CHAPTER - 3

LAW OF MONEY LAUNDERING - LEGAL SYSTEM REQUIREMENTS

Introduction

Money laundering statutes have historically been broadly divided into two categories (a) comprehensive monitoring and reporting framework designed to curtain money laundering activity by focusing primarily on financial institutions (b) criminalization of money laundering by individual or corporate entity. As countries have divergent legal systems no county would be in a position to adopt laws identical to those of other country. Though the legal system requirements are broadly divided into eight categories for the purpose of convenience in the Reference Guide356, the Guide will serve as a single, comprehensive source of practical information for countries to fight money laundering and terrorist financing. Under these principles, each country is permitted to adopt laws that are consistent with its own cultural circumstances, legal precepts and constitution, as well as international standards. Regardless of how they are categorized each of these eight legal system requirements are necessary for a country’s legal agenda against money laundering357.

I  Criminalization of money laundering in accordance with Vienna and Palermo Convention
II  Criminalization of terrorism and terrorist financing
III  Laws for seizure, confiscation and forfeiture of illegal proceeds
IV  The types of entities and persons to be covered under AML laws
V  Integrity standards of the financial institutions
VI  Consistent laws for implementation of FATF Recommendations
VII  Co-operation among competent authorities
VIII Investigation

356 supra note 1; The World Bank and IMF developed this 2nd edition of “Reference Guide to Anti Money Laundering and Combating the Financing of Terrorism” to held countries understand new international standards, authored by Paul Allen Scott
357 ibid; p-V-1
The **First type** of money-laundering crime identified in the Vienna convention involves either (a) the transfer or conversion of property with the knowledge that such property is derived from a drug-trafficking offense for the purpose of concealing or disguising its illicit origin, or (b) helping another to evade the legal consequences of his or her other actions. The **Second type** of money laundering offence relates to an effort to conceal or disguise the true nature, source, location, disposition, movement with respect to, or ownership of property with the knowledge that the property was derived from a drug-trafficking offense. The **Third type** of offence involves acquiring, possessing, or using property with the knowledge that it is derived from a drug-trafficking offense. Under the *Vienna Convention*, countries are obligated to enact the first two types of offences into their domestic law, while for the third type of offence, it is not mandatory. In other words, the third category of offence is specifically subject to each country’s constitutional as well as basic concepts of legal principles.358

Instruments such as UN Model legislation and other Model Legislation should be taken only as suggestive approach for the language and drafting of a national law, and should not be copied merely. In the process of drafting, model laws, therefore, should be adapted to take into account the particular country’s circumstances, constitution and legal principles.359 A twin track policy has gradually evolved in AML law, consisting of a preventive approach founded in banking law and the repressive approach founded in criminal law. Both the repressive and preventive approach to money laundering have their roots in America and Swiss laws but were subsequently developed in other countries. While the criminal law focuses on money launderers the preventive legislation is geared towards ‘money launderettes’ that is institutions and professions that are prone to being misused.360

The legal system requirements for an effective AML regime is based on the 40 Recommendations of FATF, as the Recommendations are much more than mere suggestions and recommendations. They are mandates for every country, not alone the

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358 supra note 1; p-V-3
359 ibid; p-V-5
360 supra note 70, p108, 112&133
FATF members, but also any other country or non member who wish to have an effective AML regime in place with international standards. Before drafting the domestic legislation, each Recommendation of the FATF has to be viewed carefully by a country in crafting the language of its laws\textsuperscript{361}.

3.1 Jurisprudence on money laundering & laundering offences

Due to the overburdened criminal justice system, legislators would prefer regulatory action to protect the financial sector from criminals. A study of money laundering in the literature of 90s has shown that it is impossible to eliminate all forms of crime and, therefore, the related money laundering activities. The problem is about selecting the right mix of different strategies to create an effective weapon against criminal organization. Integration of strategies and policies is a solution which, if it does not wholly succeed in combating money laundering, will surely make the life of launderers more difficult\textsuperscript{362}. As money laundering is a dynamic process, to put in measures to prevent future money laundering requires a broad legal net to be cast so that various manifestations are caught under a comprehensive set of predicate offences. Further the asset forfeiture provisions need to be implemented to remove the profit incentive. The primary medium through which government have chosen to construct this latticework of legal provisions has been the criminal law. But the use of criminal law in this context is not just about sanctioning increased powers to regulatory and law enforcement agencies interfering with civil liberty issues. Given the fact how quickly money laundering was changed from a legal into illegal act, money laundering laws, their development and implementation requires justification by reference to appropriate jurisprudence principles\textsuperscript{363}. Money laundering laws, originally focused only on the dirty money associated with the narcotics trade, in the course of time evolved to include a wide range of grey money activities. The legislation process has now reached a stage where tax and other fiscal offences are being considered for inclusion as money

\textsuperscript{361} supra note 1; p-V-2
\textsuperscript{362} supra note 58; p7
\textsuperscript{363} supra note 5; p100
laundering predicate offences. The law has the potential to apply not only to financial institutions, but also to those people employed by the financial institutions. A “tipping off” is an offence when a client is warned in advance about an investigation\textsuperscript{364}.

Art.3 of Vienna Convention is an example of how the concentration of early money laundering legislation was restricted in its focus to the narcotics trade. Art.6 of Council of Europe convention 1990 represented an important development as it was the first major initiative to de-couple money laundering from narcotic related issues. There now exists more than 160 money laundering predicate offences. To define a criminal offence broadly is not objectionable. What is objectionable, however, is that in the haste to outlaw an activity which was previously considered to be legal. Most countries appear not to have dully considered and reconciled the objects to be achieved through the criminal law with the appropriate jurisprudence, democratic and other relevant principles\textsuperscript{365}. It is a legislative tool designed to facilitate the drafting of specially adapted legislative provisions by countries wishing to have on their books a law against money laundering or to modernize their legislation in that area. The model law incorporates the most relevant provisions developed by national legislation, and amends, strengthens or supplements them in the light of actual practice by States in action to combat laundering. It also proposes innovative provisions aimed at improving the effectiveness of money laundering preventive and punitive measures and offers States appropriate legal mechanism related to international cooperation of great strategic and practical importance\textsuperscript{366}. Though in reality money laundering process can occur within a country or jurisdiction, the literature in general assumes and believes that money laundering is a transnational process, having cross border elements and effects\textsuperscript{367}. Due to efforts of international organizations, Conventions, FATF recommendations, a uniform and substantive AML law started to develop. Though

\textsuperscript{364} supra note 5; p102
\textsuperscript{365} ibid; p97,98
\textsuperscript{366} supra note 233; p196
\textsuperscript{367} supra note 146; p21
important differences remain international institutionalization of AML efforts, international organizations helped promoting development of substantial AML law\textsuperscript{368}. The term laundering was used because these techniques are intended to turn ‘dirty’ money into ‘clean’ money but laundering is not confined to cash\textsuperscript{369}. Most of the crimes significantly generate fund more than their perpetrators can spend in cash in short term, hence storing huge cash creates considerable risk from other criminal predators as well as law enforcement agencies. In that sense “hiding” which term has become “laundering” through legal extension of concept, has become integral part of crime process\textsuperscript{370}. The allegory of dirty money, income, proceeds or whatever that is being washed to make it clear or white, is still adequate for all definitions of money laundering. The definition is more ambiguous than one expect it to be. Experts from law, economics, political and international organizations have different views\textsuperscript{371}. When the history of legislation surrounding laundering is examined two important arguments resound. The first argument is that grave offences such as terrorism, organized crime, drug offence require differential treatment with more intrusive enforcement powers, draconian confiscation powers, and high penalties. The second argument is that other offences are also serious and it is important that therefore they are to be equally treated serious\textsuperscript{372}. At the basic level it is important that the legal and the constitutional definition of money laundering adopted by different governments are compatible so that the crime committed in one jurisdiction will be recognized as such by others. The widespread adoption of the 40 FATF recommendations, together with the 1988 UN Convention and 1990 Council of Europe Convention have greatly assisted in the process of harmonization\textsuperscript{373}. It will be up to each country to adapt the proposed provisions in order to bring them, where necessary, into line with its constitutional principles and the

\textsuperscript{368} Bruce Zagaris (2010), \textit{International White Collar Crimes – Cases and materials}, Cambridge University Press

\textsuperscript{369} supra note 282; p3


\textsuperscript{371} supra note 247; p21

\textsuperscript{372} supra note 102; p10

\textsuperscript{373} supra note 21; p21
fundamental preemies of it legal system, and to supplement them with whatever measures it considers best designed to contribute towards effectively combating laundering. The model nevertheless constitutes itself a coherent legal whole. By incorporating these provisions into their national legal apparatus, States must take care to preserve the coherency of the text in order not to detract from its scope. Some provisions that are dependent on the text in its entirety would not have the desired degree of effectiveness if they were adopted in isolation or out of context. Something of the philosophy of the text would also be lost if certain provisions were removed from it.

While some of the definitions refer to illegal activities which are civil and criminal in nature, others refer to criminal actions only. Something which is illegal need not necessarily be criminal. For example while it is illegal to gamble in a unlicensed Casino, it is not a criminal offence. Another striking feature of definitions is while some say that money laundering is an act ‘trying to hide the source’ of the illicit income, others stress the act of “making it appear legal”. The former would cover a simple situation of one hiding stolen money under his pillow, the latter necessitates some action of bringing the money back legally into the financial system. To measure money laundering one needs a clear definition that includes all types of crime that are at its foundation. FATF has indeed made great efforts to define money laundering clearly. However the efforts were directed to achieve international standards, which nevertheless conceals the existence of variations in definitions adopted by national legal systems.

A concise working definition as adopted by INTERPOL General Secretariat Assembly in 1995 defines money laundering as any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources. Article III of the Vienna Convention provided a

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374 supra note 233; p197
375 supra note 247; p4
376 supra note 32; p100
comprehensive definition of money laundering which has been the basis of virtually all subsequent legislation. It was also the basis of money laundering offences in the draft Model Law for Prohibition of Money Laundering for Commonwealth Countries. In addition Vienna Convention inserted provisions for money laundering to be an internationally extraditable offence. A common feature of the description given by the FATF and the Joint Money Laundering Steering Group, is the concealment character of the laundering process. Both definitions suggest that money laundering is a concealment process, by which a person/criminal conceals or disguises the criminal origin or source of the assets. The meaning of term money laundering still differs substantially among 18 definitions after considering different approach by scholars of law, economics and social sciences as well as International organizations such as FATF. These differences is of more concern to economists and social scientists rather than lawyers, for whom the definition adopted by Dutch penalty law is the one and only valid definition. For economists it is not clear as to what is the meaning of the term ‘money’ in various definitions, that is whether it can be stock or flow, wealth, proceeds or income.

Money laundering is an example of white collar crime, as it is a form of crime facilitated by professionals such as accountants, lawyers who hold responsible status in the society. As a white collar crime, money laundering poses a unique challenge to criminal jurisprudence, as it is often facilitated through medium of company. Edward Sutherland has defined white collar crime as one which is committed by a person of respectability and high social status during the course of his occupation or profession. As a means of punishment the criminal law when applied to individuals who engage in white collar crime is effective, when compared to common criminals.

If strictly defined, money laundering does not have a compulsory involvement of illegal activity. According to Prof Rider, proceeds involved in laundering may also be

377 supra note 21; p13
378 supra note 146; p5
379 supra note 247; p9
380 supra note 5; p109-112
used for activities which are not criminal in nature, and there are pressing need for secret money not only in the underworld, but also in secret service and intelligence network. Analysis of literature shows that legal measures are not harmonized worldwide. In some countries the predicate offences does not fully comply with the international standards as it is often limited to the number of predicate crimes. In some, criminalization of money laundering is not fully consistent with the Vienna and Palermo conventions. Some countries especially in low and middle income groups still have legislation focused solely on drug related money laundering. High income countries though have developed sound legal framework. One area that remains problematic is the criminalization of insider trading and market manipulation. Countries still need to pass legislation considering them to be distinct offences. In addition, other predicate crimes such as corruption still remained a widespread problem for compliance with legal measures. The lack of money laundering prosecution, in some countries, indicates that the international standard has not been effectively implemented, and there is a tendency to stop prosecutions at the predicate offences without pursuing it to identify any money laundering offences. If the intention of legislators is to just to change the risk or costs associated with predicate crimes they could have simply brought in draconian sanctions. Legislators intend to get political mileage symbolically for passing criminal statutes, but when they begin to run out of things to criminalize the look for new tropes that seem to make intuitive sense like for example fighting the link between money and crime. A question arises as to whether statutory laws on money laundering matter or not. Traditionally the work in law and economics such as work of Coase and Stigler point out that statutory laws are either irrelevant or counter-productive. Specific money laundering regulations may not be effective as it targets wrong area, as money laundering is a symptom but not the cause. According to this view only feeder activities are to be monitored, regulated and controlled, which will lead to reduction in money laundering. This view suggests that an efficient set of legal

381 supra note 135; p8
383 supra note 15; p382
tools to deal with criminal activities and good enforcement by courts should suffice for the containment of money laundering\footnote{\textit{Money Laundering and its Regulation}” Jan 2007 \url{http://www.iadb.org/res}}.

### 3.2 Laws for Confiscation, freezing and seizure of illegal proceeds

Confiscation of proceeds of crime springs from the fundamental idea of justice holding that ‘crime should not pay’. A similar idea lies at the basis of the law of tort and of contract and of the doctrine of unjust enrichment\footnote{\textsuperscript{supra note 70}; p51}. The recent approach in international criminal law is to make criminal activities unprofitable and to keep criminals and terrorists from accessing funds. These goals cannot be achieved without effective confiscation laws, whereby authorities permanently deprive criminals and terrorists of their illicit funds\footnote{\textsuperscript{supra note 1}; p-V-16}. International and regional organizations have in recent years are encouraging national legislators to amend their law and use non-conviction based confiscation and civil proceedings, as it certainly is much more powerful legal tool to reach the underlying aim of stripping criminals of the proceeds of crime \textit{like}, \textit{eg}.the provisions contained in Art.54 (1) (c) of UN Convention Against Corruption\footnote{\textsuperscript{supra note 12}; p282}.

Civil recovery may arise when there is a suspicion that assets are proceeds of a serious crime, based on their being disproportionate to the declared income of their owner. The suspicion may be reinforced by other facts, such as contacts and relationship between the owner and known criminals. Civil forfeiture has for long been available in the US. It was first introduced in UK by Part 5 of Proceeds of Crime Act 2002. This scheme permits by way of civil proceedings, recovery of property that is or represents the proceeds of unlawful conduct, whether or not criminal proceedings have been brought\footnote{\textsuperscript{supra note 299}; p28}. If a country’s domestic legal systems allows, a defendant should be required to prove the lawful origin of the alleged proceeds of serious crime or other property liable to confiscation. This gains support from Art.5(7) of Vienna and Art.12(7) of

\begin{itemize}
\item \textsuperscript{384} “Money Laundering and its Regulation” Jan 2007 \url{http://www.iadb.org/res}.
\item \textsuperscript{385} supra note 70; p51
\item \textsuperscript{386} supra note 1; p-V-16
\item \textsuperscript{387} supra note 12; p282
\item \textsuperscript{388} supra note 299; p28
\end{itemize}
Palermo Convention. Another obvious advantage is that forfeiture proceedings are possible even when the criminal defendant is unavailable for prosecution\textsuperscript{389}.

Confiscation laws or criminal forfeiture laws connote a legal process that facilitates the recovery of property linked to criminal activity. The process is triggered by a criminal conviction for a predicate offence. Confiscation is a three step process. Firstly, an individual must be convicted for an offence. Second the Court must determine whether a benefit has been obtained from the alleged criminal conduct. The third step is the determination of the extent of the benefit and consequent issuance of confiscation order\textsuperscript{390}. Confiscation can be generally defined as a governmental action through which property rights can be affected as a consequence of criminal offence Art.19(f) of Vienna Convention refers to confiscation as the ‘permanent deprivation of property by order of a court or other competent authority’. While the Vienna Convention allows any Competent Authority to issue a confiscation order, the Money Laundering Convention limits this powers to courts., the term also includes non-judicial tribunals, but excludes administrative confiscation issued by for example customs and excise authorities\textsuperscript{391}.

The term ‘freeze’ means to prohibit conversion, transfer, disposition or movement of funds on the basis of, and for the duration of validity of an action initiated by a Competent Authority, or Court under freezing mechanism. The frozen funds or assets shall however remain the property of the person/entities that held an interest in the funds/assets, prior to freezing.

Seizure would refer to the powers of judicial authorities or officials to seize the property connected with the offence under investigation, including evidentiary items that make it possible to identify such property. Again the term “seize” means to prohibit conversion, transfer, disposition or movement of funds/assets on the basis of action initiated by a Competent Authority. Against the seized property shall remain the

\textsuperscript{389} supra note 27; p437
\textsuperscript{390} supra note 98; p14, 17
\textsuperscript{391} supra note 70; p30
property of person/entities who have interest in the funds/assets, although the Competent Authority or Court may often take over possession, administration or management of the funds/assets\textsuperscript{392}. Profits might be seized \textit{in rem} or \textit{in specie}, with or even without a conviction for the predicate offence and they might even be taxed\textsuperscript{393}.

\subsection*{3.2.1 Direct and Indirect Proceeds – Confiscation}

The assertion of a general principle that a person should not be permitted to benefit from crime does not necessarily justify the \textit{criminalization} of the proceeds of crime. Indeed, if the confiscation provisions were to operate ideally, and no profits actually were to be allowed to generate from the predicate offences to which the laundering provisions applied, then the independent argument for criminalization would be considerably weakened\textsuperscript{394}. Earlier prior to the AML regime, under most legal systems confiscation has been largely confined to the instruments used in commission of crime such as murder weapon, and subjects of the crime such as drugs in drug trafficking. Generally, there was no confiscation of proceeds of crime except in certain jurisdiction under certain laws. The Vienna Convention and Palermo Convention defines proceeds of crime as “any proceeds derived from or obtained, directly or indirectly, through the commission of an offence”. (See Art.1 (p) of Vienna Convention and Art.2 (e) of Palermo Convention). Confiscation of instrumentalities of crime is usually compulsory, and it is justified in the case of \textit{per se} contraband, where the uncontrolled possession in itself is dangerous\textsuperscript{395}. Three types of confiscation orders are encountered across jurisdictions First, the confiscation of instrumentalities of the crime relates to instruments that were used in the perpetration of a crime (for example a knife in murder) Secondly, confiscation of the \textit{objectumsceleris} concerns the subject of the crime, that is the goods subject to the criminal behavior (false passport) The third and recent type of confiscation included proceeds of crime that is financial gains obtained

\begin{footnotes}
\footnotetext[392]{supra note 230; p17}
\footnotetext[393]{supra note 12; p282}
\footnotetext[394]{ibid; p287}
\footnotetext[395]{supra note 70; p47}
\end{footnotes}
through criminal activities referred to as \textit{fructum sceleris}\textsuperscript{396}. Many countries have therefore adopted a broader meaning of forfeitable property due to huge profits generated by crimes, and the ease with which such illegal profit move into and out of financial system. English law distinguishes four different types of forfeiture, criminal forfeiture, the forfeiture of things related to conviction, the forfeiture of objects \textit{malem in se}, and civil forfeiture. The first two types are described as instruments of the criminal law because forfeiture in these categories are triggered by a criminal conviction. The latter two are defined as civil strategies because they are not contingent upon criminal conviction\textsuperscript{397}.

In terms of Regulation 3 FATF urges countries to adopt laws permitting confiscation of laundered property, proceeds of laundering and predicate crimes, the instrumentalities used or intended to be used in laundering, and also for confiscation of property of corresponding value\textsuperscript{398}.

Initially mostly in the past national legal systems were confined to confiscation of instruments used in commission of a crime, such as murder weapon, material objects of crime, and drugs involved in drug crime\textsuperscript{399}. While international law relating to confiscation does not prohibit confiscation of assets in the hands of third parties, various international agreements allow countries to take measures to protect the rights of bonafide third parties\textsuperscript{400}. The term “confiscate” includes forfeiture means, permanent deprivation of funds or assets by an order of Competent Authority or Court. It takes place either through administrative or judicial procedures, by transferring of specified funds/assets to the State. The persons/entities who held interest in the specified funds/assets, on confiscation loses all rights. Confiscation or forfeiture orders are

\textsuperscript{396} supra note 70; p30
\textsuperscript{397} supra note 98; p55
\textsuperscript{398} supra note 1; p-V-16
\textsuperscript{399} ibid; p-V-12
\textsuperscript{400} supra note 1; p-V-13
usually linked to a criminal conviction, wherein the confiscated property is determined to have been derived or intended for use in violation of law\textsuperscript{401}.

Object confiscation value has several advantages as it is not restricted to property constituting proceeds of crime, but can extend to even lawfully acquired one. It also avoids repeat confiscation of the same proceeds. If the proceeds of crime have been laundered to another jurisdiction, but the assets traceable to the perpetrator remain within the reach of enforcement agencies, value confiscation is highly beneficial. Countries like UK have adopted value confiscation by default\textsuperscript{402}. Subject confiscation refers to the goods subject to the criminal behavior but the modern confiscation relates to the proceeds of crime or the financial gains obtained through criminal activities\textsuperscript{403}. Value confiscation also known as pecuniary penalty order (eg. in Australia) does not forfeit the property but in the alternative issues judicial order for payment of amount corresponding to the value of proceeds from crime. To put it simply value confiscation means confiscation of equivalent sum of money. The advantages is that it operates \textit{in personam} that is with regard to properties enjoyed by an offender and bonafide third parties are not affected. The major drawback is it is subject to abuse by offenders by transferring properties to family members and friends\textsuperscript{404}.

As psychologist Burrhus Frederic Skinner asserts, an offender does not associate punishment with the crime when it comes after a too longer period, like confiscation taking place after years of crime, but rather feels the punisher as unjust. For this reason AML measures do all it can, to shorten the time lag between offence and confiscation\textsuperscript{405}. In some countries like the United States, there are provisions allowing for confiscation of property without conviction. It is difficult for many countries to accept such a proposition. However in many developing countries the conviction rate is very low thus prohibiting confiscation of illegal assets. Consequently adoption of \textit{in rem}

\textsuperscript{401} supra note 230; p17
\textsuperscript{402} supra note 27; p441
\textsuperscript{403} supra note 213; p21
\textsuperscript{404} supra note 17; p38
\textsuperscript{405} supra note 124; p6
confiscation is suggested if the legal system of the country permits such a measure.\textsuperscript{406} Apart from criminal forfeiture, civil forfeiture is aimed at the criminal asset, which is based on heavy standard of proof of ‘probable cause’. This leads to ‘relation back doctrine’ which provides that all rights, titles, and advantages of possession that may be the subject of forfeiture belong to the state the moment these act or conduct leading to forfeiture takes place. This doctrine is based on a legal fiction that property in objects that can be deemed to be instrumental in committing a certain offence has been transferred to the State the moment the offence was committed. Later proceeds are forfeited to State, and rulings of Court later, has declaratory nature. Even discharge in criminal cases does not vitiate civil forfeiture actions, and any one who holds or alienates the property of State commits a criminal offence.\textsuperscript{407} Both domestic and international law provide protection against ‘double jeopardy’ by prohibiting an accused from being tried or punished for the same offence. However given the lack of an adequate international system that protects against double confiscation, domestic legislators should take it upon themselves to create a system.\textsuperscript{408}

3.2.2 Enforcement of property- Confiscation

Funds can be transferred nowadays by a click of a mouse, and hence authorities should be granted enough power to take preventive measures. They should be able to freeze and seize properties which are subject matter of confiscation. Such a enforcement power is necessary in preventing laundering of proceeds of crime. Effective enforcement of confiscation order requires that authorities concerned are given powers to identify, trace and evaluate property that are subject to confiscation. AML law recommends that banking secrecy laws or other privacy protection statues should be so designed in a country so as not to create barriers to disclosure or seizure for the purpose of

\textsuperscript{406} supra note 279; p463
\textsuperscript{407} supra note 22; p114
\textsuperscript{408} supra note 70; p79
confiscation\textsuperscript{409}. (See Regulation 4 of FATF Art.5 (3) of Vienna Convention, Art.4 (1) of Council of Europe Convention 1990). Apart from the profits accruing from drug offences Vienna Convention addressed investigative roadblocks to tracking, freezing and forfeiting these proceeds. An important groundbreaking terms of Vienna Convention is to create international obligation to attack banking secrecy laws, and in turn facilitating tracing, freezing and forfeiture of proceeds of crime\textsuperscript{410}. In the field of confiscation of proceeds of crime, civil procedure is generally a preferred option. The reason for this view is that civil proceedings require less level of proof that in criminal proceedings. According to the principles of jurisprudence, while the requirement of civil law is ‘preponderance of probability’, the requirement in criminal law is ‘beyond reasonable doubt’\textsuperscript{411}.

Most federal criminal statutes contain provisions for forfeiture of assets as part of punishment of a defendant who is convicted of criminal offence. All the forfeiture provisions are not equal, as some statutes contain narrow provisions allowing forfeiture of properties that are only directly traceable.\textsuperscript{412} Various domestic legislators have introduced legal techniques that are intended to make it easier to demonstrate the criminal origin of profits, and making it easier to order their confiscation. Article 5 (7) of the Vienna Convention allows states to ‘consider ensuring that the onus of proof be reversed regarding the lawful origin of the alleged proceeds or other property liable for confiscation, to the extent that such sanction is consistent with the principles of its domestic law and with the nature of judicial and other proceedings’ This departure from the international standard of proof is in part also dictated by the nature of many predicate offences which are often offences without a victim. Sometimes domestic legislators not only provide for a reversal of onus of proof regarding the criminal origin of proceeds, but also severe the link between the offences for which the offender was

\textsuperscript{409} supra note 1; p-V-17
\textsuperscript{410} Robert W Hubbard, et al. (2004), Money Laundering & Proceeds of Crime, Irwin Law Inc. Canada; p1,4
\textsuperscript{411} supra note 26; p215
\textsuperscript{412} Stefan D Casella “The Forfeiture of Property Involved in money Laundering offences” Buffalo Criminal Law Review, Vol-7 No.2 PP-583-660
convicted and the confiscation order, by allowing confiscation of proceeds that were generated by offences other than the one for which the offender stood trial. Money laundering statutes are broader authorizing forfeiture of any property involved in commission of money laundering offence. The governments can recover the money which is laundered, or other property co-mingled with it, or obtained in exchange for it or other property that facilitates laundering. For example even the clean money used by a defendant to conceal or disguise laundered funds, the legitimate business used as a front for laundering operations, properties, luxury items which are used to hide the illicit sources can all be forfeited.

3.2.3 Third Party Liability – Confiscation

Though under international law confiscation of assets which are in the hands of third parties is permissible, FATF and other international agreements suggests that countries may take appropriate action based on rights of legitimate third parties (See Regulation 3 of FATF, Art.5 (8) of Vienna Convention, Art.12 (8) of Palermo Convention) As per the OAS Model Regulations, appropriate Authority is required to intimate of the proceedings, and allow potential third parties to make claims to the property subject to confiscation. As far as the rights of bona fide third parties, the UN Model Crime Bill stipulates that the Court can deny third party claims if it is found that the person staking a claim was involved in the commission of predicate offence, OR acquired the property in question for insufficient consideration, OR acquired the property knowing its illicit origin. In a way, UN Bill adopts a strict standard for denying claim for the property. Yet another thorny issue is dealing with innocent third parties, which is often encountered under US law. US law operates on ‘relation back doctrine’ according to which the title of the property is automatically conferred

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413 supra note 70; p67
414 supra note 412; p-5
415 supra note 1; p-V-14
upon the state, at the instance the crime is committed. Consequently, any transfer of property or proceeds to a third party is void under law.\textsuperscript{416}

The presumption of innocence as enshrined in Art.6 (2) of the European Convention on Human Rights and Art.14 (2) of ICCPR which both state that ‘everyone charged with criminal offence shall have the right to be presumed innocence until proved guilty according to law’. Object confiscation, often known as ‘forfeiture’ relating to instrumentalities of the crime, is a powerful criminal sanction it results in the transfer of property title to the state. The moment of transfer of property title usually coincides with the moment at which the decision ordering the confiscation becomes final. The US however adhere to the so called ‘relation-back doctrine’ according to which the transfer of property in title is deemed to take place at the moment the offence at issue is committed. Some jurisdictions order object confiscation blindly without paying attention to who is the actual possessor of the property Vienna convention prevents goods in the hands of third parties being confiscated, although it contains provisions regarding the rights of bonafide third parties. \textit{In rem} procedures obviously do not afford the same degree of procedural protection for the owner of the property at stake as do \textit{in personam} proceedings\textsuperscript{417}. If the \textit{in personam} method of bringing the perpetrators to justice faces too many practical difficulties, then it would be ideal to bring justice to the perpetrators via an \textit{in rem} method. This is the logic behind the asset forfeiture. By forcing the sacrifice of the laundered proceeds law enforcement is able to deal a genuine blow to the criminal enterprise\textsuperscript{418}. Using civil law for forfeiture of proceeds of crime, though is an easier option and quite a few regard it as an infringement of human rights. In fact fairly agitated debate took place in UK before civil forfeiture proceedings were incorporated in their Financial Services Act, 2000 as such a move was in violation of European Convention on Human Rights\textsuperscript{419}.

\textsuperscript{416} supra note 27; p438  
\textsuperscript{417} supra note 70; p32,50,68  
\textsuperscript{418} supra note 27; p413  
\textsuperscript{419} supra note 26; p215
3.2.4 International Aspects

Though establishing an effective confiscation regime domestically may be a step forward in eliminating the profitability of crime, steps are requited internationally as mostly the proceeds of crime are in foreign countries, or laundering takes place in overseas jurisdictions. An important aspect to be taken note of is creating a cooperative mechanism for enforcing cross-border confiscation orders. This is done normally by enabling relevant authorities to implement confiscation request from other jurisdictions, employing measures such as tracing, identification, freezing and seizure. Another area of importance is asset sharing arrangements. International legal instruments encourage countries to enter into mutual agreements that provide for sharing of confiscated property among countries that cooperated in investigation and confiscation process420.

3.3 Types of Entities to be covered

Money laundering often involves some form of bearer negotiable instruments or some form of cash. The AML regime is developing on two major fronts, prevention and enforcement, and at three levels namely regional, national and international. Prevention is about reporting, customer due diligence, regulation and supervision, while enforcement is about investigation, prosecution and confiscation. Despite criminalization of money laundering, the prevention regime appears to be a regulatory one421. The principle of banking secrecy exist in almost every country, and owing to this unique characteristics’, financial institutions are the most vulnerable sectors for money laundering. When the funds are passing through these institutions several points are vulnerable to detection, and these ‘choke points’ at the placement stage, include deposit and withdrawals. At the integration stage funds are routed normally through

420 supra note 1; p-V-19
421 Eleni Tsingou (2005), “Global Governance & Transnational Financial Crime – Opportunities and Tensions in the global AML regime”, Centre for the Study of Globalisation and Regionalisation, University of Warwick
electronic transfer. Efforts to combat money laundering should concentrate on these choke points.422

3.3.1 Financial Institutions

The types of financial institutions and their capabilities vary greatly between jurisdictions. FATF defines a financial institution to mean “any person or entity who conducts as business one or more of the following activities, or operations on behalf of customers”. Some of the transactions included are broadly categorized as acceptance of deposits from public, lending, financial leasing, transfer of money value, issuing and managing means of payment (such as debit card, cheques, electronic transfer etc), financial guarantee, trading in foreign exchange/commodities/securities etc., portfolio management, safekeeping, underwriting, money and currency changing. The definition adopted by FATF is a functional one rather than designation or institution based. To attract the mischief of the definition, the test is whether an individual or entity carries out any of the above functions or activities for or on behalf of the customers, like for example accepting deposits or giving loans, irrespective of the fact that the entity may be or may not be called as a ‘bank’ in the common parlance. If a financial activity is carried out occasionally or in a limited scale where the risk of money laundering is less, a country may decide not to apply or indeed any of the money laundering requirements. One such example would be a hotel or guest house which offer foreign exchange facility on a very limited scale for guests, or a travel agency which wires money to clients in overseas in case of emergencies423. (See 40 Recommendations, Glossary – FI) Financial activity should be subject to limited controls or may be excluded in certain cases after proper analysis of the situation which shows the money laundering risk is low.

423 supra note 1; p-V-21
FATF recommendations 6 require financial institutions to conduct enhanced due diligence for those customers who are foreign PEPs. Corrupt PEP take care to ensure that criminal assets are not identified and traced back to them. Corporate vehicles provide most convenient avenue to separate the origin of illegal funds and the nexus with PEPs. A nation state which resists temptation to go after short terms flows from proceeds generated by money laundering, would be laying a strong foundation for the financial sector which is beneficial to the economy in the long run. In other words by setting high standards of financial regulation, a country could attract high inflow of funds and quality institutions which will contribute to wider economic development. Without the assistance of financial institutions it is difficult to launder money. When such institutions are controlled by criminals or senior management positions are held by associates of criminals, it is exceedingly difficult to prevent money laundering. Countries laws should prevent convicted criminals from holding significant investments in covered institutions. Similarly convicted persons should not hold any management position including board of directors, executive, supervisory boards in financial institutions. Financial institutions should be headed by persons who have no criminal record for violation of fiduciary duty or similar crime.

### 3.3.2 Designated Non-Financial Business & Professions – (DNFBP)

However, the financial sector is not the only area being associated with money laundering. If a country has a tightly regulated financial sector to keep dirty money off, weak link is always present in the non financial sector. With the trend toward globalization, an international solution is needed for handling this task. FATF regulations were revised in the year 2003 to bring into ambit certain DNFBP within the coverage of 40 Recommendations for the first time. The requirements are listed under

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424 supra note 50; p19  
425 supra note 21; p37  
426 supra note 1; p-V-18  
427 Adam Paul Logan (2005), "Let it all come out in the Wash: Heavy Duty Action Required", *University of Tennessee Honors Thesis Projects*. http://trace.tennessee.edu/utk-chanhonoproj/879
Chapter VI, and the following entities and persons among others are to brought within the coverage of AML/CFT regulations. They are casinos, real estate agents, lawyers, notaries, legal professionals, dealers of precious metals/stones, trust and company service providers, acting as agent for company, firms, legal persons, providing registered office/premises/accommodation, acting as trustee etc. FATF further urges that countries should consider applying recommendations to businesses and professions other than those listed above, that create money laundering or terrorist financing risk. Non banking financial systems are still unevenly regulated in most part of the world, especially the placement stage for cash. First view emphasizes the role of preventive measures in catching money launderers. As large fraction of cash laundered goes through banks and non banking financial institutions at some point or other, standardized disclosures by these institutions pave way for clearer liability and lower enforcement costs. In the absence of standardized disclosures, the costs involved in detection of criminal activities would be high. FATF recommendations are generally targeted towards financial institutions and non financial business and professions, towards prevention of money laundering and terrorist financing. While applying these measures FATF also provide for certain exception, and leaves the discretion to countries. Therefore a vital decision in this regard has to be taken by a country as to which entities and persons are to be covered, and if so by which requirements. The preventive measures covered under Recommendations (See Recommendation 5 to 25) apply to financial institutions in general, while some of them apply to ‘designated non financial business and profession (DNFBP) on limited basis.

The new draft ML Directive expands the circle of persons to accountants, auditors, real estate agents, notaries and other independent legal professionals. The role that members of legal professionals may play in the combat against organized crime is quite significant. They have the skills and ability to identify sings of illegality in transactions or actions undertaken by their clients. Moreover members of these professions are likely to be called upon for advice or representation by criminals.

428 supra notw 1; p-V-23
429 supra note 1; p-V-19
engaged in organized crime\textsuperscript{430}. Shell corporations are one of the major tools in layering funds. For example, by the early 1980s as much as 20% of all real property in the Miami area was owned by entities incorporated in the Netherlands Antilles. Using inflated prices to pay for imported goods is a common laundering technique. Launderers working through front companies or willing accomplices, simply create false invoices for goods either never actually purchased, or purchased at greatly inflated prices\textsuperscript{431}.

Companies and trusts are often used by money launderers and other criminals who wish to conceal their identity. To curtail the laundering process which seek to conceal criminal funds within normal activity, relevant legal measures should be brought in as soon as possible. For example, registration of companies should be carried out with strict provisions and to ban shell companies. When a company is set up, the source of capital, status of the shareholders, whether the company is floated for another person other than investors, should be examined. When an entity is virtually registered by another person, the true identity of these people should be checked. Trust companies pose a risk regarding money laundering because they have the capacity to conceal the beneficial ownership of the legal persons behind the entities they manage. Netherlands is one of the first countries to introduce specific legislation that regulate the governance of trust companies, which can be followed up for setting similar standards elsewhere\textsuperscript{432}.

In 2004 Stephen Schneider published a detailed analysis of involvement of legal sector in money laundering cases investigated by Royal Canadian Mounted Police. This report appears to be the only one which focuses on vulnerabilities of legal sector in money laundering cases. His report points out a range of services such as purchase of real estate, formation of companies/trusts, passing funds through legal professional’s client account, offered by legal professionals which are attractive to criminals who are engaged in laundering. Schneider pointed out that in some cases the legal professionals were innocently involved, where there were no overt signs which would alert the

\textsuperscript{430} Constantin Steganou and Helel Xanthaki (2005), Financial crime in the EU, Kluwer Law International
\textsuperscript{431} supra note 62; p56,59
\textsuperscript{432} supra note 69; p186
professional. He was critical as to whether the professional lacked awareness, or simply willfully blind to suspicious cases. After Schneider’s study a number of countries have implemented FATF recommendations for legal professionals also. The FATF Recommendations, including in the most recent revision of 2012, apply to legal professionals only when they undertake specified financial transactional activities in the course of business. They do not apply where a person provides in-house legal services or provides services as an employee of an organization433.

Cases of laundering involving professionals have been noticed since 1990s. Criminals do require the expertise of accountants, lawyers and other professionals to aid and assist them in laundering activities. These professionals provide a wide range of services such as creation of a corporate vehicle, purchase and sale of properties, and various other financial services, which are vulnerable to money laundering. Even if the professionals are reluctant to aid criminals to launder money purposely, they may participate in the money laundering schemes unconsciously. As these professionals are regulated by professional ethics, and have respectable social status it would be much subtle and safe for them to assist in laundering proceeds of crime. Clients may also take advantage of the legal privilege available, and owing to the inherent nature of their services, these professionals are infected by money launderers434.

In legal profession, professional secrecy or privilege is a principle which exists among members, but the boundaries vary depending on the structure of relevant legal systems. The object of regulating this sector is to avoid potential money launderers misuses the services of lawyers, while still taking into account fundamental and other constitutional rights. The terms confidentiality, professional privilege and secrecy though often used interchangeably has a different meaning application and consequence depending on each country. Confidentiality applies to all information obtained in the course of legal professional’s interaction with clients and in most countries it can be waived by the client or by express provision in law. On the other

434 supra note 64; p28
hand professional privilege and secrecy which is often contained in constitutional law or common law, appear to offer higher level of protection than the confidentiality clause. Protection offered to professional privilege/secrecy is also contained in criminal law of most of the countries, either in the form of statute or rule of evidence\textsuperscript{435}. Traditionally persons under a statutory secrecy obligation such as lawyers, notaries, doctor and clergyman, have the right to refuse to testify in criminal proceedings. However this right is restricted to the information entrusted to them in their capacity of being under the secrecy obligation. It is a right, not a duty. The obligation to give evidence in such a case is statutorily overruled by the right of refusal to testify. The right of refusal to testify is certainly not an absolute right. Under exceptional circumstances the interest if the truth has to be brought before the court, the duty prevails over the right to refuse to testify\textsuperscript{436}. Investigating a legal professional poses more practical challenge than investigating other professionals, due to protection of fundamental rights attached to their services. But the privilege would not permit a legal professional to continue to act for a client who is engaged in criminal activity. Because of divergent practices and different interpretations it is difficult always for enforcement agencies to take action against legal professionals\textsuperscript{437}. Given the relationship between professionals and their clients, apart from the privilege factor, reporting the suspicious transactions to enforcement authorities will damage the image of the professionals. To overcome this it can be provided that the professionals should report their suspicious money laundering to their association or other self-regulatory bodies\textsuperscript{438}.

Art.3 of Vienna Convention gives a broad definition of intentional money laundering. The report of US delegation to UN Conference for adoption of Convention Against Illicit Traffic in Narcotics Drugs & Psychotropic substances addressed the penalization of money laundering in relation to Attorneys, specifically drawing inference from Para (b) (i) of Art.3 of VC which requires a specific intent to either

\textsuperscript{435} supra note 433; p20
\textsuperscript{436} supra note 162; p120
\textsuperscript{437} FATF (2013). “ML & TF Vulnerabilities of Legal professionals”. June 2013
\textsuperscript{438} supra note 64; p29
convert or transfer property or to assist a person to evade discovery of his illegal actions. However an attorney who received his fees for legitimate representation of his client should not be prosecuted even if it is turned out that the money give was out of proceeds of drug crime. The terms such as ‘evasion’, ‘evading legal consequences of his action’ implies a criminal purpose and would not cover the instances of legitimate representation through a Counsel. It is unjustified to view a lawyer receiving payments from defendant in good faith, running the risk of committing an offence. During discussion on the issue in Dutch Parliament, the Minister was of the opinion that from the history of law lawyers are not punishable as long as they receive the normal fee meant for a good lawyer, and the same does not exceed the normal limit.\textsuperscript{439}

A number of countries also reported there were significant restrictions on their ability to obtain search warrants for a legal professional’s office or other orders for the production of papers from a legal professional. The case studies clearly demonstrate that criminals still seeking to exploit the vulnerabilities that caused the FATF to call for extending AML/CFT obligations to legal professionals. However, the case studies also show that, at least in some instances, it is now the legal professional who becomes aware of the attempted misuse of their services submits an STR which even prompts an investigation.\textsuperscript{440} While not all legal professionals are actively involved in providing legal services which may be abused by criminals, the use of legal professionals which provides a respectability to the client’s activity, is often attractive to criminals. There is also a perception among criminals that legal professional privilege/professional secrecy will either delay or obstruct or prevent investigation or prosecution by authorities if they engage the services of a legal professional.\textsuperscript{441}

The FATF Report on Money Laundering Typologies 2002-2003\textsuperscript{4} recognized the inherent risk that diamonds and other precious stones pose as a ML commodity. One of the complexities noted in the laundering activities through diamond transfer mode, is

\begin{itemize}
  \item \textsuperscript{439} supra note 22; p121-123
  \item \textsuperscript{440} supra note 433; p23,32
  \item \textsuperscript{441} supra note 437; p23
\end{itemize}
that diamonds can be both the vehicle to generate criminal profits as well as the vehicle to launder them. Diamonds are used as an alternative currency by criminals as they are not included in the concept of cash, currency or bearer negotiable instruments. Enforcement in this sector is difficult due to lack of evidence due to traditional ethics of trust within the sector and lack of international cooperation. Although specific FATF Recommendations are applicable to diamond dealers, several countries have not yet implemented these in their national AML/CFT legislation. Only few countries regulate the diamond trade, and studies point out to low level of enforcement in this sector. The FATF definition of ML is based on the definitions included in the UN Vienna and Palermo Conventions. These definitions note that ML includes the acquisition, possession, concealment or disguising or conversion / transfer of property derived from criminal offences. Examining ML in its broadest sense, diamonds may fall under the category of (a) acquired as a "property of an offence" (theft of diamonds); (b) used to conceal or disguise "proceeds of crime" (as they are a high value/low mass good and relatively easy to hide from detection); and (c) converted into other financial instruments or conveyed or transferred relatively easily across borders and hold their value for a very long period of time, as diamonds are very high value liquid assets.

Auction houses and lottery are also often used by money launderers because the people in these businesses are not ready to combat money laundering, and governments of many countries have not asked these industries to take the responsibility of anti money laundering regulations. Casinos by their nature considered cash-intensive businesses, as the majority of transactions are cash based. The FATF 2009 report showed that there is significant global activity in Casinos, which is cash-sensitive, competitive in its growth and vulnerable to criminal exploitation. Online Casinos though used for entertainment purposes, they provide means to launder funds quickly. While the dirty money is played in Casinos, the clean money returns back to the launderer. These transactions are carried from home instantaneously, and due to

442 supra note 77; p9,10,133,134
443 supra note 64; p20
444 supra note 75; p21
internet presence many of the Casinos do not come under a particular jurisdiction. According to an estimate more than 1400 online Casinos exist. Presently there is not much legislation to tackle money laundering at cyber level. Issues such as intellectual property, privacy, freedom of expression apart from jurisdictional issues crop up. The FATF has begun to focus their recommendations to include a more cyber crime centered approach, but has not fully deduced solid legislation on how to mitigate, deter and bring justice to those who launder money through the use of a connected computer system⁴⁴⁵.

3.3.3 Other financial entities/persons – types of entities to be covered

As per Regulation 20, FATF stipulates that countries should consider applying the recommendations to businesses and professions other than those listed above (Note – FI and DNFBP) that pose a money laundering or terrorist financing risk. The inclusion of such other entities or persons is left to the discretion of a country which should be weighed to the risk posed by such persons/entities. Some of the entities/persons which can be covered under this head are dealers in high value goods such as antiques/automobiles/boats etc, investment advisers, auction houses, pawnshops etc. Though the requirement is not to cover the entire list, the risk factors are to be taken into account for an appropriate response⁴⁴⁶.

Free trade zones over a period of time have been badly abused. Though created to provide duty-free importation, minor fabrication or conversion, and then re-exportation, many such trade zones have instead become routes for smuggling into the countries where they are situated and to regions beyond⁴⁴⁷. FTZ (Free Trade Zones) have proliferated in recent years to such an extent that today there are approximately 3000 FTZ in 135 countries around the world with a total turnover surpassing billions

⁴⁴⁶ supra note 1; p-V-23
⁴⁴⁷ supra note 153; p136
of US dollars. They are designated areas within the jurisdiction in which incentives are offered to support development of exports, FDI, and local employment. These incentives can result in a reduction in finance and trade controls such as enforcement, thereby also creating opportunities for money laundering and the financing of terrorism. Legal entities setting up in FTZ should be subject to the same requirement as legal entities in the rest of the country. The size and scope of FTZs makes it difficult to effectively monitor incoming and outgoing cargo, and activities such as mere repacking and relabeling. Some FTZ though export cargo worth billions of dollars every year, have fewer competent authorities present to monitor and examine cargo and trade transactions. The relaxed oversight in FTZ makes it more challenging to detect illicit activity and provides an excellent opportunity for misuse.448

3.4 **Integrity Standards**

Approximately two decades back, forensic accountants started to contribute their skills to detecting possible money-laundering activity buried in the books and records of victimized financial institutions.449 Without the assistant of financial institutions neither money can be laundered nor financing of terrorism can take place. When criminals control financial institutions or hold senior managerial positions countries find it extremely difficult to tackle money laundering and financing of terrorism. Integrity and licensing requirements help prevent such entities or persons from participating in money laundering and terrorist financing activities. A series of financial transactions which gives dirty funds which gives a semblance of lawful origins, makes it easier to use those funds without attracting suspicion. Historically secrecy and anonymity helped shield most of the financial activity from public scrutiny.450 There is different types of ‘launderettes’ operating in money laundering markets. Some of them are regulated mechanism such as banks and other financial institutions. Sometimes these institutions

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449 supra note 163; p2
450 supra 98; p13
have information subsidiaries devoted to laundering, such as black network of the BCCI\textsuperscript{451}.

The cash intensity of financial institutions makes it possible to channel huge amounts of money through these systems, without arousing their suspicion. Tainted funds must pass through banks and financial institutions at some point before the link between the funds and their criminal origin has been sufficiently attenuated. The most vulnerable moment for a money launderer is when he enters into contact with a financial institution or other institutions chosen as 'launderette, and therefore the chance of detection of a money laundering operation is at its highest during the stage when the alleged proceeds are entering the financial system. Financial institutions benefit from the monetary transactions whether the origin of the funds they handle are lawful or unlawful. Though the proceeds of crime also receive the blame for causing corruption, but corruption is not always a by-product of criminal proceeds. Money of lawful origin can also be used to prevent institutional structures.

3.4.1 Core Financial Institutions

In terms of Basel Committee, IOSCO and International Association of Insurance Supervisors and the standards which are prescribed by these organizations, banks, insurance companies, security industry are subject to comprehensive supervisory regime. The provisions among other things include licensing/authorization to engage in business, evaluation of directors and senior managers for their integrity, evaluation of managerial staff to rule out adverse criminal findings, prohibition against ownership or control of such institutions by persons having criminal antecedents. (See Regulation 23) These regulations apply for prudential purpose as well as AML controls, and the term supervision includes the authority concerned to compel for production of records and information to examine compliance\textsuperscript{452}. The damaged integrity of the financial sector as a result of its association with money laundering and the entrenched presence of

\textsuperscript{451} supra 30; p21
\textsuperscript{452} supra note 1; p-V-24
organized crime, may lead to a negative impact on a country’s FDI. If a country’s commercial and financial systems are perceived as being under the influence of criminal elements, it may compromise the country’s reputation and would undermine foreign investors trust453.

Experience indicate that launderer chooses institutions and services which are poorly regulated, and offshore havens, which offer guarantees of secrecy and anonymity. Such secrecy and anonymity is also available to the launderer through the informal channels of the parallel economy. Since the financial institutions deal with other peoples money, they should have reputation of probity and integrity. Any institution which is found to have assisted in money laundering will be shunned by legitimate enterprises454. Banks are in business to make money and undetected money launderers are good business for bankers since they assist in liquidity and contribute to overheads by paying higher bank charges455.

The situation is far worse than simply holding open the bank vaults to dirty money in its various forms. Western banks solicit, transfer, accumulate, and manage dirty money in the trillions of dollars, every year. The tension between anti–money laundering compliance and bringing in business is no contest. New bank deposits, private accounts, with customized personal services win nearly every time456. In some cases banks were party to conspiracy of money laundering when they help transfer capital through settlement or any other forms of transfer to other country. In order to ensure that the financial sector do not become the proverbial jam pots or in money laundering terminology ‘sinks’, a range of regulations and legislation have been put in place. The recent German intelligence report shows that Liechtenstein is under pressure

453 supra note 69; p144
456 supra note 153; p190
to either clean up or close down as a financial centre. Panama was actually invaded by US military because it had become a money laundering/drug trafficking centre\textsuperscript{457}.

The existence of tax havens in Europe has made currency smuggling, a traditional method, very popular and largely used by money launderers. Currency smuggling is favored by presence of financial institutions, under off-shore legislation\textsuperscript{458}. If proceeds of crime are wired from a country where criminal activities have taken place, to a transfer country, it creates additional value in recipient country. Apart from expanding the financial sector in recipient country, it will create income for individuals, companies, and tax income for government. In fact many of the OFC in Europe, North America, Caribbean, South East Asia which are attracting funds from various criminal activities have been doing economically well\textsuperscript{459}. To compete for criminal money by means of low bank secrecy seems a tempting strategy for countries, to attract additional funds. Once the funds are diluted in the financial sector it is as good as any other money. Laundered money does not only require the services of countries like the Seychelles, but is also attracted to major industrialized economies such as the US, Netherlands, UK, France and Germany\textsuperscript{460}. Criminal organizations engage in a form of jurisdictional arbitrage using offshore financial centers who promise maximum protection for their funds and in effect are financial safe havens.

Insurance industry is abused by launderers due to weak interference of legal system in this sector. Launderers are interested in cash policies and those which can be bought without revealing much about the buyer. Despite the requirement for insurance companies to identify their clients, there is no such regulations for agents. A drug dealer purchased a life insurance policy worth US$ 80,000 through a agent of large life insurance company using a cashier’s cheque. The investigation showed that the Agent was aware of the fact that premium represented drug proceeds, but failed to report it due to high commission he made out of the policy. Three months later, the drug dealer

\textsuperscript{457} supra note 42; p30  
\textsuperscript{458} supra note 58; p155  
\textsuperscript{459} supra note 130; p117  
\textsuperscript{460} supra note 173; p91
cashed the policy, and the proceeds have been laundered, but eventually the Agent acted as conspirator.

A strongly regulated financial sector without any distinction between onshore and offshore activities, is an essential perquisites for any money laundering prevention. Money laundering may entail corruption and more generally a warped functioning of some institutions such as banks. Financial institutions which know their customers, their sources of their wealth and income are usually expected to recognize abnormal financial flows, and can identify easily suspicious transactions and large financial flows generated by corrupt payments. One who suspect that a transaction is suspicious, is not expected to know the exact nature of the criminal offence or that the funds were definitely those arising from the crime. If one has noticed something unusual or unexpected and after making enquiries, the facts do not seem normal or make commercial sense, it is to be ensured that things are reported. In other words, one need not have evidence that money laundering is taking place to have suspicion. The regulatory system should provide incentives for the banks involved in AML function so that their conduct will be consistent with their goals. Most confidentiality legislation permits financial institutions to pass on information about criminal activity to the authorities, and offered protection by statutes for any breach of customer confidentiality. However some commonwealth countries extend customer confidentiality beyond the common law right, to the statutory right to secrecy. Any person who discloses information relating to the identity, assets, liabilities, transactions and accounts of a customer will not be committing a criminal. Banks are viewed not only as potential victims, but also as actors, be it through inadvertent or conscious association with criminals. A major factor has been the mentality, not amongst the public at large but amongst the financial services community. E-money system provide anonymity allowing the parties to the transact with each other without the intervention of a regulated financial institution. Powerful encryption are used to guarantee anonymity of money transactions. Consequently the required audit trail may be missing,

461 supra note 160; p34
leading to abuse of financial system. Cash can be deposited in unregulated financial institution and electronic funds transfers effected without jurisdiction restrictions. Placement is achieved easily by using a smart card or personal computer. While physical smurfing of hard cash deposits is prohibited and regulated by most AML law, it is difficult to tackle electronic smurfing, as cyber banks are not registered or licensed, and cyber cash is entering markets as alternate to hard cash. Once the e-cash account is established funds can be transferred from any computer connected to the internet. E-cash being anonymous allows the account holder total privacy to make internet transactions.

3.4.2 Other Financial Institutions

Other financial institutions are not normally subject to same stringent requirement as applied to the core institutions, because of absence of core prudential issues. For instance the directors and senior management staff are not evaluated for their integrity, expertise and experience. However certain minimum standard requirements are to be observed like licensing, subject to supervision or oversight for AML purpose. Though the licensing/registration applies to all financial institutions, a discretion is available for a country for these institutions as to which category the oversight of implementation of AML/CFT measures. However for the money transfer and exchange business licensing/registration is compulsory and effective system should be put in place to oversee compliance462.

Money laundering is good business for those professionals who become involved in it. For example bankers, lawyers, accountants, company formation agents, tax advisors, fiduciaries and various other groups, benefit handsomely by assisting in washing the proceeds of crime. “Gate keepers are, essentially, individuals that protect the gates to the financial system, through which potential users of the system including launderers, must pass in order to be successful. The issue of gatekeepers has been

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462 supra note 1; p-V-25
addressed by FATF on several occasions. The 2003-04 report indicated that money launderers increasingly seek the advice or services of these professionals to help facilitate their financial operations. They seek professionals help to set up corporate structures to disguise the source and ownership of illicit money. Gatekeepers are essentially individuals who protect the gates to the financial system through which potential users of the system, including launderers, must pass in order to be successful. Gatekeepers are prevalently abused by launderers and terrorist financiers. Gatekeepers will undertake either self-laundering or third-party laundering. Such individuals in fact could form part of the criminal group and may also be involved in the predicate crime\textsuperscript{463}. Corruption flourishes in an environment where state officials and public sector employees misuse their positions for private gains. Private sector institutions are an attractive venue for laundering the proceeds of corruption, especially when they are owned or infiltrated by corrupt persons or have implemented weak AML/CFT measures.

3.4.3 Designated Non-Financial Businesses and Professions (DNFBP)

These are categorized into two (a) casinos and (b) other DNFBPs. For the first category requirements are put in place for licensing, measures to prevent criminal ownership, supervision with regard to AML/CFT compliance. For the second category the requirement is that effective system for monitoring and ensuring compliance on risk-sensitive basis is a priority. Such monitory mechanism can be taken care of by government or a self-regulatory organization. However for the second category there is no licensing or registration mechanism\textsuperscript{464}. In Switzerland long regarded by the media and anticorruption campaigners as an iconic laundering nation, even hotels that offer money exchange facilities above a modest level are subject to money laundering regulation and are required to identify customers and record dealings.

\textsuperscript{463} supra note 75; p44

\textsuperscript{464} supra note 1; p-V-26
3.5 **Law consistent with FATF regulations**

For efficient and effective functioning of a domestic legal system a country should have its internal laws and regulations, and work with co-ordination with each other. Even for domestic law is concerned there shall not be any conflict of laws, unless there is a basis in policy for making an exception, and that two laws can be read as working together without contradiction. The area of potential conflict would be secrecy laws. A country may have privacy law protecting parting of financial information, which may conflict with specific requirement of AML law for example a requirement to report suspicious transactions by financial institutions. To address this situation FATF in Recommendation 4 provides that each country should make sure that its financial institution secrecy laws do not inhibit implementation of FATF regulation\textsuperscript{465}.

In order to ensure effective global action in the AML regime, member countries of FATF carry out self assessment exercises based on the Recommendations (40+9) Apart from this the member countries are also subject to mutual evaluation process based on the Recommendations (also known as peer group review) wherein experts from other member countries of FATF as evaluating team visit the country to be reviewed for an independent review. FATF also draws up action plan to ensure effective implementation of Recommendations, which involve time limit for self-assessment. Even non members are also encouraged to participate in the exercise\textsuperscript{466}.

3.6 **International co-operation & Cross border implications**

Each country shall put effective mechanism in place to enable policy makers, law enforcement authorities, FIU, financial institutions and other authorities to co-operate with each other, in terms of Regulation 21 of FATF. Countries shall have the requirement of coordinating in policy development, implementation towards anti-money

\textsuperscript{465} supra note 1; p-V-28  
\textsuperscript{466} sura note 26; p224-225
laundering and preventing financing of terrorism. Further a country’s regulation or laws should not hinder cooperation. There has always been free trade in crime. Criminals do not respect sovereignty, instead they use borders to their advantage. They know it very well that following the money trail is harder, when more countries are involved. Countries lack effective criminal justice system pose a disproportionate threat to the well being of stable societies. They are the major source of cross border flows of dirty money and one bad apple in a regional barrel can taint all of its geographical neighbors. The dynamics of illegal markets, the activities of criminal enterprises, the reach of criminal networks, and the pervasiveness of money laundering all militate in favor of multilateral responses. In the absence of an adequate domestic framework, international cooperation could provide an option to track illegal funds that have been transferred and laundered in other countries. Mutual legal assistance is useful in jurisdictions which has political will to tackle laundering, but lacks in resources. In such a case the partner country that has stronger instruments, and systems in place to deal with money laundering can assist the weaker one. The weakest link in the chain of anti-money laundering measures is the complete non compliance of several countries whose economies depend on their ability to provide tax havens and banking secrecy. Launderers feel themselves comfortable in jurisdictions with high rates of informal economy. This is because of the fact that in such informal economy, the physical volume of ill-gotten cash money could be mixed up or confused within the higher rates of the informal or the underground economy; so, as a consequence of this general ground of confusion, the risk of being detected by legal authorities could always be lower. There is considerable divergence in definition of money laundering which is extremely problematic given its transactional character. What might constitute money laundering in Canada might not amount to same in Greece, given the shorter list of predicate offence in the later. The variety of the domestic money laundering laws

467 supra note 1; p-V-26
469 supra note 107; p196
relating to the range of predicate offences may hamper international co-operation for lack of double criminality. Bank Secrecy in some jurisdictions still inhibit investigations. Legal obstacles in investigation and the work of law enforcement of a country in another would complicate an already complicated operation. One of the most important obstacles to seeking out illegal funds and securing their repatriation, is lack of capacity in the requesting country. Courts in requested countries often set pre-condition about conviction of accused, before agreeing to freeze assets or transfer frozen assets. They may also demand that the requesting country may file a criminal charge or bring a forfeiture proceeding the offender in question in order to keep the assets frozen, and final decision would depend on results of criminal proceedings in requesting state.\footnote{470}

Money laundering regardless of the predicate offenses is a global problem. Communication among states is a key element to enhanced effectiveness and maximizing the use of scarce resources. Notwithstanding the internationalization of anti-money laundering enforcement, extradition has not proved to be useful. Extradition which is referred to as the practice of prizing the scoundrel from his last refuge, is a process of international cooperation which not only is anachronistic but also poses many legal hurdles.\footnote{471} Against this highly ambitious global regime of standard setting and prevention, international coordination in law enforcement is a relatively underdeveloped and slow process. It remains unclear, however, whether actual changes in the practices of law enforcement agencies have occurred as a result of the AML regime or whether effective communication channels are being established. Both Vienna and Palermo Conventions require the signatories to co-operate rather than compete to respond to criminals who use borders to frustrate criminal investigations. The will of national governments to introduce effective anti-money laundering and terrorist financing strategies and to eradicate all forms of criminal finance and official corruption is key factor while extending international aid to those countries. Non co-operative countries do suffer from international acceptance and co-operation. Adverse publicity may lead to financial institutions around the world

\footnote{470} supra note 40; p94-95
\footnote{471} supra note 27; p410
adopting to a close scrutiny, while dealing with such recalcitrant jurisdictions. Non
cooperating jurisdictions run a risk of legal sanctions. Such sanctions can more than
offset potential short-term gains from following a free rider strategy and can be
damaging for the financial centers concerned\textsuperscript{472}. A number of countries, including the
UK, can and do prohibit or restrict dealings with countries whose strategies to combat
money laundering and terrorist financing are considered to be totally
inadequate\textsuperscript{473}. Art.18 (1) (c) of MLC allows states to refuse to cooperate because of the
political or fiscal nature of the offence concerned. Art.3 (10) of the Vienna Convention
on the other hand stipulates that for the purpose of cooperation under the convention
drug trafficking or laundering of proceeds from drug trafficking shall not be considered
as fiscal or political offences. The exception for fiscal offences stems from a traditional
concept of sovereignty by which states are seen as competitors when their economic
interest collides. The fiscal offence exception allowed states to decline to prosecute
offences , as by doing so it might compromise their competitive position. Often fiscal
offences relate to the taxes and excise duties levied on imports in order to protect the
state’s economy. Though this may be theoretically correct, it is deplorable that
cooperation can be excluded in the case of fiscal offences. If some infringement of tax
laws are so serious that they are criminalized, there is no reason as to why states should
not collaborate in the fight against the laundering of proceeds from these fiscal
offences\textsuperscript{474}.

The condition of double criminality means that the “predicate activities, which
generated the proceeds constitute an offence under the law of both the state where they
were carried out and under the law of the state where the proceeds were eventually
laundered. The double criminality requirement owes its existence to certain
considerations. First of all, it makes little sense for a jurisdiction to prosecute certain
behavior as criminal if it is not regarded as such under domestic law. Thus, as long as
there are differences among countries in terms of what constitutes a predicate offence to

\textsuperscript{472} supra note 130; p130
\textsuperscript{473} supra note 149; p5
\textsuperscript{474} supra note 70; p299
money laundering, situations could arise where one jurisdiction could not prosecute a person for laundering offence when predicate offence was committed in another. One possible way to address the problems outlined above would be to adopt a very broad approach to predicate offences, to expand their scope as much as possible. Additionally, a broader list of predicate offences would also lead to increased effectiveness in the domestic legal context. Regardless of which option is preferred, international convergence with regards to predicate offences, is very important. Even if one jurisdiction extends predicate offences so as to cover all crimes like for example the Netherlands), it could still encounter jurisdictional problems. Consequently, a move towards convergence would benefit not only investigation and prosecution efforts, but also benefit international exchange of information.\textsuperscript{475}

3.7 \textbf{Investigation, law enforcement and prosecution by AML Authorities}

In terms of FATF Recommendation 27 each country should assure that designated law enforcement authorities are responsible for money laundering and terrorist financing investigation. FATF encourages countries to authorize, support and develop special investigative techniques and mechanism, for example undercover operations, specialized asset investigation, and investigation with the cooperation of foreign countries. It is needless the mention that the investigating agencies should receive adequate staffing, financial and other resources to meet high integrity standards.\textsuperscript{476} In many respects, the contemporary global financial system has become a money launderer’s dream. To put it conversely, it is a nightmare for law enforcement agencies who have to work through a jurisdictional and bureaucratic muddle, in their efforts to follow and seize the money.\textsuperscript{477} All of the portion of the criminal earnings that appears in the legal economy potentially attracts the attention of the fiscal authorities. The investigation of money laundering necessitates, more intrusive investigative

\textsuperscript{475} supra note 247; p27  
\textsuperscript{476} supra note 1; p-V-27  
\textsuperscript{477} supra note 235; p1110
powers than many other offences that are normally regarded as more serious, Gaining convictions for money laundering requires, or said to require, that the prosecution be given the assistance of shifts in the burden of proof and access to information that hitherto was regarded as privileged.

3.7.1. Investigation

Banking secrecy laws whether relating to common law duties, or civil law offence or criminal law violation, tend to be framed in such a manner that it conflicts with AML legislation of other countries. Two particular legal obstacles may hinder an effective AML investigation, namely blocking laws and banking secrecy laws. Blocking laws are designed to protect a country’s domestic interest from a foreign legal interference, and can be traced to judicial activism of American prosecutors. Similarly aggressive enforcement of America’s anti-trust laws received backlash from other jurisdictions. This concept originated in Canada in 1947, during American grand jury investigation against a Canadian paper industry. As regards secrecy laws due to shift in the thinking of legal and law enforcement agencies, this concept has now become an exception rather than a rule. Operations that seek to recover state assets are expensive, complex and time consuming. Countries impoverished by corruption may lack the financial resources to undertake the costly financial investigation necessary.

3.7.2 Law Enforcement

Money Launderers have ability to operate in simultaneous markets in different countries. On the other hand the regulators and enforcement authorities have control over only limited markets within a geographical are. Criminals can wire money through secrecy havens at speeds limited only by the ability to communicate information from one place to another. The creation of single market means that money can move

478 supra note 5; p364-365
479 supra note 5; p332
across the world in nano seconds. Virtual money laundering has now become a reality. Money launderers who are at a greater risk of losing their illicit proceeds, are becoming more and more sophisticated and well equipped as investigators and prosecutors are professionally equipped to intercept the money trail. The principle of sovereignty, state equality, jurisdiction, non-interference are inextricably linked concepts. These concepts often raise significant political and practical obstacles that hinder intergovernmental efforts in extending cooperation to enforcement agencies. Foreign law enforcement agents are not only dependent on the local goodwill but also on the capabilities of local law enforcement agents. Another problem is in the area of training and techniques. When local law enforcement agents fail to keep records or fail to comply with technical requirements, the case is lost in the court.

When the remuneration of law enforcement agents are poor, temptation to accept money to supplement their income is great, and if they succumb to such temptation they abuse their powers and tend to overlook questionable unlawful activities. For so many legitimate reasons the financial institutions have been restrained to cooperate with law enforcement agencies. They are confidentiality issues, legal rules which may prevent sharing of client’s information, and thirdly the institutions have general distrust towards law enforcement agencies, especially relating to request from foreign jurisdictions. Investigations are often frustrating affairs where it is easy to assume that the institutions, its bureaucracy, and its people are obstacles.

3.7.3 Prosecution

The primary difficulty for the prosecution in terrorist finance cases, however, is to prove beyond a reasonable doubt that the property is terrorist property. This difficulty is exacerbated when the funds are raised in support of terrorism overseas.

480 ibid; p377-378
481 ibid 379, 383-384
Most common prosecutions is that the charge of money laundering is linked with charge of underlying offence, of which money laundering was an integral part. Less common are prosecutions in which the money laundering was outsourced by the prosecution of the money launderer is integrated with the prosecution of the person who committed the crime. Integrated money laundering is standalone prosecution, which often relates to crimes committed in other jurisdictions\textsuperscript{483}.

\textsuperscript{483}http://www.piie.com/publications/chapters_preview/381/4iie3705.pdf accessed 28/10/2014