

**CHAPTER 5**  
**AN EVALUATION OF INFRASTRUCTURE TO**  
**DETECT AND CONTROL MONEY LAUNDERING**  
**AND TERRORIST FUNDING IN MALAWI**

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### Introduction

Over the centuries it has been important for criminals to legitimise the proceeds of their criminal activities by converting the funds derived from criminal activity to funds that appear to be legitimately obtained. Preventing criminals from using the financial institutions to launder the proceeds of crime has therefore become a standard feature of the fight against crime. After the tragic events that took place in the United States on 11 September 2001 a number of governments called for a rapid and co-ordinated effort to detect and prevent the use of the world financial system by terrorists. This was based on the general recognition that effective efforts to combat money laundering cannot be carried out without the co-operation of financial institutions, their supervisory authorities and law enforcement agencies. Launderers are continuously looking for new routes for laundering their funds. Economies like that of Malawi, with growing or developing financial centres but inadequate controls, are particularly vulnerable. There is therefore a need for money laundering to be fought in Malawi by establishing a comprehensive anti-money laundering regime and by providing the necessary legal or regulatory tools to the authorities charged with combating the problem, acting in liaison with all the institutions susceptible to money laundering. This chapter evaluates infrastructure in Malawi to detect and control money laundering.

### What is money laundering?

Taking effective measures to combat money laundering requires one to have a good idea of this crime and how it is carried out. The goal of a larger number of criminals' acts is to generate a profit for the individual or group that carries out the act. Money laundering is the processing of these criminal proceeds to

disguise their illegal origin. The following definition of money laundering is adopted in this chapter:

All activities to disguise or conceal the nature or source of or entitlement to money or property, or rights to either, being money or property or rights acquired from serious economic crime or corruption, as well as all activities to disguise or conceal money or property that is intended to be used in committing or facilitate the commission of serious crime.<sup>1</sup>

In terms of clause 19(1) of Malawi's proposed Money Laundering and Proceeds of Serious Crime Bill, 2002, a person launders money if he or she:

- (a) acquires, possesses or uses property, knowing or having reason to believe that the property is derived, directly or indirectly, from acts or omissions:
  - (i) in Malawi, which constitute a serious offence.
  - (ii) outside Malawi, which had they occurred in Malawi would have constituted a serious offence.
- (b) directly or indirectly, renders assistance to another person for
  - (i) the conversion or transfer of property derived, directly or indirectly, from acts or omissions referred to in paragraph (a) with the aim of concealing or disguising the illicit origin of that property or of aiding any person involved in the commission of the offence to evade the legal consequences thereof.
  - (ii) concealing or disguising the true nature, location, disposition, movement or ownership of the property derived directly or indirectly from acts or omissions referred to in paragraph (a).

It is noted from both definitions that the process of disguising money is of critical importance as it enables the criminal to enjoy the profits of crime without giving away the source. Illegal arms sales, smuggling and the activities of organised crime, including armed robbery, drug trafficking and prostitution, can generate huge sums of money. Embezzlement, insider trading and bribery schemes can also produce large profits and create the need to 'legitimise' the ill-gotten gains through money laundering. When criminal activity generates substantial profits, the individual or group involved must find a way to control the funds without attracting attention to the underlying activity or the persons involved. Criminals do this by disguising the sources of the money, changing its form, or moving funds to a place where they are less likely to attract attention. By so doing, they commit the crime of money laundering.

## **Exposure of commercial, financial and other sectors in Malawi to money laundering**

The formal retail and mercantile commercial sector in Malawi continues to deal mainly in cash transactions. Most shops, concentrated in the commercial cities of Blantyre and Lilongwe, prefer dealing in cash. Malawians of Asian descent, who are the bulk of retail traders, generally do not accept cheques, hence the widespread use of cash. This provides a wide-open playing field for money launderers. The growing trend of refusing payment by cheque has "raised concern among industry captains, who say the practice frustrates the country's efforts to move towards a cash-free financial system if left unattended."<sup>2</sup> For many shops the amount of cash is immaterial to the transaction. An interview with some leading merchants showed that they do not keep proper records of their transactions, which heightens their vulnerability to becoming part of the money laundering chain. It is widely known that criminals can use cash from the sale of drugs, armed robbery or any other illicit trade to purchase items from retail outlets.

There are a few motor vehicle dealers in Malawi. As with other parts of the commercial sector, people can buy vehicles using cash. Further, the dealers do not require any form of proof of identity from purchasers, nor do they verify purchasers' identity. Anyone can buy a vehicle by merely stating his name and address, upon which the seller can give the purchaser a letter of change of ownership. This is then submitted to the Road Traffic Authority to effect the change of ownership into the purchaser's name. This practice exposes the motor vehicle trade to the laundering of tainted money.

Foreign exchange bureaux are highly exposed to money laundering. An observation of the way transactions are carried out in one such bureau revealed that in some instances, no record of transactions is entered in any books. It is at the discretion of the customer whether the transactions should be recorded or whether his passport should be stamped to indicate the transaction. This exposes the bureaux to money laundering. Furthermore, the bureaux are not obliged to report any cash transactions to the police, regardless of the amounts involved.

The Fiscal Police, with headquarters in Blantyre, is the police unit that deals with economic crimes. The unit has 10 members. It is not clear what measures, if any, it has put in place to detect and control money laundering. The concept of money laundering seems still to be only vaguely appreciated within the unit, which clearly compromises the unit's capacity.

The sale by banks of bearer certificates makes them susceptible to abuse for money laundering purposes. In Malawi bearer certificates can be traded and negotiated after maturity for a bank cheque or cash. Money launderers can use banks to deal in bearer certificates.

## **Institutional mechanisms to detect and control money laundering**

In South Africa, the Financial Intelligence Centre Act No. 38 of 2001 (FICA) is the most direct legislation dealing with the proceeds of unlawful activities. Apart from strict measures introduced against offenders, FICA places onerous obligations on all accountable institutions, including authorised foreign exchange dealers. Malawi does not yet have the legislative equivalent of FICA. The Money Laundering Bill, which has twice been tabled in parliament, has not been passed on account of being insufficiently explained: legislators have complained that they do not understand it. The Attorney-General indicated that the Bill would be tabled again before the end 2003,<sup>3</sup> but this had not yet occurred at the time of writing.

The Money Laundering Bill refers to financial institutions or cash dealers. 'Financial institution' covers a wide range of business activities. In this chapter the following institutions are examined: boards of executors, trust companies, travel agents, estate agents, police, banks, gambling establishments, lawyers, forex bureaux, accountants and investment promotion agencies. Most of them would fall under the proposed definition of financial institutions.

The mechanisms in place to detect and control money laundering in these institutions are varied. Since money laundering is not yet a crime in Malawi, it is still a matter of speculation whether these mechanisms are in fact intended to detect and control money laundering, or whether they are primarily aimed at some other purpose.

### ***Banking institutions***

In many cases, banks and other financial institutions may be the only entities capable of tracing the assets of launderers and terrorists and of preventing them from being used to finance terrorism or the other criminal activities. Accordingly, it is important that mechanisms to be put in place to detect money laundering by these institutions. The Reserve Bank plays an important role in this regard.

### *The Reserve Bank of Malawi*

The Reserve Bank of Malawi is established under the Reserve Bank Act 1964, Chapter 44:02 and its principal objectives include the:

- promotion of a sound financial structure in Malawi, including payment systems, clearing systems and adequate financial services able to detect and control money laundering;
- collection of economic data from the financial and other sectors for research and policy purposes. The research assists in bringing new, counter-money laundering perspectives to respond to ever changing methods of money laundering.
- supervision of banks and other financial institutions to ensure their activities are carried out lawfully with the Reserve Bank providing the necessary checks and balances on money laundering.

Supervision of banks and other financial institutions is in terms of Section 48 (i), which stipulates that:

The Bank shall supervise banks and other financial institutions to safeguard the liquidity and solvency of such institutions and ensure their compliance with the monetary regulations under the Act.<sup>4</sup>

The Reserve Bank has the power to call upon commercial banks and other financial institutions to submit financial and other statements regarding their business and any additional information the Bank may require. This allows it to evaluate the commercial banks' activities and determine if there are any suspicious activities taking place.

With regard to the liquidity and solvency and sound management of banks and other financial institutions, the Reserve Bank issues guidelines, regulations and directives. Each bank or financial institution is required to comply with them or risk certain penalties.

In addition to setting out the basic elements for banks to follow, the Bank also monitors the application by the commercial banks of sound 'know your customer' procedures.

The Reserve Bank's inspectors can investigate the affairs of any bank or financial institutions at any time.

### *Commercial banks*

There are six commercial banks in Malawi, namely National Bank, Stanbic Bank, Finance Bank, First Merchant Bank, Loita Bank and Indebank. Their measures to detect and control the laundering of tainted money are more or less the same. At the biggest bank, National Bank, the following mechanisms are used:

#### **Opening of accounts**

Customer identification is essential before any account is opened.<sup>5</sup> The bank takes reasonable measures to satisfy itself as to the true identity of anyone seeking to enter into a business relationship with it by requiring the applicant to produce an official record reasonably capable of establishing his or her true identity, such as a passport, driver's licence, a letter from employers with proof of remuneration, or references from account holders. In the past the National Bank took such references at face value but now it has to verify them.

The bank generally does not establish a banking relationship until the identity of a new customer is verified. With regard to companies or trusteeships the bank not only requires the certificates of incorporation but also checks on the identity of the directors. The same applies to trusteeships of any charitable organisation.

Stanbic Bank has more or less the same requirements for opening an account as the National Bank. The operations manager indicated that the bank endeavours to get as much information as possible from clients when they open accounts. Stanbic has now gone further and is currently working on requiring customers to get authenticated letters of recommendation from notary publics before the bank will open an account for them. As there are no national identity cards in Malawi, Stanbic Bank sometimes accepts personal identity cards for individuals.

However, the banks do not verify the authenticity of some of the documents regularly relied on for identification, such as passports and driver's licences, with the relevant institutions, namely the Immigration Department and Road Traffic Department respectively. The Immigration Department has been known to issue passports to non-Malawians, particularly Zimbabweans.

#### **Record keeping**

The National Bank of Malawi has an archiving system that is used in keeping records for the bank and a booklet that defines what they mean by 'records'. The statutory requirement for keeping records in Malawi is seven years but the National Bank may keep key documents for as long as 20 years. Stanbic Bank

keeps records for seven years, after which they are stored in a data bank. The records are never destroyed. The banks revealed that all records relating to transactions are kept to enable them to comply swiftly with information requests from the Reserve Bank of Malawi. The records are sufficient to permit reconstruction of individual transactions.

### **Reporting system**

Banks in Malawi are not obliged by law to report regular transactions and they are invariably not keen to do so. The tendency is to uphold secrecy practices. National Bank's approach is to discuss any potentially problematic matter with a customer before reporting it to law enforcement officers. Within the bank any officer who is confronted with a suspicious transaction reports to quality assurance officers, who have the responsibility of co-ordinating unusual transactions arising in the bank. They refer the matter to the bank's Risk and Security Department, which is mandated to investigate and check such transactions.

At Stanbic Bank any bank official confronted with an unusual transaction refers the matter to the internal auditor, who in turn refers it to the Operations and Administration branch of the bank. In respect of other new banks, such as First Merchant and Finance Bank, reports are made to the manager of the bank.

No banks allow the operation of anonymous bank accounts.

### **Screening of employees**

It is important for banks to screen employees lest they employ individuals who then connive with the launderers. Screening of potential new employees takes place through interviews and by writing to the previous employers or former education institutions for references.

### **Staff training**

Though most bank employees of National Bank and Stanbic Bank receive training each year in the banks' general operation, not much time has been devoted to specialised training on money laundering or its detection. Proper training is required if laundering is to be detected. Bank officials can only detect laundering if they have knowledge of what it entails.

### **Cash transactions**

The financial sector in Malawi deals predominantly in cash transactions. The banks thus rarely report any cash transactions, although National Bank said that suspicions are aroused in the case of cash deposits of a million kwacha or more.

The banks in Malawi do not allow anonymous bank accounts. Each account is assigned to an existing person. However, as pointed out above, banks such as the first Merchant Bank and Finance Bank that sell bearer certificates do not require identities for anyone purchasing them. This practice is a loophole which can be used by criminals to disguise their tainted money.

### ***Other commercial institutions***

#### *Estate agents*

Most estate agents in Malawi do not understand what money laundering is about and thus have not put in place mechanisms to control and detect it. The estate agents regard it as nothing unusual if a person brings in a million kwacha in cash to purchase a property. They do not even profile their customers. Most estate agents carrying on business in Malawi are not registered with the Estate Agents Board.

It is difficult for estate agents to detect the laundering of tainted money. Most are simply interested in selling properties, regardless of the source of funds. They are not required by law to question a client's source of funds or to verify the identity of any individual, hence their capacity to detect laundered proceeds is next to zero.

#### *Lawyers*

Five law firms surveyed had no measures to detect and control the laundering of tainted money. No profiling or identity verification of clients was undertaken. There is no doubt that lawyers are well positioned to acquire information relating to money laundering and even to facilitate it. However, because of client confidentiality, lawyers cannot effectively discharge their responsibilities in the detection of money laundering. In Malawi lawyers are not obliged to make any reports, hence their capacity to detect money laundering is to no avail.

#### *Insurance organisations*

The insurers in Malawi have also not put in place any measures to control or detect money laundering. Interviews with officials<sup>6</sup> from insurance companies revealed that they were generally unfamiliar with the concept of money laundering. The insurance companies did not care to probe the source of income of their customers or verify with foreign jurisdictions whether or not motor vehicles being insured were stolen.

The capacity to detect money laundering is made more difficult for insurance companies in cases where they have to pay out for accidents, some of which are not genuine. Sometimes drivers of company vehicles connive with unscrupulous individuals and stage accidents, for insurers are required to pay. The insurance companies do not have the capacity to deal with such situations, which nonetheless provide an opportunity for money laundering.

### **Gambling institutions**

Gambling institutions are a new phenomenon in Malawi and have only been in the country since 2002. Blantyre has one casino. There are no mechanisms to detect and control the possible laundering of tainted money and other illicit proceeds through the casino. Gamblers can visit the casino with millions in cash without anyone raising an eyebrow. Money launderers can thus 'clean' as much money as they want through the casino without any fear of detection. Casinos are not required to get the identity of their customers or question the source of customers' funds.

### ***Government departments and institutions***

#### **Registrar of businesses, trusts and companies**

Money launderers can register firms, companies or trusts and use the same to disguise their clandestine activities.

The clerk who processes registration of these entities indicated ignorance of the term 'money laundering' and was not aware that entities can be registered for illicit purposes. The only mechanism which can be said to be in place to control money laundering is the requirement of some of those who register business names to furnish their identities, copies of which are kept in the respective files of the registered entity. In regard to the registration of companies or trusts, no trustees' or directors' identity documents are required whatsoever.

#### **Malawi Revenue Authority and Department of Customs and Excise**

The Malawi Revenue Authority is the government department empowered to collect revenue in Malawi. The department is more interested in collecting revenue than it is in mechanisms to detect or control money laundering. It finds it difficult to determine whether the correct tax is being collected since most traders do not issue receipts.

The main mechanism to detect and control money laundering is in action at the country's borders, through the Department of Customs and Excise, though its chief aim is in fact to collect duties payable on goods entering Malawi.

Customs officials at the borders are required to inspect all goods entering Malawi and determine the duty payable. However, they find it very tough to detect whether invoices for such goods are genuine or not. Attempts have been put in place to use organisations such as the 'Société Générale Desuiveillance (SGS) to determine the correct prices of goods, but it is still very difficult to determine their true values. Sometimes money is laundered through under-invoicing in respect of cross-border trade.

As criminals can purchase volumes of commodities using cash and with no receipts being issued, it is very difficult to detect the laundering of tainted money.

Even if goods manage to slip through the border, the Malawi Revenue Authority has road blocks in place along the roads leading to the major towns, such as Blantyre, Lilongwe and Mzuzu, to inspect goods that pass through them.

Tax evasion is rampant in Malawi. The Malawi Revenue Authority can, however, visit any institution and inspect the books to determine if there are any illegal activities taking place.

In regard to purchase and sale of properties in Malawi, no property can be transferred unless the seller can produce a tax certificate that he has been paying tax and such tax certificates are only issued by the Malawi Revenue Authority.

### **The Immigration Department**

For African countries no visas are required to enter Malawi, making it difficult for the Immigration Department to control and investigate such visitors to the country. However, the Immigration Department has intensified scrutiny of all those entering Malawi from outside the continent, and monitors the movement of all those suspected to have terrorist inclinations, with the assistance of the National Intelligence Bureau.

### **The police**

The capacity of the police to detect money laundering is diminished because most do not understand what it entails. In interviews with the Fiscal Police, the branch that is meant to deal with laundering, only two out of eight policemen interviewed had any idea of what money laundering is all about.<sup>7</sup> For the police to be able to effectively discharge their duties they first require training.

Their capacity to detect money laundering is further limited because they are not allowed by law to tap telephones when investigating matters, though they

did do this during the one-party dictatorship of Kamuzu Banda in an attempt to clamp down on political opponents.

### **Malawi Investment Promotion Agency**

The main function of the Malawi Investment Promotion Agency is to encourage investment in Malawi. The organisation has no mechanisms to check the sources of finance for investment projects, or to detect or control the laundering of tainted money through such projects.

### **Forex bureaux**

Forex bureaux are vulnerable and susceptible to abuse by money launderers. Individuals, both foreign and national, can undertake large transactions as there is no limit on the amounts that can be transacted in the bureaux. It is thus surprising that they have not put in place any mechanisms to detect or control money laundering. The forex bureaux do not have the capacity to detect fake passports so anyone, including foreigners, can exchange money by producing any passport. In this way the proceeds of crime can be easily transferred to other countries. It should be noted that individuals can also buy forex, even if they are not travelling, unlike the situation in banks where production of a bus or airline ticket is required before the issue of travellers' cheques and banks do not sell foreign exchange just to anybody but only to established customers.

### **Limitations on institutions' capacity to detect money laundering**

Since money laundering touches different sectors, a multi-disciplinary approach is required to detect it. On paper the police, the Malawi Revenue Authority, the National Intelligence Bureau, the Anti-Corruption Bureau and the Director of Public Prosecutions are required to work together. However, it is noted these institutions do not appear prepared to do so. There have been cases that have been investigated by the Anti-Corruption Bureau but which the Director of Public Prosecutions has inexplicably declined to prosecute.

These institutions are reluctant to share information as a result of lack of trust between them. There is the usual fear that information could be leaked to wrong persons. The Anti-Corruption Bureau and the Director of Public Prosecutions, and the National Intelligence Bureau and the police, regard themselves as rivals and this results in a weakness in the control of money laundering.

The capacity of the institutions that are required to detect the laundering of tainted money and other illicit proceeds to effectively discharge their

responsibilities is very limited since the government has not yet established a comprehensive set of benchmarks.

Money launderers' tools range from complex financial transactions carried out through webs of wire transfers and networks of shell companies, to currency smuggling, under- and over-invoicing and tax evasion.

One of the major obstacles to the successful fight against money laundering is that many institutions still do not understand the concept. The staff of relevant institutions do not have the necessary skills to determine when money laundering is taking place and thus their capacity to implement counter measures is limited. Just as banks and other financial institutions have to identify their clients, they are also called upon to develop the ability to know whether identity documents are real or fake. The capacity to do this is narrow.

The banks further have an enormous task if they are really to get to know a customer with a number of different businesses. The capacity to profile not just the customer, but his family dependants and beneficiaries, is an onerous one to procure and the cost of profiling customers extensively is costly for Malawian institutions.

Some institutions, such as the Registrar of Companies, have poor record maintenance practices, with the result that files can easily go missing. There is also an absence of records in the files of some business entities. Notable is the lack of filing of annual returns. It is therefore difficult to determine if a business entity was established for legal purposes or for the purposes of laundering proceeds and carrying out illicit activities.

The absence of company records makes it difficult to collect, evaluate, process and investigate financial information relating to financial and business transactions.

The Registrar of Companies, like most government agencies, still uses outdated forms of storage analysis and communication of information.

Formal, structured co-operation is clearly lacking between financial institutions and government departments. If money laundering is to be detected, then a multi-disciplined approach between government agencies and financial institutions is desirable, but the capacity to carry out this approach is hindered because:

- an unwillingness to share information is common among government agencies and is usually the result of lack of mutual trust which gives rise to fear of possible leakage of sensitive material to unauthorised persons;

- there is a reluctance on the part of the financial institutions to provide government authorities with information that might be related to, but is not patently indicative of, crime. The financial institutions are wary of being called as witnesses in court proceedings and would prefer to do what they can to avoid going to court;
- there are differences in the levels of technology being applied by the relevant institutions and in the skills levels of their personnel. This often acts as a barrier to effective and efficient information exchange; and
- resource limitations limit the capacity of government agencies to effectively exchange information among themselves and with private financial institutions, such as banks, which have at their disposal comparatively sophisticated information technology systems.

### **Capacity of institutions to supervise the implementation of money laundering control**

The regulation of primary money laundering control points by their mother institutions is done with full knowledge that there is no legislation on money laundering in Malawi. Hence, the supervision is general and not specifically relative to countering money laundering as a distinct crime. This section discusses the relevant institutions and their capabilities. There is no duty on the supervisory authorities to disclose or cause to be disclosed to any body any information that a person may be engaged in money laundering.

#### ***The Reserve Bank***

As noted one of the principal objectives of the Reserve Bank of Malawi is to supervise other banks. The Reserve Bank has the capacity, and is empowered, to appoint inspectors who may at any time investigate the affairs of any bank or other financial institutions at such institution's premises. An attempt to discuss the Reserve Bank's supervisory capacity was refused by the bank's lawyers.

The big banks themselves believe that the Reserve Bank officers are more interested in protecting bank clients than in checking if any money laundering activities are taking place. Further, the Reserve Bank officers do not just arrive at a bank to investigate it but only do so after prior arrangement, thus diminishing their own money laundering detection capacity by giving the banks ample time to put their houses in order before being investigated.

The Reserve Bank is able to determine that banks have adequate policies, practices and procedures in place that promote high ethical and professional standards. Should any bank not comply with these, the Reserve Bank can, in theory, revoke the bank's licence, although in practice this has never happened. The Reserve Bank can also report any criminal activity detected to the fiscal police.

In respect of documentation and policies of identification of customers, the Reserve Bank has the capacity to check on these by visiting the banks and requesting the documents at any time.

The Reserve Bank can further direct any financial institution to direct how any bank official can operate, even a money laundering officer.

The Reserve Bank's capacity to enforce civil/criminal legislation is cumbersome as it has to pass through the Law Reform Commission and the Ministry of Justice. Although this can be done, it takes time.

#### ***The Law Society***

The Law Society was established under Section 25 of the Legal Education and Legal Practitioners Act Chapter 3:04 and has the power to make rules dealing with standards of professional conduct with which every legal practitioner is required to comply.<sup>8</sup>

An attempt was made by the Law Society to establish a committee to inspect the books of any firm of legal practitioners at any time. However, the proposal to do so was rejected by the Law Society's members.

Despite having the power, on paper, to deal with professional misconduct, it is difficult for the Law Society to enforce administrative measures.

It should further be noted it would be difficult for the Law Society to supervise lawyers since the executive members of the Law Society are also practising lawyers who have the interests of their own firms at heart.

With no specific legislation on money laundering it is difficult to evaluate the capacity of the Law Society to regulate or supervise lawyers.

The Law Society has the capacity to enforce mutual legal assistance, despite the present legislation that only covers Zimbabwe and Zambia.<sup>9</sup> In regard to

the forfeiture of property, it can enforce this through the courts. Such forfeiture is conditional on conviction.<sup>10</sup>

### ***Society of Accountants***

The mission of the Society of Accountants is to produce properly trained accountants. The Society's Secretary indicated that it is, in practice, difficult to really check or supervise how accountants carry out their duties. Nor does the Society have the capacity to enforce administrative measures in relation to mutual legal assistance, or the freezing and forfeiture of proceeds of crime.

### ***The Anti-Corruption Bureau***

The Anti-Corruption Bureau has the capacity to seize or freeze any property which is the subject of an investigation or a prosecution in relation to any offence alleged or suspected to have been committed under the Act.<sup>11</sup> This is done with the assistance of the police. However, surveillance laws cannot be enforced and the Anti-Corruption Bureau cannot put measures in place since the laws have not been enacted.

The Anti-Corruption Bureau also needs to train its staff to understand the whole concept of money laundering.

### **Implications of Security Council Resolution 1373**

The United Nations (UN) Security Council Resolution 1373 was taken after the terrorist attacks of 11 September 2001. Among other things, the Resolution called on states to work together urgently to prevent and suppress terrorist acts, including through increased co-operation and full implementation of the relevant international conventions relating to terrorism.

The Security Council, acting under chapter VIII of the Charter of the UN, took some mandatory decisions in respect of all nations, which are worth repeating here in some detail. It was decided that all nations shall:

Prevent and suppress the financing of terrorist acts;

- (a) Criminalise the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

- (b) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the directions of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- (c) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities action on behalf of or at the direction of such person;

...2.

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other states or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflect the seriousness of such terrorist acts;
- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

- (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.<sup>12</sup>

In addition, states were also called upon to:

- (a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;
- (b) Exchange information in accordance with international and domestic law and co-operate on administrative and judicial matters to prevent the commission of terrorist acts;
- (c) Co-operate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;
- (d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9<sup>th</sup> December 1999;
- (e) Increase co-operation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);
- (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;
- (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts, and that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists.<sup>13</sup>

We now turn to an examination of whether the decisions taken in this Resolution have been implemented in Malawi through domestic legislation.

The first decision taken is in respect of the prevention and suppression of the financing of terrorist acts. For terrorists to act they require funding and funding in turn requires laundering facilities. No legislation has been put in place in Malawi to prevent and suppress the financing of terrorist acts and nor has the willful provision or collection of funds by Malawians with the intention that the funds should be used in order to carry out terrorist acts been criminalised. The Money Laundering Bill still remains to be promulgated into Law.

In regard to freezing of funds, under the Corrupt Practices Act No. 18 the Minister may make regulations for the disposal of recovered gratification under the Act. In terms of Regulation 3 of the Corrupt Practices (Disposal of Recovered Seized or Frozen Property) Regulations, any recovered, seized or frozen property which comes into the possession of the Anti-Corruption Bureau shall vest in the state if it cannot be returned to the rightful owner. There is no other legislation which provides for the freezing of funds, financial assets or economic resources of persons who commit or participate in the commission of terrorist acts. The act referred to above is only in respect of corruption. Malawians' making of funds and other resources available for the benefit of terrorists is also not criminalised.

No legislation has been put in place to complement the UN decision that all states would refrain from providing any form of support, active or passive, to entities or persons involved in terrorists acts including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.

In regard to the provisions in respect of mutual legal assistance, there are no provisions of warning to other countries by exchange of information. Resolution 1373 also decided that terrorist acts be established as serious criminal offences but this has not been incorporated into Malawi's domestic laws and regulations.

Although there is no legislation compelling Malawi to assist another state in connection with criminal investigations or to provide assistance in obtaining evidence relating to financing or support of terrorist acts, the police do assist each other in practice through the Southern African Regional Police Chiefs' Co-operation Organisation (SARPCCO).

In regard to border controls, though no visas are required from any country in Africa and there is no legislation in respect of national identity cards, traffic in arms is controlled through the Firearms Act.

All in all, the decisions taken in Resolution 1373 have not been enacted into domestic legislation. The legislation that is in place is not adequate as it does not specifically refer to terrorism.

### ***Recommendations to meet the requirements of Resolution 1373***

Malawi needs to enact the necessary legislation to establish terrorism as a criminal offence and should incorporate all aspects of Resolution 1373 into its domestic law. The Bill on money laundering, which has twice failed to pass through parliament, should quickly be made into law. Malawi should further ratify and implement the remaining conventions and protocols relating to terrorism. The institutional measures should include the prevention of recruitment to terrorist groups, movement of terrorists, establishment of terrorist safe havens and/or any other forms of passive or active support for terrorists or terrorist groups. Institutional measures should also include:

- (a) police and intelligence structures to detect, monitor and apprehend those involved in terrorist activities and those supporting terrorist activities. This means the Malawi Police and National Intelligence Bureau should work hand in hand;
- (b) improving the capacity of police, customs, border guards, the military and the judiciary through the provision of training for officials;
- (c) establishing exchange programmes with counter-terrorism operatives and officials from within the SADC region and other regions;
- (d) establishing a data base and communication systems for monitoring and controlling the movement of terrorist weapons, such as firearms;
- (e) establishing inter-agency working groups involving police, military, customs, home affairs and other agencies to improve policy co-ordination, information sharing and analysis at the national level regarding explosives, firearms and ammunition;
- (f) developing surveillance procedures by the police, army, immigration and the National Intelligence Bureau to secure the country's borders against infiltration;
- (g) creating systems by the police, army and National Intelligence Bureau to protect vital installations and the safety of diplomatic and consular persons and missions; and

- (h) supporting the National Intelligence Bureau and its intelligence activities enhanced aimed to expose terrorist groups and thwart their designs.

With these measures in place the requirements of Resolution 1373 would be met.

### **Conclusion**

If money laundering is to be detected and controlled in Malawi, the country's infrastructure has to be developed as at the moment it is haphazard. The first steps would be to enact the proposed Money Laundering Bill into law and put in place legislative and institutional frameworks spelling out the measures that institutions must adopt to detect and control money laundering.

Institutions in Malawi should be required to build a comprehensive system that can support an effective, multi-disciplined approach for combating money laundering. Malawi should further establish centralised structures to follow up any reported suspicious transactions. Malawi needs to create an intelligence unit for the purpose of receiving and analysing suspicious transactions. This institution should be autonomous and have adequate resources to be able to function.

The police must prioritise economic crime in order to fight money laundering, without being hampered by political pressure. The need for training to equip them to deal with complex money laundering schemes cannot be overemphasised. Training has to be extended to other institutions and government departments.

### **Notes**

- 1 This definition was agreed to by commissioned researchers at an ISS workshop on combating money laundering in the SADC region, held at Holiday Inn Arcadia, Pretoria on 19th January 2002 (see page 2).
- 2 *Nation Newspaper*, 25 April 2002.
- 3 *The Daily Times*, 4 November 2002.
- 4 Reserve Bank Act, Section 48(i), 1964.
- 5 Under Section 49 of the Banking Act any director, manager, officer or employee of a bank who makes or permits to be made any transaction including the opening of an account without taking reasonable steps to verify

the true identity of the person concerned on the transaction, shall be guilty of an offence.

- 6 Mr Uka is a senior insurance salesman with Old Mutual
- 7 See Jai Banda, Money laundering in Malawi: Contemporary trends, seminar paper presented to ISS Regional Seminar, Developing strategies and mechanisms against money laundering in East and Southern Africa, Leriba Lodge, Centurion, 22 and 23 November, 2002.
- 8 Section 36 of the Legal Education and Legal Practitioners Act, 1965, Chapter. 3:04.
- 9 Service of Process and Execution of Judgments Act, 1956, Chapter 4:01.
- 10 Section 30 of the Penal Code.
- 11 Corruption Practices (Disposal of Recovered, Seized or Frozen Property) Regulations 6N 39/1999.
- 12 United Nations Security Council, S/Res,1373(2001), <[www.unodc.org/pdf/crime/terrorism/res\\_1373\\_english.pdf](http://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf)> p 2.
- 13 Ibid, p 3.