had no particular suspicion as to precisely what, this will be sufficient. Indeed, these were the facts of *McIlravey*. Nor even need the precise nature of the origin of the criminal property be proven by the prosecution: if the jury are satisfied that the property was derived from some kind of criminality (albeit that it is not certain what crime) and that the defendant knew or suspected that, this will suffice.[202]

[201] *Foley v. Hill* (1848) 2 HLC 28, 36 per Lord Cottenham, House of Lords (1848).

[202] "It would put a huge burden on the prosecution if it had to prove only one route by which the property was criminal property and negative all others." *R v. C* [2007] EWCA Crim 2913; 2007 WL 4947526, Court of Appeal of England & Wales (Criminal Division), 2007, para. 26 per Gage LJ. Affirmed in *R v. Anwoir* [2009] 1 WLR 980, Court of Appeal of England & Wales (Criminal Division), 2008. However, the position will be different where the defendant believed that the funds had a legitimate origin and that the transaction had a purpose that was unethical but not actually illegal. (See *R v. Geary* [2011] 1 WLR 1634, Court of Appeal of England & Wales (Criminal Division), 2010 - funds, in fact derived from fraud, transferred to defendant who believed that they had a legitimate origin and that the transfer was to conceal them from forthcoming divorce proceedings.)

This raises decided possibilities for the government when pursuing such a case. Like its criminal forfeiture counterpart in the United States, confiscation is an in personam, not in rem, measure. Hence any confiscation order against the bank, in relation to criminal funds found in an account, will be separate to that made against the criminal customer. To take the example of the *McIlravey* case, in addition to the confiscation order made against Ms. McIlravey, a confiscation order will have been made against her son in respect of the full benefit that he was deemed to have received from his drug trafficking – including the funds paid into his mother's account. Similarly, separate to the order against Morris himself, his client will have been liable to a confiscation order in respect of the full amount he was deemed to have gained from his tax fraud offenses – including the amount laundered by Morris. If this appears to mean that the same funds are subject to confiscation by the government twice over, that is exactly what it means. Any doubt as to that was explicitly dispelled in *R v. May*,[203] considered by the Court in *McIlravey*, in which the House of Lords held that where a benefit from criminal conduct is obtained jointly by a group of people, the entire benefit may be deemed to have accrued to any one member.

The consequences, in the context of the issues discussed in this article, are twofold. First, it provides an even more powerful measure against those involved in corruption. Not only may they face a prison sentence or, in the case of a corporation, a severe fine,[204] but they may suffer seizure of their assets that go considerably beyond what can be proved to derive from the corruption itself. But second, where a bank has assisted in transferring some, or even all, of the funds overseas, perhaps to a jurisdiction that is unwilling to

[203] [2008] 1 AC 1028, House of Lords, 2008.
[204] Although the laws typically permit them to do so, English criminal courts rarely impose both a prison sentence and a fine in relation to the same offense, in contrast to the approach taken in the United States.

cooperate in their return,[205] that bank may be forced to return them out of its own assets. Put another way, if the funds cannot be recovered from a corrupt leader him/herself, it may recover them from their bank. As referred to above, this is perhaps particularly important where the defrauded government is that of a developing country. Rather than that government being required to bring an expensive civil action[206] based on a constructive trust – although that is also an option[207] – the confiscation provisions may simply be applied. Further, where, as in such a context, the predicate crime took place overseas, §444 of the 2002 Act allows for proceedings to be brought in the U.K. to confiscate funds to give effect to an order made by that foreign jurisdiction.

But the confiscation order against the bank need not stop at the amount actually proven by the Government to be derived from the crime itself. A conviction for conversion or transfer of criminal property or its removal from the jurisdiction under §327 of the 2002 Act, or of entering into an arrangement to facilitate the retention or use of criminal property under §328, will automatically trigger the criminal lifestyle provisions. These are contained in §§10 and 75. They apply in any of four sets of circumstances. The first, most relevant to this article, is where the defendant is convicted of an offense listed in Schedule 2 to the Act. The offenses contained in §§327 and 328 of the 2002 Act are included in the Schedule 2 list, although those of acquisition, use or possession under §329 are not. A finding of a criminal lifestyle will also be made where the defendant: 1)

[205] The reasons for such refusal may not necessarily be a lax approach to economic and financial crime. Rather, they may simply be political. It is frankly inconceivable that any court in the southern part of Cyprus would order the return of assets to Turkey (or indeed vice versa). Similarly, to take a topical example, recent events suggest that Russia would be equally unwilling to hand over funds from the account of a member of the Assad regime to a future Syrian government, let alone to a Western jurisdiction.

[206] Never an attractive option for the government of a developing country with limited resources, it is made even less so by the "loser pays all" rule of English civil procedure. In other words, the claimant (plaintiff) government not only faces significant expenditure up front of its own (the legal professional rules in England do not permit "no win, no fee" arrangements in such cases, but risks paying the defendant's legal costs as well if it loses.

[207] See, for example, *Attorney General of Hong Kong v. Reid* [1994] 1 A.C. 324, Privy Council (New Zealand) (1993).

is convicted, in the same proceedings, of a total of at least four offenses, from which he has derived a benefit,[208] 2) has been convicted on at least two other occasions, within a period of six years prior to the start of the current proceedings of an offense from which he derived a benefit; or 3) is convicted of an offense which he perpetrated over a period of at least six months. In each case, the benefit in question must be at least £5,000 for a finding of a criminal lifestyle to be made,[209] but in the kind of cases that this article concerns, it is likely to be considerably more.

The consequence of a finding of a criminal lifestyle is that four rebuttable presumptions are applied.[210] First, any property transferred to the defendant during a period of six years leading up to the proceedings represents the proceeds of crime. Second, any expenditure incurred by the defendant during the same period was met from the proceeds of crime. Third, any property held by the defendant on the date following his conviction represents the proceeds of crime. It should be noted that, for this presumption, how long ago the defendant obtained the property is irrelevant: they may have obtained it 30 years previously, but if they still held it on the day after their conviction, the presumption will apply to it. Fourth, all property held by the defendant is held free of any third-party interest in it.

All such property will then be liable to confiscation unless the relevant presumption is shown to be incorrect. This will generally mean the defendant showing, on the balance of

[208] "Benefit" includes not only direct proceeds but also a "pecuniary advantage". This means precisely that: any financial advantage. It has been interpreted as covering, inter alia, the ability to gain income or other profits from securities obtained through crime (*Government of the United States of America v. Montgomery* [1999] 1 All ER 84, Court of Appeal of England & Wales, Civil Division (1998)) and the ability, through tax evasion, to make use of the money that should have been paid in tax (*R v. Dimsey* [2000] 1 CR. APP. R (S) 497, Court of Appeal of England & Wales, Criminal Division (1999)). Both these cases are discussed in R. Alexander (2011), *supra*., pp.
[209] Proceeds of Crime Act 2002, §75(4).
[210] *Ibid.*, §10.

probabilities, that the asset in question did in fact have a legitimate origin, but it will also apply where it is shown that an asset is in fact held subject to a third party interest. Hence where the defendant holds a house worth £1.4 million (not unusual for a senior officer of a major bank in the U.K., particularly given real estate values in some parts of the country) but shows that he has a mortgage on it with a current balance of £550,000, that £550,000 will not be liable to confiscation. The presumptions may also not be made where this would result in a serious risk of injustice,[211] but in practice this is rarely if ever applied. However, the resulting calculation of benefit will be discounted by the amount of any confiscation order made during the relevant period.[212]

If the defendant does succeed in showing that a given asset has a legitimate origin then, in principle, they will keep it. However, the value principle of the U.K.'s confiscation provisions needs to be considered. In contrast to the U.K.'s forfeiture provisions, and also the civil recovery provisions found in Part 5 of the 2002 Act, confiscation is not of a particular asset per se. Rather, it is of its value: a confiscation order is always of a monetary amount. Let us remain with the above example of the banker with his £1.4 million house. Suppose that it is shown that in June, 2007, 5 years before the start of his trial, he bought a weekend house for £500,000, but sold it 2½ years later, in response to the ongoing financial crisis for £300,000.[213] If he cannot now prove that the £500,000 with which he bought the house had a legitimate origin, he will face a confiscation order in respect of this for £500,000, since this was his expenditure, not the £300,000 that he

[211] *Ibid.*, §10(6)(b).
[212] *Ibid.*, §10(9). Where a confiscation order has been made during the six years prior to the current proceedings, a) the period over which the assumptions will apply is not the full six years but rather the period starting with the date of the previous confiscation order and b) property held on the day after the current conviction but acquired prior to the previous confiscation order will not be presumed to be derived from crime.
[213] This illustration assumes that the lower sale price was due to the fall in the real estate market – credible in the time period described – rather than for any more sinister reason.

sold the house for. If he cannot satisfy that order in any other way, funds proven to have a legitimate origin may be seized (or other assets liquidated) to pay it.

For a bank officer personally, this is a serious enough prospect. But there is nothing in the Act that states that the criminal lifestyle provisions may only be applied to an individual. That being so, "person" may cover natural and legal persons alike. Therefore, a corporation which secures a commercial contract through payment of bribes and then (as it generally will, as noted above) engages in financial transactions with funds derived from that contract may, through being guilty of money laundering, be held to have a criminal lifestyle.[214] But crucially, in the context of this article, so may a bank that launders funds which it knows to be linked to corruption. To date, no bank in the United Kingdom has ever faced the application of the criminal lifestyle provisions and it may well be that political considerations will continue to prevent this.[215]

5. CRITICISMS

5.1 BANKS TURNING A BLIND EYE

It has been suggested throughout this article that banks, in particular, play a significant role in the propagation of corruption and money laundering. Through the various services of deposit taking, financial advice, discounts, foreign exchange and settlements[216] that banks provide all too indiscriminately to their customers, including, all too often, knowingly, to corrupt PEPs, they perpetuate the problem by assisting the very persons whom they should be helping to

[214] R. Alexander (2009), *supra*, pp.103-4.
[215] In the United States, one prosecutor has expressed the view, albeit unofficially, that, when a bank has been bailed out with public funds, there can be a decided reluctance to see it then subjected to the full rigor of the criminal law; all too often, it will be able to negotiate a deferred prosecution agreement instead. The implication is clear: "too big to fail" could in practice also mean "too big to prosecute fully".
[216] P.He, (2010). "A Typological on Money Laundering". JMLC, 13(1), 15-32.

catch out. Moreover, as highlighted in this article, banks, through handling the proceeds of corruption, engage in money laundering themselves.

However, money laundering is at the heart of all profit-driven crime. The primary function of banks is to make a profit and thus it can be argued that it is unsurprising that there is evidence suggesting banks often turn a blind eye to corruption and money laundering. Some would say that there can be some justification for the behavior of banks. This is even more true in times of financial turmoil: the decision by Wachovia, discussed earlier in this article, to accept without question funds from Mexican drug cartels came at a time when it was fighting to survive the global financial crisis. Indeed, although none have actually said so, at least publicly, it is quite possible that some in Wachovia's senior management feel that, had they not accepted the funds, the bank would have collapsed earlier than it did. In response, the authors of this paper would say that that is no excuse. Sympathetic though one may be to managers struggling to save their institution, they cannot be compared to a man who steals during a famine as the only means to keep his family alive. In contrast, the crimes producing the funds which they help to launder, do often kill people. Although precise figures for the casualties of the drug wars of northern Mexico are difficult to assess, it is clear that they have, to date, run into the hundreds of thousands. This aside from the damage caused to the ordinary citizens of a developing country as some foreign institutions hesitate to invest and tourism, a key source of revenue, suffers as governments advise their own citizens to stay away.

In any case, although Wachovia was facing financial difficulties, many other banks found to have been involved in money laundering have not. One need only look at a brief list: Riggs

Bank in the United States,[217] HSBC, a British bank (albeit that it took the U.S. authorities to bring its laundering to light)[218] and, most recently UBS in Switzerland.[219]

A further objection raised by some is that the fight against corruption and money laundering has impacted upon the rights of individuals and financial institutions alike. This is undoubtedly true. The customer's right to confidentiality, not to mention the principle of banking secrecy, long cherished in many jurisdictions, have been gradually eroded to the point where banking secrecy has now been effectively outlawed.[220] Some may argue that this erosion of fundamental rights is a step too far. The effect this can have is lowering the confidence of customers in the banking system, which impacts upon the profits of banks. Turning a blind eye can thus be argued as a means by which banks restore confidence in a system that laws and regulations to an extent have stripped of customer satisfaction, confidentiality and privacy.

However, despite limited justification on the part of banks, their role in propagating corruption is inexcusable. The very real harm that corruption causes, including, in many cases, actual deaths, has already been examined in detail. More generally, as a consequence of the part they play in financial crime, the long-term economic wellbeing of the developing world in particular, is held in the balance. Therefore, the expectation imposed on banks is that

[217] *Riggs Bank Agrees to Guilty Plea And Fine* (2005) WASHINGTON POST, January 28, 2005. www.washingtonpost.com/wp-dyn/articles/A41584-2005Jan27.html. Last accessed, September 21, 2012.

[218] *HSBC'S Mexico nightmare on money laundering* (2012) FT.COM, July 18, 2012. http://www.ft.com/cms/s/0/832b582a-d0f2-11e1-8a3c-00144feabdc0.html#axzz276Rvm0FK. Last accessed, September 21, 2012. *HSBC in talks to settle US money laundering claims* (2012) THE TELEGRAPH, August 24, 2012. http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9498374/HSBC-in-talks-to-settle-US-money-laundering-claims.html. Last accessed, September 21, 2012. The former report suggests a reverse of the Wachovia situation: the global head office of a bank repeatedly attempting to persuade a subsidiary to comply with AML standards, but consistently being ignored.

[219] *Swiss launch UBS money laundering probe* (2012) FT.COM, August 31, 2012. www.ft.com/cms/s/0/da0f7bc8-f37d-11e1-9c6c-00144feabdc0.html#axzz276Rvm0FK. Last accessed, September 21, 2012.

[220] E.g. FATF Recommendation 9.

they do combat money laundering and help to reduce significantly the opportunities for people to engage in such activities and from using the financial system as a conduit for their illicit funds. It is expected that they do this through various means, including customer due diligence (CDD), suspicious transaction reporting (STR), by identifying and accounting for the risks in outsourcing and managing the risks across national borders: the detailed prevention mechanisms have been examined in detail in a sufficiently wide range of literature for it not to be necessary to analyze them afresh here. However, despite these systems having been put in place for some time, and hence now far from novel, it is worrisome that the fundamental issue in regard to banks is that many if not all corrupt dictators and PEPs who have transferred money offshore for personal enrichment have continued to do so through services provided to them via private banks. Indeed, all too often, such persons' overseas assets only become the subject of real attention when they leave office[221] or, at least, their regime falls from favor in the West.[222]

Banks have been instrumental in laundering and concealing the proceeds of corruption; offshore banks have been an important and visible vehicle for money laundering. In this context, the true definition of "offshore bank" is particularly important: simply a bank located in a different jurisdiction than that in which its customer is based. It is not small Caribbean or Pacific islands in which corrupt PEPs typically hold their assets, it is Switzerland, France, the United Kingdom and, yes, the United States. This suggests one (or both) of two things: either the preventative measures in place are inadequate and ineffectual[223] or the measures to

[221] The assets of former Tunisian President Ben-Ali, located in European bank accounts, were only frozen after he was removed in the first of the uprisings of the Arab Spring.

[222] Similarly, the assets of Syrian President Bashir Al-Assad and his associates only became the subject of financial sanctions following the extreme measures he took to deal with the Syrian opposition. Indeed, it would appear that the blocking of these accounts are aimed more at persuading Al-Assad to leave office than to seize the proceeds of corruption. This despite the fact that, in the Transparency International 2012 Corruption Perception Index, Syria ranked , with a score of .

[223] This is the thesis put forward by J.C. Sharman in his recent work, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (2011), considered above.

enforce them are not used to their full and necessary extent: the view of the authors of this article.

However, what is of considerable concern is that even the U.S.'s Foreign Corrupt Practices Act of 1977, which provided the incentive for the OECD Convention, falls short. The assumption that those banks that follow good practices at home maintain the same standards elsewhere is inaccurate. Financial institutions and corporations in countries that have considerable history of transnational anti-bribery legislation, such as the United States, appear to exhibit large differences between their standards of corporate ethics at home and those adopted in countries outside of the OECD, a practice that appears to be common across all the major OECD states.[224] Thus, inadequacy of legal provisions is not a problem limited to the U.K. alone; the U.S. also has a lot to answer for, even though, as in the U.K., directors can be prosecuted for crimes committed abroad.[225] The current situation is such that the potential benefits of corruption and money laundering far outweigh the risks and indicates that more needs to be done to change the incentives for bribery and corruption abroad. Worryingly, the problem appears more widespread than initially thought. Perhaps the fundamental problem lies in lack of tough enforcement of all aspects of anti-corruption and AML regimes where there may be leniency in some aspects. This argument would be consistent, given the current state of the law in the United Kingdom. However, in the case of the United States and other countries that have demonstrated that they are tough on corruption, it now appears that they have double standards and that where their corporations can exploit differences in order to make profits, they do so.

[224] D. Kaufmann, (2004). "Corruption, Governance and Security: Challenges for the Rich Countries and the World", *The Brookings Institution*, [Online] 2, 83-102. Available from: SSRN-id609897. Last accessed, August 1, 2010.

[225] Although there are certain differences, the provisions of the Foreign Corrupt Practices Act are broadly similar to those of the U.K.'s Bribery Act 2010, including its extra-territorial reach.

5.2 SHORTCOMINGS OF THE SYSTEM

The developing world screaming about Western corruption refers to the importance of the apparently more sophisticated developed countries to take a lead in such matters since they are in a comparatively more advantageous position than developing countries. Even with this reliance, the West disappoints. The United Kingdom for one is looked upon as an example. However, the U.K. can be seen to have disappointed on occasions even in instances when other countries such as Switzerland , which has historically been notorious for a rather lax approach to corruption and money laundering control, have upped their game. One illustrative incident was in regard to the corruption of General Abacha, former President of Nigeria: while U.K. financial institutions demonstrated their oblivion to the hundreds of millions of U.S. dollars which flowed through the City of London's financial institutions, Switzerland showed the gumption required by the U.K. and ordered payment of over half a billion dollars to Nigeria.[226]

With this said, the Bribery Act 2010 is the first real attempt at combating corruption because it puts in place penalties that are likely to deter, including up to ten years imprisonment in some cases. However, even it has its drawbacks. A key flaw is the requirement that any prosecution must (except in Scotland) have the consent of either the Director of Public Prosecutions, the Director of the Serious Fraud Office or, in England & Wales,[227] the Director of Revenue and Customs Prosecutions.[228] Furthermore, such consent must be given personally, save where the Director concerned is unavailable.[229] This was a direct result of the British Government's perspective on the BAE scandal. Although the then Prime Minister, Tony Blair, put very severe pressure on both the Attorney-General and the Director of the

[226] S. Baker, *A Sorry State of Affairs*, NLJ, 158(7323), 775. (2008).
[227] In Northern Ireland, only the Director of Public Prosecutions or the Director of the Serious Fraud Office may give such consent.
[228] Bribery Act 2010, §10.
[229] *Ibid.*, §10(4).

Serious Fraud Office, he was all too aware that neither he nor the Attorney-General had, at the time, the actual power to order a halt to the investigation. While the British public, as well as anti-corruption organizations such as Cornerhouse, were horrified at the Government's caving in to the direct threats by a senior Saudi government minister of reprisals if the investigation continued, Blair saw it very differently. It is worth reminding ourselves here of precisely what the Saudi Government threatened. First, they said, all intelligence cooperation in the area of counter-terrorism would cease.[230] Second, all Saudi contracts with British companies would be cancelled. Not just BAE's contract to supply military aircraft – all British contracts. Blair took the second threat as seriously as the first – with good reason. In contrast to the U.S. system of government, whereby the executive branch is kept separate from the legislative, and hence neither the President nor any of his Secretaries have particular responsibilities for specific areas of the country, the British Prime Minister is a Member of Parliament, elected, just like his/her colleagues, to represent a particular geographical constituency. Blair's was Sedgefield, an area in County Durham in the North-East of England with very high unemployment. No one knew better than Tony Blair what the impact of such a cancellation of contracts would be: he had seen first hand the devastation caused when factories closed. Therefore, he did not appreciate being publicly humiliated for, as he saw it, protecting both the physical and the economic security of the United Kingdom. This must never happen again.

Understandable though Blair's concerns were, the fact remains that the 2010 Act requires any bribery prosecution to obtain the approval of a government Minister before it can proceed.

[230] Although the investigation was halted, there was, as discussed, considerable adverse publicity, not only in the United Kingdom but also elsewhere, something which will certainly have displeased the Saudi Government with its strong cultural emphasis on respect. Only those at the highest level in the British Government and its security and intelligence services, if even they, will ever know whether the attempts to bomb Glasgow Airport and a street in the theater district of London, both in July, 2009, would have been detected earlier had it not been for the scandal.

Given this, one may ask whether the U.K. is genuinely committed to combating corruption. The prosecutions of Mabey & Johnson and Innospec give some confidence, but what will happen if the next case involves a country that the British Government is less prepared to offend than Ghana or Indonesia? Will a case alleging bribes paid to senior politicians in Vietnam be allowed to proceed if it is felt that this could upset the establishing of new military alliances in South-East Asia or will this, once again, be held to be against the interests of national security?[231] It is to be noted that it will not be a question of the Government intervening, giving reasons, as in the BAE case; all that will be required is for the Attorney-General to decline to consent to the prosecution.

A further issue is that of the sentences passed when those involved in corruption are brought to account. Mabey & Johnson was fined £3.5 million, the approximate equivalent at the time of US$5.6 million: not a lot for a major commercial corporation. One may wonder what the value was of the contracts which their bribes secured. Innospec then secured a plea agreement with the Serious Fraud Office that so limited the sentence that the judge expressed outrage, stating that the SFO had no legal authority to make such a settlement and should not do so in future.[232] Yet only months later, then SFO Director Richard Alderman confirmed at a meeting at leading U.K. law firm Eversheds, "Global settlements are here to stay"[233] and

[231] At the time of writing, U.S. Defense Secretary Leon Panetta, had recently visited Vietnam with a direct view to establishing military cooperation, seen by many as a move to counter the perceived rise in influence of China. See Panetta makes symbolic visit to Vietnam (2012) FINANCIAL TIMES, June 3, 2012. www.ft.com/cms/s/0/e98dd6d4-ad6f-11e1-bb8e-00144feabdc0.html#axzz26vDP0t2l. Last accessed, September 19, 2012.

[232] *British chemical firm Innospec fined for Indonesia bribes* (2010) THE INDEPENDENT, March 26, 2010, http://www.independent.co.uk/news/world/asia/british-chemical-firm-innospec-fined-for-indonesia-bribes-1928508.html. Last accessed, September 19, 2012.

[233] E. Larson (2010) *Global Settlements Are Here to Stay, Serious Fraud Director Alderman Says*, BLOOMBERG, July 16,2010. http://www.bloomberg.com/news/2010-07-16/global-settlements-in-u-k-fraud-cases-here-to-stay-sfo-s-alderman-says.html. Last accessed, September 19, 2012.

continued to argue for, effectively, plea agreements in two keynote speeches at the Twenty-Eighth[234] and Twenty-Ninth Cambridge International Symposia on Economic Crime.[235]

Ultimately, financial institutions across the developed world and their legal systems need to be of a standard whereby those in developing nations can have confidence in them. The lack of sophistication in investigating and prosecuting corrupt PEPs in many developing countries and the question, all too often, of the credibility of the investigators means that developed countries undoubtedly have to take greater responsibility. Greater regulation of the financial system may well be necessary. But for there to be significantly more effort to prosecute and make examples out of banks, and their individual officers and employees, complicit in corruption and money laundering, what is even more important is a drastic change in attitude. It appears the U.K., although it is unlikely that it is alone in this respect, was slow to appreciate the corollaries of corruption and the importance of money laundering control until the recent change brought by the Bribery Act 2010. But even now, there are worrying signs. Although it is clear that the Serious Fraud Office did not set the example that they should have in the BAE case, they had the excuse of having been put under immense political pressure from the Prime Minister himself. Therefore, the blame may more fairly be directed at the British Government. However, the Innospec case was different. This was a decision by the Serious Fraud Office to cut a deal – not on political grounds but on the simple grounds of expediency. Better get a quick settlement, with admission of guilt, and pay the price of a very lenient sentence than spend considerable time and resources on a long-drawn out investigation and trial. Perhaps it was felt that this was particularly important at a time when there is a very

[234] Serious Fraud Office, Director's Speech, The 28th Cambridge International Symposium on Economic Crime, September 6, 2010. http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2010/the-28th-cambridge-international-symposium-on-economic-crime.aspx. Last accessed, September 19, 2010.
[235] Serious Fraud Office, Director's Speech, 29th Cambridge International Symposium, September 5, 2011. http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/29th-cambridge--international-symposium.aspx. Last accessed, September 19, 2011.

real objective to reduce the public deficit by cutting expenditure wherever possible. But the message is worrying. Bluntly, if the SFO does not demonstrate sufficient gumption in pursuing the corrupt will the full rigor of the law, it is no surprise if banks then lack conscience in engaging in acts of money laundering and corruption.

A final criticism relates to the political control over bribery prosecutions, explicitly contained in the 2010 Act. Blair's anger at the embarrassment of the BAE case was perhaps understandable: members of his Government had already repeatedly made their anger clear at the decisions of Ministers, who are elected,[236] being scrutinized by lawyers and judges who are not.[237] However, if the fight against corruption is to be effective, it must be free from political interference. Inevitably, such investigations will sometimes be politically sensitive: no government will wish to see the bank account investigated of a leader whom it considers an important ally, whether political, economic or military. The comment has already been made in this article that the overseas assets of Ben-Ali and Assad were only frozen after they fell from favor with the West. But that is precisely why investigations into corruption and money laundering offenses linked to it must be kept free from political control. The message that a leader or official need not worry about his overseas assets being looked into as long as his government is deemed politically important by the jurisdiction in which those assets are located is unacceptable. But it is more than just a moral issue. Such a stance will mean that such leaders will be even more determined to hold on to power by whatever means necessary because the one thing that will threaten their overseas assets is if they leave office. While

[236] In contrast to the position in the United States, most Government Ministers in the United Kingdom are Members of Parliament (MPs) and, as such, elected representatives. Although some are members of the currently unelected House of Lords, these tend to be the minority; in any case, those Ministers who have protested at their decisions being judicially reviewed have been elected MPs.

[237] E.g. then Home Secretary David Blunkett: *Blunkett accuses judges of damaging democracy* (2003) THE TELEGRAPH, February 21, 2003. www.telegraph.co.uk/news/uknews/1422661/Blunkett-accuses-judges-of-damaging-democracy.html. Last accessed, September 19, 2012.

they remain in power, a good friend to the West, their Western bank accounts are safe. They will be free to enjoy their wealth, investing some of it in luxury real estate or whatever else they choose, without interference. But if their opponents succeed in driving them from power, all that may change. They will no longer be able to offer any quid pro quo for their assets being left in peace; it will be the new government that has the ability to offer commercial contracts, mineral resources, military bases[238] or whatever. Therefore, they must ensure that, come what may, that never happens. The only way to avoid this rationale is to ensure that the proceeds of corruption will not be safe in a Western bank account in any event because any suspected proceeds of corruption, regardless of who the account holder is, may be subject to investigation and, if the suspicions are shown to be grounded, seizure.

Some may say this is a pipe dream: political realities will always override such utopian ideals. Others may point out that the writers of this article have the luxury of not having to please an electorate. But there are example that suggest that it is possible: that one does not have sacrifice the fight against the economic and financial crime to political expediency. In Sweden, the independence of the public prosecutor's office is viewed as sacrosanct and therefore no government minister has the authority to tell a prosecutor to drop a case. There may be occasions when a local prosecutor may be requested by a colleague elsewhere to delay a case in order to assist another investigation,[239] but even that request may be denied: a favor,

[238] A number of reports have commented that a leading reason for the Putin government's steadfast support of the Assad regime is the Tartus naval base, Russia's only naval base in Mediterranean (and indeed outside the former Soviet Union). See *Russia Sending Warships on Maneuvers Near Syria* (2012) NEW YORK TIMES, July 10, 2012. www.nytimes.com/2012/07/11/world/middleeast/russia-sends-warships-on-maneuvers-near-syria.html..Last accessed, September 19, 2012. That said, other reports, including one in the New York Times, have suggested that other factors may be more significant. See: *Why Russia Is Backing Syria* (2012) NEW YORK TIMES, July 6, 2012. www.nytimes.com/2012/07/07/opinion/why-russia-supports-syria.html. Last accessed, September 19, 2012.

[239] For example, if a suspect in a major organized crime investigation, under surveillance by the Stockholm police, is arrested for drink driving in Gothenburg. (DUI offenses carry a mandatory jail sentence in Sweden.)

effectively, is being asked, not an order given.[240] Similarly, in South Korea, the brother of the President was investigated for corruption in July, 2012.[241] If Sweden, a country in which international trade plays a significant part in the economy and South Korea, with a culture that places very great importance on respect and family, can take such an approach, so can other jurisdictions.

6. SUGGESTIONS FOR REFORM AND CONCLUDING REMARKS

When considering the effects of corruption, the impact on the developing world is the first to be considered. However, Western corruption creates problems for the West too, particularly with regard to confidence in the legal and economic systems and in the integrity of politicians who exploit financial institutions. Were it not for the fact that developed countries typically have a considerably more credible legal and political system than those in the developing world, many politicians who have engaged in corruption – and there have been a number - would still be in office.[242] However, changes are necessary in order that the United Kingdom does not follow a downward spiral, deteriorating into the condition of many developing countries. If this seems an extreme statement, the experiences of Israel and Japan are salutary. Both are without question part of the developed world, but both have had not one but several corruption scandals involving politicians at the highest level of government.[243] If corruption is tolerated, that is where the road can end.

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[240] Source: Prosecutor interviewed at economic crime conference, Stockholm, 2003. Government officials such as prosecutors are only permitted to give their views on strict condition of anonymity.

[241] *South Korean president's brother arrested over bribery charges* (2012) THE TELEGRAPH, July 11, 2012. www.telegraph.co.uk/news/worldnews/asia/southkorea/9391186/South-Korean-presidents-brother-arrested-over-bribery-charges.html. Last accessed, September 19, 2012.

[242] Some, admittedly, may have been removed from power in any event, simply due to their party losing an election, but the point still holds.

[243] *Ex Israeli prime minister accused of corruption gets mixed verdict* (2012) C.N.N. U.S., July 10, 2012. http://articles.cnn.com/2012-07-10/middleeast/world_meast_israel-olmert-corruption_1_olmert-corruption-trial-israeli-police. Last accessed, September 19, 2012. *Japan defence ministry raided in bribery scandal* (2007)

Therefore, a number of steps need to be taken. Banks need to apply the same scrutiny to domestic PEPs that they should apply to foreign PEPs. Undeniably, banks and other financial institutions, given their strategic positioning, can play a pivotal role in combating corruption and money laundering. Instead, as this article has highlighted, the role of gate-keepers of AML regimes imposed on banks is ill-fitting. Indeed, consistent with the arguments put forward in this article, banks have been one of the most important channels of money laundering[244]. At the same time, the anti- money laundering laws and regulations require banks to bear an investigatory burden: a role that they are ill equipped for. The result is that, too often, at present, banks are more part of the problem than part of the solution and as things currently stand, they can afford to take chances. This is particularly true of the United Kingdom, where, to date, no bank has suffered in the United Kingdom the kind of sanctions that have been imposed in some cases in the United States. In order for this to change there needs to be a drastic change in attitude on the part of banks, regulatory bodies and prosecutors alike.

This article has also demonstrated that adequate laws are already in place: in relation to both corruption and money laundering, the United Kingdom now has some of the strictest laws anywhere in the world. However, without greater use and proper enforcement of these laws, there is no reason why, in time, the U.K.'s political, economic and even legal systems could not start to bear a disturbing resemblance to that of those of some developing countries.

THE GUARDIAN, November 29, 2007. http://www.guardian.co.uk/world/2007/nov/29/japan.justinmccurry. Last accessed, September 19, 2012. More famously, several members of Prime Minister Kakuei Tanaka's administration were indicted, and ultimately found guilty, in relation to bribes paid on behalf of the Lockheed Corporation in relation to a major aircraft deal in 1976. *Tokyo Upholds Final Lockheed Guilty Verdicts* (1995) LOS ANGELES TIMES, February 23, 1995. http://articles.latimes.com/1995-02-23/news/mn-35283_1_guilty-verdict. Last accessed, September 19, 2012.

[244] R.A. Araujo. (2008) *supra*.

Nonetheless, the legal and regulatory regimes do need to take greater account of the fact that the primary purpose of banks is to make a commercial profit. Their role is not to carry investigatory burdens, to police the financial system or even to play hide and seek with corrupt PEPs. Each of these activities impinges upon banks' profits and that has to be faced. What the law and the regulatory regimes need to focus on is the penalties that can be imposed on banks in order to motivate them to help in the fight against corruption and money laundering and ensure that this is effective.

One key motivating factor is the impact that a tarnished reputation will have on the ability of banks to make a profit: Wachovia was a case in point. So far only the Bribery Act 2010 has given hope that things are moving in the right direction. The Act may go a considerable way in instigating change in banks and other financial institutions by giving U.K. enforcement agencies considerably more power, which is likely to have far-reaching effects on the way that many businesses are regulated. In addition, the Act brings to attention the importance of companies undertaking compliance reviews and risk assessments in light of the new standards it imposes. Therefore this may bring about the much needed change in attitude. However, more needs to be done to ensure that anti- money laundering regimes penetrate the much exploited offshore banking system, notorious for corruption. In this context, the correct meaning of offshore banking must be remembered: all institutions that offer services to customers located in other jurisdictions, regardless of where the institutions themselves are located.

For far too long, banks and other financial institutions have escaped without harm by adopting the "three wise monkeys" policy,[245] finding contentment in oblivion. Primarily, this

[245] "See no evil, hear no evil, speak no evil."

has been because this policy has enabled banks to make significant profits through simply asking no questions. Section 7 of the 2010 Act is set to change things, although the Act's success in achieving substantial and long-lasting change will be in the extent to which it is enforced. The previous legislation, especially once it was extended to cover bribery of foreign public officials in 2001, would itself have been a successful deterrent if its provisions had been more strictly enforced. Even voluntary codes of conduct and recommendations such as those of the FATF and Wolfsberg principles have not been lacking. However, their effect has been limited. In practice, incorporating these measures has inevitably not been convenient, while there has not been sufficient motivation to push through regardless since the benefits of non-compliance have, frankly, outweighed the costs.

However, if the approach taken to Mabey & Johnson were applied to banks, things could soon change: directors escorted from their offices in handcuffs would arguably concentrate minds, even more so when pictures of their arrival at court appeared in the media. The Financial Services Authority refreshingly demonstrated its capability in taking a hard line approach to enforcement in the Aon Ltd case, referred to above. The significant fines imposed for breaching the FSA's principles should set an example to banks and act as a wake-up call to the fact that the FSA will not remain shy to flex its muscles. Nor, it may be hoped, will the Financial Conduct Authority, due to take over this aspect of the FSA's role in 2013. If this article has established one thing, it is that all too often, banks do not conduct their business with integrity. Therefore, they are subject to the wrath of the FSA/FCA – which may include criminal as well as regulatory proceedings. The time has come for examples to be made.

The foundations of any regime have to be solid in order for it to survive in the long term. In regard to anti- money laundering regimes, this is essentially genuine commitment on the part of both banks and governments to ensure that a truly inter-agency, inter-disciplinary, and international approach is taken. Technology is not lacking to build, develop and implement sophisticated corruption and money laundering detection methods such as STR, "Know Your Customer" rules and other due diligence procedures, together with stringent monitoring control and policing of financial activities. What has been lacking is gumption on the part of banks. While there has been admirable progress in many respects, it remains true that, too often, banks, particularly at the most senior levels, simply do not care. The repeated ignoring by Wachovia's headquarters in Charlotte of the concerns raised by Martin Woods, their nominated officer in London are a case in point. So is the fact that, although he was lauded by U.S. law enforcement for his integrity, and indeed his assistance in the investigation, Woods has never worked in the banking industry since.[246] It is hard to believe that the reducing of staff numbers due to the ongoing financial crisis is the only reason. Therefore, while the technology just referred to will provide welcome assistance to those institutions which do have a genuine commitment to reduce money laundering, for others, such systems may simply give the impression that the institution is taking the laws and regulations seriously, while conveniently providing a screen behind which they can continue as before.

Genuine change will require a change in attitude and will take time and patience: quick fixes are not an option. Organizational purpose and integrity need to be realized and should be able to withstand dominating political interests. Rules need to be enforced and strong management needs to be in place. A special independent anti-corruption officer should be appointed in each bank to guard against any conflict of interest and to ensure that there is

[246] Martin Woods is now Managing Director of an AML consultancy company, Hermes Forensic Solutions. http://hermesforensicsolutions.com/aboutus.php. Last accessed, September 19, 2012.

adequate protection for those who resist corruption, that is, whistleblower facilities providing clear channels for staff to raise concerns in a safe and confidential manner. While, in the United States, the Dodd-Frank Act has introduced provisions to positively encourage whistleblowing,[247] the best that the United Kingdom's legislation offers is legal redress for whistleblowers who are fired in consequence.[248] In addition, well trained bank employees, sharp prosecutors and investigators are all crucial parts of an effective anti-corruption program. They need to be assisted by clear and efficient channels through which genuine international cooperation can take place. Without this fundamental change in attitude, the fight against corruption and money laundering control will be at best a half-fought battle. Even small changes such as simplifying and minimizing bureaucratic systems and the expenses related to arduous form filling can help catalyze changes in attitude.

Importantly, the prevention aspects [249] of AML regimes and their enforcement[250] are both interdependent and complementary to each other. As such, according to Reuter and Truman,[251] they should be given equal weight, (2004). The identification of a problem is not

[247] §922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act provides that, where a whistleblower voluntarily provides to the Securities and Exchange Commission information that leads to a successful enforcement action that in turn results in a financial sanction of over $1 million, the whistleblower is entitled to between 10% and 30% of the total sanctions imposed, either by the SEC itself or in a related action (e.g. a criminal prosecution). The first such award, of almost $50,000, was announced on August 21, 2012: *SEC Issues First Whistleblower Program Award*, U.S. Securities and Exchange Commission Press Release 2012-162, August 21, 2012, www.sec.gov/news/press/2012/2012-162.htm. Last accessed, September 19, 2012.

[248] §47B of the Employment Rights Act 1996 provides that a person shall not "suffer detriment" in the context of their employment as a result of having made a "protected disclosure". This is in turn defined in Part IVA of the Act making a report of a criminal offense, or alternatively a violation of a legal obligation, which is made to the person's employer, an officer of a body set up by statute (such as the Serious Organised Crime Agency or the Serious Fraud Office) or some other person prescribed by statute - e.g., in the case of money laundering, a police officer, Customs officer or nominated officer of the institution (i.e. Money Laundering Reporting Officer): Proceeds of Crime Act 2002, §338. The redress is damages awarded by an employment tribunal: §§48 and 49 of the 1996 Act. In the United States, §922 of the Dodd-Frank Act provides similar protection to whistleblowers who disclose information to the SEC. For a discussion of the U.K. provisions, see R. Alexander, *The role of whistleblowers in the fight against economic crime* (2004) 12(2) J.F.C. 131.

[249] Prevention includes, establishing regulation and supervision of financial institutions, reporting requirements, customer due diligence, and civil and administrative sanctions for noncompliance.

[250] This includes investigation, prosecution, freezing assets, confiscation, and punishment for money laundering, and also, often, for the underlying predicate crime.

[251] P. Reuter and E.M. Truman (2004), *Chasing Dirty Money: Progress On Anti-Money Laundering*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS.

in itself sufficient if there are no incentives or workable procedures in place to solve it. Thus, banks must draw up unambiguous anti-bribery and corruption policies and ensure that these are filtered down to staff at all levels. Information about the dynamics of corruption must be accumulated and then passed on to financial institutions, which must then, in turn, pass them on to their employees through continual training encompassing all levels of staff. Further, there must be clear policies on corporate gifts and hospitality, execution of due diligence, together with regular and comprehensive audits, which would help to increase public confidence, employee standards and improve the fluidity of corporate systems. Always important, albeit all too often lacking in practice, these policies are now essential if the company is to protect itself from a charge of corporate failure to prevent bribery under §7 of the Bribery Act 2010. The approach to this must be all-encompassing and be conducted, separately, in relation to every country with which the company does business, in order to take proper account of country-specific risks.[252] Crucially, more conditions need to be attached to international loans and anti-bribery clauses incorporated into commercial contracts in order to guard against the likes of "Mr Ten Per Cent". Full implementation of measures such as these will not only improve the integrity (both actual and perceived) of international corporations, but also considerably help with reduction of the foreign debt faced by the developing world.

Arguably, one of the most significant changes necessary is the implementation of complementary measures to change the incentives for overseas bribery. This would create uniformity in standards both at home and abroad, thus assisting in the creation of a more unified and synchronized defense against corruption and money laundering. Moreover, there needs to be a system of full and transparent disclosure in order that citizens, particularly those

[252] G. Brown and others. (2010). "The Bribery Act 2010: Bribery and Corruption". CSR, 5(34), 38.

of developing countries, can hold their governments accountable for the management of revenues generated by state resources. This would also considerably assist in addressing the damaging, but accurate, stereotype that banks and other financial institutions are complicit in corruption and thus the deterioration of the socio-economic wellbeing of the countries with which they deal. Importantly, although there is need for special anti-corruption and money laundering officers and departments within financial institutions, it is important that a balanced approach is taken to ensure that banks in the fight against corruption, together with other anti-corruption bodies, do not turn into partisan instruments who, rather than engaging in meaningful enforcement strategies to detect fraud and corruption, instead harass political opponents simply because of who they are rather than any actual illicit conduct. Where this occurs, it is no more satisfactory than taking no action at all. Indeed, it is probably worse, since such behavior discredits the entire anti-corruption effort.

In addition, initiatives such as the World Bank's public delisting of firms who are discovered to practice bribery in the course of international projects funding provide some satisfaction, especially since, for banks, reputation is everything. Without these measures in place, at the very least, banks can actually cause corruption: if money laundering can be the cause of corruption, then banks involved in money laundering are the root cause of corruption and play a significant role in perpetuating the problem. Therefore, a clampdown on the exploitation of offshore banking for illicit purposes – wherever the institutions concerned happen to be located - is necessary. Linked to this is of course the need for greater policing of the financial system in general.

The climate of sharing bribes and favors has become a deeply entrenched problem, and given that complacency on the part of banks has become so engrained, any considerable change

will inevitably be slow. Therefore, although the development of improved AML tactics and a tougher standard applied to offshore banking in view of the extent of its use in corruption, particularly by corrupt PEPs, is important, is will not in itself be enough. It must be expected that corruption and money laundering are not stagnant. These criminal practices have evolved and will continue to do so as launderers use smarter tactics and manipulate the ever advancing technology at their disposal. The techniques of those fighting them must similarly evolve in order keep up.

But importantly, banks and regulated financial institutions are not the only vehicles through which funds can be laundered. With the spotlight having been on regulated financial institutions for as long as it has, and with the further changes that are now coming in force, launderers will undoubtedly have seen – and taken - the opportunity to exploit the non-regulated sector. Therefore, exclusive focus on banks, with the possible exception of offshore banking, where the law has sometimes been comparatively lax, has been somewhat misguided and a crack-down of corruption and money laundering activities in the non-regulated financial sector is overdue. This is an area that a follow up paper on this subject should explore.