finance: a critical analysis in the light of evolving global standards', *International and Comparative Law Quarterly*, **56**(1), 119–40.
Muller,W.H., C.H. Kalin and J.G. Goldsworth (2007), *Anti-money Laundering: International Law and Practice*, New York: Wiley.
OECD (2001), *Governance in the 21st Century*, Paris: OECD.
Office of the United Nations High Commissioner for Human Rights (2007), *Good Governance Practices for the Protection of Human Rights*, New York: UN.
Pennarts, H.T.F. (2008), *Beginselen van behoorlijk bestuur*, Antwerpen: Maklu.
Ping, H. (2006), 'Lawyers, notaries, accountants and money laundering', *Journal of Money Laundering Control*, **9**, (1), 62–70.
Prechal, S. and M. De Leeuw (2007), 'Dimensions of transparency: the building blocks for a new legal principle?', *Review of European Administrative Law*, **1**(1), 51–61.
Rietrae, J. (2007), 'The 3rd EU Anti-money Laundering Directive: main issues and intriguing details', in P.C. Van Duyne et al., *Crime Business and Crime Money in Europe: The Dirty Linen of Illicit Enterprise*, Nijmegen: Wolf Legal Publishers.
Ross, S. and M. Hannan (2007), 'Money laundering regulation and risk-based decision making', *Journal of Money Laundering Control*, **10**(1), 106–15.
Statskontoret (2005), *Principles of Good Administration in the Member States of the European Union*, available at: http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf (last visited August 2011).
Stessens, G. (2000), *Money Laundering: A New International Law Enforcement Model*, Cambridge: Cambridge University Press.
Stout, H.D. (2007), *Weerbare waarden – borging van publieke belangen in nutssectoren*, Den Haag: Boom Juridische Uitgevers.
Unger, B. and F. Van Waarden (2009), 'How to dodge drowning in data? Rule- and risk-based anti money laundering policies compared', *Review of Law & Economics*, **5**(2), 953–85.
Wakefield, J. (2007), *The Right to Good Administration*, Deventer: Kluwer.
World Bank (1989), *Sub-Saharan Africa: From Crisis to Sustainable Growth*, Washington DC: World Bank.
World Bank (1997), *Corruption and Good Governance*, Washington DC: World Bank.
Wouters, J. and Ryngaert, C. (2005) 'Good governance: lessons from international organizations', in D.M. Curtin and R.A. Wessels, *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, Antwerp: Intersentia, 69–104.
Zoellner, C.S. (2006), 'Transparency: An analysis of an evolving fundamental principle in international economic law', *Michigan Journal of International Law*, **27**, 579–628.

28. Economic crimes and money laundering: a new paradigm for the criminal justice system?*

John Vervaele

28.1 INTRODUCTION: PHENOMENOLOGY

Money laundering is a complex issue, not only as a result of the development of the processes of internationalization and globalization, but also because of its transverse nature and its relationship to criminal law, criminal procedure, administrative – both substantive and process – law, financial, and international public law.

To become familiar with the concepts of money laundering, let us begin with the phenomenology from a criminological perspective. Afterwards, we shall revise a little of the history in order to discover where these concepts have their origin and how they have been legally drawn together, and in this way place ourselves in the history of the criminal policy connected with this new regulatory offense. Subsequently, we shall deal with certain aspects of criminal law, such as specific problems connected to the substantial elements of the offense and certain relevant matters of criminal procedure. Finally, we shall deal with the human rights framework and the question of international cooperation in the criminal law domain, related to this phenomenon.

The first case of criminal conviction can be traced back to 1988 and comes from the United States. The BCCI bank (Bank of Credit and Commerce International), by that time quite well known and active in many countries, with over 500 affiliates, was convicted of money laundering. Unfortunately, a section of this bank specialized in the laundering of assets from the Pablo Escobar cartel, especially its affiliates from Florida. This demonstrated the structure of the crime of money laundering, which today is considered financial engineering. It basically develops in three well known stages. The initial stage is receiving the money. Subsequently, the money was displaced in a series of operations through financial companies located in France, the United Kingdom, Luxembourg, the Bahamas and Panama, and also in some banks in South America. The purpose of this was to hide the money and search for ways of protecting or shielding it. Some countries offer this protection more than others, and are even allowed to apply bank secrecy, while others are denominated as *tax havens*. Finally the money is recovered for consumption or reinvestment purposes.

At the beginning of the 1990s, the Slavenburg bank – an important bank in the Netherlands at that time – was convicted of money laundering; it had five affiliates and its headquarters were located in Amsterdam. Knowingly, the Board of the bank specialized in the laundering of assets of a series of activities of groups trafficking marihuana. We are referring to the so-called Dutch *coffee-shops*, where the consumption of this plant was legal, but not its trafficking or the laundering of assets. The latter activities were by that time already included as criminal offenses under Dutch law. The bank was submitted to an in-depth judicial investigation, resulting in the cancellation of its license and the

closure of its activities. The management of the bank was personally convicted either for the perpetration of the laundering of assets or for the omission of related duties of due care or diligence. The same fate befell the management of the affiliate, its employees, and the executive. Also, its legal capacity was cancelled.

Another recent case covered in the media, less complex and less institutional than those from the banking sector, is that of Mr Roldán, head of the Spanish Civil Guard (one of the major national police forces). He was convicted of money laundering and corruption. Mr Roldán was the first civil – not military – authority in charge of the police force, but benefited from the construction contracts of military premises. He charged rather high commissions on the contracts, which in Spain is held to be a crime. With the obtained assets he carried out a series of financial operations to launder the money and later purchased properties in different European countries.

There are two more cases that can be included here because they illustrate, firstly, the global nature of the crime and, secondly, the substantial legal elements of the crime. The first case is rather recent, and was also covered in the media. It refers to a conspiracy to launder assets perpetrated by Alfonso Portillo, former president of Guatemala. Portillo was extradited from Mexico to Guatemala for having appointed personal friends in a number of ministries – *figureheads* who quickly emptied the coffers of the state, specifically those of the Ministry of Defense, the Ministry of Public Works, the Ministry of Development, and other public funds for development granted by foreign countries such as Taiwan.

When it comes to laundering money, the same scheme is always applied. In the case of Portillo, a series of companies were established – the issue of legal capacity is here very important – and by their means various financial operations were performed with the money from the Guatemalan state. This money circulates through the banks concealed as investment and ends up as illicit earnings in the hands of companies controlled by the head of state through his relatives. Guatemala was initially incapable of finding evidence against Portillo, given the particular capacity and quality of the Guatemalan judicial system. In this context it is not strange that in this country a transnational prosecutor has been established. In agreement with the United Nations (UN), a special Prosecutor's Office has been put in place called CICIG, the International Commission Against Impunity in Guatemala (*Comisión Internacional Contra la Impunidad en Guatemala*). Thanks to this organization, sufficient evidence against Portillo was found and two lawsuits requesting his extradition were brought forward: one in the United States, the other in France. Both countries have jurisdiction in the case since the operations were performed through their banks. When a case like this is investigated, jurisdiction can extend to twenty or more countries. This adds complexity to the investigation, but especially to the prosecution. The United States applies an extended concept of jurisdiction (long arm jurisdiction) in this regard.

The second case, perhaps less notorious, unravels the complex legal nature of these crimes. The Wachovia Bank, one of the five biggest and most important in the United States, specialized in money transfers (remittances) and currency exchange in some parts of Latin America, especially in connection to the drug cartels of both Mexico and Guatemala. The remittances and currency exchanges were used to launder the assets. There are legal decisions from the American judiciary against the bank. One of these imposes civil fines, but criminal investigations are underway. In the countries belonging

to the civil law tradition, this civil way is considered as a minor evil for the firms, but in the United States it is regarded as a serious problem as it can also lead to the confiscation or deprivation of property under a civil forfeiture scheme.

On the criminal side, the bank has not yet been accused of money laundering, but its further failure to establish an administrative system oriented to the prevention of the laundering of assets (compliance program) will be prosecuted as money laundering. This is because such failure is regulated as a criminal offense. In this case, the Prosecutor can opt for charging the bank with a fine if the latter accepts its responsibility. Otherwise, the record is sent to the criminal court, and is granted with one year to improve and adopt measures. This ensures that not only predicate offenses such as corruption, trafficking of women, etc. which create illicit assets, are taken into account for the criminal charge; today the criminal offense of the laundering of assets also exists as an autonomous criminal offense, as well as the lack of compliance with the preventive measures.

At this point it is appropriate to concretely define the concept of money laundering. It is a process through which the assets of criminal origin are integrated into the legal system with the appearance of being legally obtained. These illicit assets are put somewhere else because the perpetrator, criminal associations, physical or legal persons must get rid of the earnings materially, by means of a series of operations of financial engineering. In the second phase it is important to disguise the origin of the illicit products by means of numerous financial transactions, all of which require even more financial engineering. The third phase consists in the integration of these illegally obtained assets into the legal economy without raising suspicions, and thus masking them with an appearance of legitimacy in their origins to later utilize them legally as an investment or for consumption. These three phases reinforce the art behind this financial engineering.

Through these cases we can conclude that the concept of laundering of assets is more coherent than the mere concept of money laundering, because it is not only capital that can be laundered. It can also refer to real estate investment or buying and selling of works of antique art. I will, however, use the concept of money laundering, as it is the standard term in English. To those who are interested in deepening the phenomenology and the methods necessary to launder assets and launder capitals, see the report of the Workgroup of the Units of Financial Intelligence entitled GAFISUD.[1]

This report contains a description of the regional criminal concepts of money laundering in Latin America, although they are also to a large extent typical for Europe, and for other continents. The transactions between the official market and the monetary black market, or the transactions intended to take advantage of the differences between levels of tariffs or taxes are specifically addressed. Along with the report, a detailed explanation of several operations is explained: fictitious expenditures; fictitious export of services; fictitious exportation or import of goods under a scheme of false invoicing; foreign investment in a local company, etc. One quite well known case concerns soccer clubs on the verge of bankruptcy and the *savior* who invests in them. When an important amount of money is offered to save a club, we are talking about fractioned transfers of illicit money through credit transfers, checks, or by means of dummy companies.

Less well known are the cases of insurance companies. By means of insurance contracts, large sums of money can be transferred, hidden and laundered. Similar cases involve lottery prizes, when the winner is offered a higher amount than the amount won

in order to legalize the money. Currently, such types of prizes are submitted to stricter levels of control. Another example is the physical transportation (cash transfers) of illicit money.

Unfortunately, a growing number of non-governmental, non-profit organizations of a humanitarian character are also used for or are using money laundering schemes. Given the high flow of money, through these organizations, they can either be established for this purpose or abused. It seems rather strange to us that the FATF document does not stipulate all types of money transfer systems, since in reality many limited transfers are made through interbank systems. Besides, certain money transfers among Muslims or indigenous ethnic groups, do not transfer the money physically, but as a loan among themselves, known as the system of the *Hawala*; we should consider the likelihood of the abuse of this system.[2]

28.2 CRIME AND CRIME ASSETS

Until the 1970s and the 1980, criminal law and even criminal procedure did not have that much interest in the financial aspects of crime. It was perfectly possible to secure criminal punishment on the basis of fines or imprisonment but, in the end, the offender was able to make use of the earnings from the offense. Seizure and confiscation are classic tools in the criminal justice system, but they had specific functions and related limited functions. Seizure and related confiscation or forfeiture had a double function: seizure of evidence (instruments of the crime) and seizure of dangerous goods such as arms, drugs, etc. However, there was no direct connection with the illicit earning – *the assets* – because it was the actions of the perpetrator that took a central role within the criminal system. In other words, the measures in relation to the personal assets were regarded as an accessory to the investigation and the main sanction. As far as they existed, in many countries they were conceived as security measures (to secure evidence or to secure dangerous goods).

28.3 HISTORY OF MONEY LAUNDERING

We said that up until the 1970s there was no emphasis on the illegal earnings from crime, at least not as an autonomous object, since it was viewed only as an accessory. The first experiences of money laundering in the 1920s until the 1930s were attributed to the European mafia in connection to heroin trafficking. Al Capone and his gang used laundries as dummy companies in order to launder the earnings obtained from the trafficking of narcotic drugs, mostly heroin. Their business became very fruitful because of the complete prohibition of drugs and alcohol in the US at that time. This shows the degree of intervention of the state into the economy from that time onwards. With the Wall Street crash, or 1929 Great Depression, the state intervened in order to protect property, including socio-legal or socio-economic interests. However, it is astonishing that the US government did not criminalize money laundering at that point, but elaborated a long list of regulatory offenses, as for instance the use of privileged information at the stock exchange.

From the criminal law perspective, the first capital laundering cases to ever take place in the United States dated from the 1960s. At that time, tax crimes were considered the first predicate offenses for money laundering. The chief historical case of this period was that of H.M. Klein accused of laundering assets in relation to the smuggling of whisky in Canada.[3] It is very curious to note that the only predicate offence at that time was tax fraud. Already at that time tax fraud was a very serious offense in the US. It still is today, judging by the many US judicial investigations into tax offenses, including those in off-shore centers or in tax havens such as Switzerland. The major Swiss Banks have been struggling with orders to unveil their US clients suspected of having committed tax fraud. As this concerns a serious judicial matter, the effectiveness of the judicial system justifies extra-territorial jurisdiction.

In the 1970s, preventive administrative financial law was developed. In this way that the United States imposed a whole series of obligations upon the financial sector, such as that of having to identify its clients, and to inform the Financial Intelligence Unit (FIU) of the suspicious operations, all actions which were developed outside the ambit of the criminal justice system. We could state that this was the first wave of financial regulation directed towards the administrative and preventive phase of money laundering in banking laws and financial regulations, as well as the one related to bank secrecy. After the bankruptcy of the financial holding Lehman Brothers in 2008, we entered a second wave.

Nevertheless, the real establishment of money laundering as a criminal autonomous definition, including an open amount of predicate offenses, will have to wait until the 1980s, when the legal definition of money laundering was launched as a criminal concept. More specifically, this took place in 1986. In 1983, Reagan's government established a National Commission against Organized Crime under this new paradigm: *War on Organized Crime* – following the *War on Drugs* – through which a legal autonomous definition for the laundering of money arose. Nevertheless, the first legal definition of the laundering of money in the world would arise in Italy in the 1970s, out of the close relation that existed between the crime and the earnings of the mafia.

This paradigmatic shift of the 1980s not only takes place within the United States, but also extends and develops internationally in an important way. This seems to occur not only through the influence the United States, but also because of the shift expenenced in the very concept of financial markets. Financial services, especially from the banking sector and insurance companies were obliged in the first place to adopt rules imposed by self-regulation. Central banks or self-regulators created the Basel Committee on Banking supervision in Basel, Switzerland. Their self-regulation is binding for both banks and insurers. The first package of measures: *Basel I*, from 1986 to 1987, coincides with the very rigid intervention of the United States in the financial sector. We could claim that Basel I made a belated appearance with respeet to the definition of all these interbank obligations, and it was ultimately superseded by state-public intervention into the financial sector, which demanded the adoption of criminal sanctions.

From 1988, the development of international treaties in this regard has been impressive. The first international convention, designated as the Vienna International Convention on Drug Trafficking, obliged member states to make money laundering a criminal offense when associated with drug trafficking. This took place two years after

the designation of money laundering as a criminal offense in the United States. In this case money laundering is only related to drug trafficking as a predicate offense.

In 1990, a new treaty on search, seizure and confiscation was approved at the Council of Europe, imposing the duty to criminalize money laundering as an autonomous offense. This time though, an important change related to serious crimes in the context of organized criminality takes place: the range and reach of the predicate offenses for money laundering are enlarged from drugs trafficking to all serious crimes and criminal associations of organized crime. Despite being a European treaty, it also opened the way to its ratification by Non-European states such as the United States and Canada, amongst others.

Again in 1990, globalization and internationalization have an increasing impact. This not only expresses itself in a proliferation of international treaties, but it also results in the creation of a body and procedures for international monitoring, something never before seen in criminal affairs. The G7, an organization of a non-public nature, comprised of the heads of state of the seven most developed countries in the world – which afterwards would become the G8, and currently is the G20 – organized events related to these matters and further declared them as having prime political importance. Later, they established a group called the Financial Action Task Force (FATF) in order to put forward general recommendations, based on international conventions, whether ratified or not by the states. These general recommendations – *soft law* – impose very detailed duties on the states, both with regard to the implementation of the law, and in connection to its practice in the field of administrative law, criminal law, criminal procedure, and mutual legal assistance (MLA), among other areas.

With these recommendations, FATF – afterwards with the support of G20 – established a constant system of monitoring states. That is to say, they monitor each member state in relation to the legal framework and to its implementation and practice (law in action). They hold rounds of meetings every four or five years, and later, experts from FATF visit each country and elaborate an official report on the performance of the recommendations. If the state does not perform satisfactorily, which usually happens, a negative report is sent to the G20, which publishes it. Depending on the degree of performance of the recommendations there are white, grey and black lists of countries. In the last FATF round, three European states were put in the grey list, principally due to the existence of bank secrecy. For a European state to be in the grey list is regarded as prejudicial, and it brings severe financial consequences. As we see, the influence of FATF over states, legislative and judicial practice is enormous. Currently, FAFT is preparing the fourth round of mutual evaluations. It can be consulted on the internet. For Latin-America there is a Sub-Committee of evaluation called GAFISUD.

Back to history, an event took place in 1999 that deserves our attention because of the complexity that it adds. The UN adopted a new convention called the International Convention for the Suppression of the Financing of Terrorism. This convention imposes upon states to duty to criminalize money laundering in relation to terrorism as a predicate offense and with respeet to the financing of terrorism in particular. There are, of course, cases in which crimes are committed to obtain money to finance terrorism, such as in the case of kidnapping performed with the purpose of committing acts of terrorism. But we are also aware that for the classic terrorist – and here we enter into the third paradigm: *War on Terror* – the ideological element is more important: these

acts of terrorism are not performed with the purpose of earning money. That is not the main goal, but only its instrument, and it is also relevant to consider that a high share of terrorist acts do not cost that much. Moreover, assets to finance terrorism are not always from an illegal or criminal source. However, the International Convention for the Suppression of the Financing of Terrorism obliges member states to regard terrorism, its acts and associations created for that purpose as a criminal offense. Likewise, it stipulates that states should treat its financing as a criminal offense, independently of its legal or illegal source. It refers then to all funds that are used to commit terrorist crimes. For instance, in the United States, there are non-governmental bodies which collect funds to re-build hospitals in Palestine because of the conflicts with Israel. These funds could be seen as illegal by some, but they are not. Also, we could wonder whether it is illegal if there is terrorist financing for these hospitals, in the case where the flow of money depends on the political and military Islamic resistance movement *Hamas*. Although Hamas has been democratically elected, it is classified as a terrorist organization both in the United States and by the United Nations. In other words, terrorism and the financing of terrorism as predicate offenses for money laundering are referring to an open definition of terrorism. Rather than money laundering from convicted predicate offenses, in this case we are speaking about the financing of offenses yet to be committed (which can be preparatory offenses or preparatory acts of the main offense). The UN Conventions against terrorism do not contain a substantial definition. The 1999 Convention, just like FATF and the G20 recommendations, oblige member states to apply the same money laundering monitoring scheme, including all preventive administrative obligations, to the financing of terrorism. And it is there, in 1999, where both conceptions are mixed; just before 2001, when the attack on the twin towers took place in New York. The FATF elaborated a series of eight (later expanded to nine) special recommendations, besides the 40 on money laundering, aimed at the financing of terrorism.

After 2001, the United Nations went beyond their conventional approach to terrorism and put forward Security Council resolutions that further complicated the legal framework. Initially, the Security Council of the United Nations decided that the fight against terrorism is the number one political goal and that the United Nations member states are expected to comply with the obligations of the conventions on matters of terrorism, without taking into account whether they have ratified them or not. This is because the resolution adopts the form of binding law for the member states. It is then that the United Nations installed a system of monitoring by means of a committee which controls whether the states are applying the content of all the conventions on matters of terrorism, which include the financing of terrorism. The monitoring refers to the law in the statute books and the laws in practice. This system of monitoring was copied from the one created by FATF on matters related to the money laundering.

Subsequently, the Security Council decided to blacklist terrorists and terrorist organizations at the UN level. By doing so, the UN is copy-pasting a system created under the Clinton Administration and still in force under the Obama Administration. This system consists of elaborating a list of terrorist persons and organizations to which so called *smart sanctions* are applied.

In practice there is a link between the criminalization of terrorism and the blacklisting of terrorism. This means that the executive branch of government de facto decides on

the substantial reach of terrorism. From the point of view of criminal law this is a very substantial paradigm change to pro-active prevention. This list is of an executive – not judicial – nature. The persons and the organizations included on the list do not need to be convicted or suspected of acts of terrorism or under judicial investigation. The mere inclusion on the list represents a danger as defined by the Executive, which is based on information provided by the intelligence services. The smart sanctions are in fact provisional, precautionary measures, such as freezing orders of assets, monitoring and freezing of financial transactions, visa bans, etc.

The Clinton list was copied worldwide by means of a Security Council resolution. From 2001 onwards, similar lists have existed in the UN, the European Union, and in countries like England. This situation is peculiar as the dangerousness is not necessarily criminalized, because it is a concept of social dangerousness, to which financial measures apply. The measures imposed on those who are registered on these lists are limited in time and have a precautionary nature. Nevertheless, they can result in the freezing of the entire personal or organization's assets, which in the end is very different from confiscation, as the former does not have a definitive nature. These persons cannot travel, nor perform any financial transaction, and this situation can last many years. In other words, these are precautionary measures which severely limit the public freedoms and liberties of the people and organizations affected by them.

Finally, in 2000, the renowned Convention against Transnational Organized Crime was signed. The convention includes as a criminal offense all the crimes with features of transnational organized crime – corruption, arms trafficking, trafficking of women, terrorism, etc. – and assesses these offenses as predicate offenses for money laundering and in the case of terrorism for the financing of terrorism. This Convention can be considered as the final result of an evolution begun in the 1980s, at least with regard to money laundering. Beside the obligation for the Party Stated to criminalize the predicate offenses and the related money laundering and financing of terrorism offenses, it also obliges member states to introduce special techniques of investigation into their criminal procedure (such as wiretapping of telecommunications, controlled deliveries, infiltration, etc.), and to establish efficient mechanisms of mutual legal assistance (MLA), such as extradition, letters rogatory, transnational freezing of assets, seizure and confiscation, and expiration of ownership.

28.4 INTERMEDIATE CONCLUSIONS

Firstly, it is clear that the underlying circle of predicate offences is no longer limited to drug trafficking but it extends to a large circle of serious crimes and organized crime and terrorism. Indeed, in many countries criminal prosecution for money laundering has become an ordinary procedure. Secondly, with the expansion of money laundering to the financing of terrorism, the focus has not been limited to the illicit money of criminality; it also extends to the legal and illegal funds, in case they are related to the act of committing terrorism. With this change of focus a new important paradigm is introduced, as the criminal justice systems is now also used as a control mechanism *ante delictum*, and as a preventive tool of policy. A new preventive and proactive criminal justice system has been born, which can be called criminal security law.

28.5 THE FATF RECOMMENDATIONS

The FATF recommendations, including the original ones of 1990 and the 2001 ones on financing terrorism, have been constantly revised and actualized. The 2012 FATF recommendations can be easily consulted on the internet.[4] They are the international standards on combating money laundering (AML) and countering the financing of terrorism (CFT) and the financing of the proliferation of weapons of mass destruction.[5] They consist of 40 consolidated recommendations that contain various obligations, including preventive administrative and financial measures, measures of substantive criminal law and measures of criminal procedure. The recommendations on AML/CFT are endorsed by over 180 countries. The FATF Standards comprise the Recommendations themselves and their Interpretive Notes, together with the applicable definitions in the Glossary. The measures set out in the FATF Standards should be implemented by all members of the FATF.

In summary, these obligations concern the inclusion as criminal offenses of predicate offenses for money laundering. The circle of predicate offenses is wide and includes all serious offenses, organized crime and terrorism. Recommendation 3 clearly stipulates that countries should criminalize money laundering on the basis of the Vienna Convention and the Palermo Convention and that they should apply the crime of money laundering to all serious offenses, with a view to including the widest range of predicate offenses.

Recommendation 5 is enlarging this obligation to terrorist financing (CFT) and the financing of proliferation. Countries should criminalize terrorist financing on the basis of the Terrorist Financing Convention, and should criminalize not only the financing of terrorist acts but also the financing of terrorist organizations and individual terrorists even in the absence of a link to a specific terrorist act or acts. Countries should ensure that such offenses are designated as money laundering predicate offenses. This obligation clearly includes the proactive, preventive approach of the blacklisting. Recommendations 5 and 6 indeed prescribe the duty to impose the smart sanctions (targeted financial sanctions). It also contains the obligations of administrative preventive supervision intended for ethnic systems of informal banking such as the *Hawala*, and it enforces obligations to the funds of non-governmental organizations (NGO) that could be used for money laundering schemes or the financing of terrorism.

A series of recommendations is detailed on the preventive-administrative obligations that are demanded from a group of persons and institutions. These recommendations are dealing with customer due diligence and record keeping, bank secrecy and reporting of suspicious transactions. They are not directed only at financial institutions – banks, insurance companies, etc. – but also at casinos, companies of direct sale and purchase of real estate assets, art, antiquities, precious metals, and also at notaries, accountants, and lawyers, whose first obligation is to get to know the identity of their clients and to communicate suspicious transactions. Any person or institution related with flows of assets shall have to register the real identity of their clients. In this regard, European countries faced problems not only because of the existence of bank secrecy, but especially because of the related codified bank accounts without name or surname; an act which is now totally forbidden. It also does not matter if the transaction begins in the United States and is later transferred to another place or if it ends up in a country in Latin America;

in every place the client must be known. If he or she is suspected of suspicious transactions, it is obligatory to communicate this to a body of financial intelligence called the Financial Information Unit (FIU). Every country must have such a body.

Yet, suspicious transactions are defined neither in the international conventions nor in the recommendations. Countries use different criteria to define suspicious transactions larger than ten thousand dollars. Depending on the definition of 'suspicious transactions' the reporting can involve small or enormous amounts of daily reports, particularly in the light of the great movements of capital around the world today. FINCEN, which is the FIU of the United States, receives an amount of reports per second that requires a continuously growing capacity of analysis. In other countries, like the Netherlands, there are objective and subjective criteria to define a suspicious transaction. If a person is a client of a bank, the bank must be aware of the monthly amount that the person earns, and in the case that an individual transfers higher amounts than permitted, there is grounds for suspicion. Also, if somebody appears in a bank in which he or she is not a client, bringing with them a considerable amount of cash money to open an account, that will be rendered as grounds for suspicion. In this way we encounter different criteria, both objective and subjective, as defined in the guidelines of the Prosecutor General's Office.

The FATF provide that every country must have an FIU. Recommendations 26 and following deal with the powers and responsibilities of the authorities. However, the regulation of FIUs vary depending on the country. In some cases it is an administrative independent body, in others it forms a part of the Central Bank, of the Ministry of Finance, or the judicial police, etc. The FIU is obliged to analyze and to investigate the suspicious transaction reports – this being exactly where the trouble begins. When receiving the report, they need to access the information regarding this person, be it a natural or legal person. What are the investigative powers of the FIU? Can they send out compulsory (subpoena) production orders and/or can they access the files of the natural and/or legal persons? It can be that the administrative authority needs to carry out certain investigative actions which require access to the administrative records of the company. In this case, the capacity to investigate requires a specialized staff in financial auditing and investigation, because if it is concluded that there is suspicion that money laundering could have been committed, the file is transferred to the Prosecutor. Not identifying clients or not reporting to the FIU, when appropriate, or the fact that the company does not have a policy of prevention, are in almost every country defined as illegal acts, be it under punitive administrative law, or be it as a criminal offense, in the case of intentional commission or grave omissions. The recommendations (31 and following) also deal with the law enforcement capacity (in law and in practice) of the judicial investigative bodies.

The group of persons that must inform the FIU is ample because there is a group of professions that traditionally deals with large sums of money. Those who deal with the purchasing and selling of precious metals and antiques generally perform a large amount of transactions with cash, unofficially. The duty is problematic for notaries and lawyers. In the case of notaries, many of them carry out real estate transactions, and handle the accounts of their clients, all of which depend on the regulation of each country, but they do this in many countries as part of a public or semi-public profession. In the case of lawyers, it is perhaps surprising that they are included in the recommendations, and in Europe political problems with lawyers have occurred in connection to these obligations.

The lawyer establishes a confidential relationship with his or her clients – *legal privilege* – which, in many countries, is stipulated in criminal procedure and in some countries even in the Constitution. However, both the recommendations and international regulations compel lawyers to inform the FIU of suspicious conduct.

An example can illustrate the kind of obligations to which lawyers are held. The Netherlands is considered a *tax haven* for transnational companies attempting to avoid double taxation, based upon international or bilateral tax treaties. For this reason, if we consider global money transfers and transnational money investment, the Netherlands is usually at the top of the list; it could be thought that this is strange since the Netherlands is such a small country, but of course this takes place with regard to flows of capital that are coming from other countries. These flows run under the tax planning strategies of multinationals, which in the Netherlands are assisted by thousands of tax lawyers who have never defended cases in courts, and who advice these so-called *letter-box* companies, to which all the money is transferred. But these lawyers have obligations just like notaries or real estate brokers. They defend their clients in tribunals by providing legal advice in relation to the financial plans of these companies and in converting their assets from illegal into legal assets through financial-legal engineering. Recently, several notaries and bar lawyers have been investigated, prosecuted and even convicted and given prison sentences in the Netherlands for participation in or perpetration of money laundering. These professions are regarded as being positions of high risk and some of their members are found to collaborate with certain groups of organized crime for the laundering of their assets.

The FATF recommendations also include judicial obligations related to the criminal justice system. Efficient measures of investigation, freezing of assets, confiscation and extinction of ownership are imposed. Additionally, states must adopt effective international cooperation measures in the criminal field (recommendation 36 and following) – mutual legal assistance requests for the taking of evidence, extradition, penalty execution, decisions of confiscation or extinction of ownership.

As mentioned before, both FATF and MONEYVAL for Europe and GAFISUD for Latin America perform continuous monitoring of evaluation. Each six years, experts visit countries and publish a report.

The reports on Latin American countries are very illustrative of the reach and impact of this monitoring process. Here a couple of examples are given as illustration. The last report on Colombia dates back to 2004, a year in which it received good evaluations for their administrative preventive policies, both from the financial institutions and the Colombian FIU (UIAF). However, the performance was very low considering the excessively restricted number of predicate crimes for money laundering, which did not include financing terrorism, smuggling, or fiscal fraud. Also, the excessively restricted circle of people compelled to report the suspicious transactions did not include notaries, accountants, or lawyers. Further, the country was criticized for the low efficiency of its criminal justice system, and the extremely small number of convictions. In 2006, the Colombian government implemented a series of reforms, which involved the inclusion of the financing of terrorism as a criminal offense. Other obligations, such as fiscal fraud, laundering of assets, or the obligation of lawyers and accountants to report suspicious conduct are still in a preparatory phase.

Another interesting country to look at is Argentina. The situation there is delicate

because the second report of evaluation and monitoring from GAFISUD took almost a year to be delivered. In Argentina, a strong internal political struggle is currently taking place. The 2006 report, which was the first one on Argentina was not very positive about the implementation of the recommendations. Afterwards, Argentina published a national agenda against money laundering with the goal of accomplishing the recommendations between 2007 and 2009 – so it should currently be fulfilled.

This national agenda is ambitious because it includes matters such as identifying money laundering and the financing of terrorism as criminal offences, provisional measures, confiscation, special procedural measures, regulations on investment funds which can also be utilized for laundering, mutual funds, measures on international transfers or transnational cash transactions, special measures on vulnerable legal persons based on their position close to ministries through which large sums of money are flowing, special measures on NGOs, etc. All that is stipulated; nevertheless, the problems mentioned in the 2006 report still seem to persist, and from this national agenda little or nothing has been done.

Argentina has not secured any convictions for money laundering, which has caused a great deal of concern in the 2006 report. Currently, only one conviction and only one fine have been imposed by the administrative authorities. Congress had not included as a legal offense the case of *self-laundering*, which means that when there is no self-laundering, the perpetrator can only commit the crime through third parties.

In the majority of the countries, self-laundering has to be included as a legal offense, and this is also an obligation imposed by FATF. It seems that in Argentina there are serious problems with the FUI for several reasons, including lack of money and lack of a capable, independent and permanent staff of civil servants, among other factors. Advances when comparing recent actions with the tendings of the 2006 report, are the inclusion of the financing of terrorism as a legal offense and the existence of a specialized unit for money laundering within the Office of the Public Prosecutor. However, the people who work at the specialized unit complain about the lack of resources because cases are not reported and about the difficulties linked to the investigations. This picture raises concern over Argentina in light of the recommendations.

The report on Brazil is very recent, dating from 2010. It includes a favorable assessment, but it has also made a number of some critiques. Financing terrorism is not yet included as a legal offense. Lawyers are not obligated to report financing terrorism. There are few criminal convictions, and the system of international cooperation is complex and slow.

28.6 CRIMINALIZATION OF MONEY LAUNDERING

The inclusion of money laundering as a criminal offense is complex, since it demands to be autonomous, that is to say, disconnected from the predicate offense. The predicate offense must be criminalized too. In other words, the earnings coming from the money laundering or the financing of terrorism must be an autonomous criminal offense. Problems emerge in criminalizing the three phases of money laundering – the disposal of the assets, disguising the assets, and returning the assets as a whole into the process – or in making each element an autonomous criminal offense (*actus reus* element of the

offence). There are different strategies which can make the work of the Prosecutor easier when it comes to prosecuting the case, filing the charge and submitting the relevant evidence. The most important question regarding money laundering is, first, whether it is made a criminal offense based on intent or based on negligence (the *mens rea* element of the offence), and second, whether the omission is sufficient for negligence. In these cases we see great differences from one country to another. This is because some criminal procedures are only acquainted with the intentional variant and leave negligence and omission to the administrative law or do not declare them illegal at all.

When it comes to money laundering, both the legal person and private companies are very important in their application. If criminal responsibility is not possible in the case of legal persons, there will be a problem. Perhaps there is a well structured punitive administrative law for this, but then not all coercive measures shall be at the disposal of the investigative bodies. The last complex element is the causal relationship between the offence and the result (the laundering). Depending on the financial engineering, it can be very complex to prove this causal relationship, in other words, to prove the strict causality between the criminal earning of the assets and the laundering of the same assets. Normally, if there is causality between the commission or omission of the crime and the result, there should be causality between the crime produced by the predicate offence, and the reintegration at the end of the process of the laundering of the assets, obtained by the commission of the predicate offence. In the formulation of the criminalization, a one-to-one equivalence must exist between the product – the earnings of the offence – and the final laundering. This could be established in a very rigid way, with the consequence that it would be very difficult for the Prosecutor to prove a one-to-one equivalence; but it could also be established easily if other criteria were utilized, as assets by analogy. This means that the Prosecutor only has to prove that the laundered assets arise from similar illegal acts. This can be very useful in a case in which some assets have disappeared or are hidden.

Finally, the criminalization is not only about the money laundering itself, but also about the compliance with the administrative obligations (record keeping, reporting, etc.). Noncompliance must be defined as serious administrative breaches of criminal offences. Sanctions must be in any case effective, proportionate and dissuasive (recommendation 35).

28.7 MONEY LAUNDERING AND CRIMINAL PROCEDURE

We shall limit ourselves here to revising the most important elements. Since the increasing shift to organized crime and terrorism, the historically classical measures of judicial investigation are no longer sufficient. We can observe that the change of paradigm in criminal law has gone hand in hand with the change in paradigm in criminal procedure, which, in many countries has been structured within the process of the criminal system as a second way. Besides the classic judicial investigation, a second separate track of financial investigation has been created as a special judicial tool under criminal procedure. The classic judicial interrogation of witnesses, of search and seizure, etc., has been widened by financial investigation into illicit earning with the purpose of knowing the sources, the investment schemes and the final outcome. Asset tracing has become a

very important tool, both with the aim of finding and preserving evidence, but also with the aim of freezing, seizing and confiscating illegal assets. Freezing of assets, seizure, confiscation, extinction of ownership are applied as an outcome of these financial investigations. The financial investigation cannot be done by classic judicial authorities. It requires specialized branches of financial auditing within the Prosecutor's office, with highly specialized personnel.

In many countries, within the criminal procedure, alongside judicial investigation, a special track of financial investigation has been created, with measures aimed at identifying, following, freezing, seizing and confiscating the assets of the suspect and/or convicted. The monitoring and freezing of bank transactions has become common and bank secrecy has lost much of its shielding capacity in criminal matters. For financial investigations, the thresholds are flexible and most of the measures can be executed by the prosecutor and/or financial experts in the police, without any prior or *a posteriori* judicial authorization. To use the classic judicial investigative measures, such as search and interception of communications, there must be a reasonable ground for suspicion. Moreover, to use these coercive measures, the judicial police or the Prosecutor cannot act on their own; they need the previous authorization of a judge, because such measures interfere with civil rights and freedoms. However, within the financial investigation, it can be observed that such investigations are fully under the supervision of the Prosecutors and generally do not need judicial authorizations or court orders. As long as a natural or legal person cannot prove the legal origin of suspicious assets considered illegal, they are deemed to be illegally obtained. There is thus also a shift in the burden of proof, as the suspect has to prove the legal origin of the assets. A further consequence of this paradigmatic shift in the criminal justice system is that it is possible to impose seizure and final confiscation through a separate proceeding from the conviction. It becomes an autonomous proceeding with a strong civil law character within the criminal justice system. This is an evolution that becomes even worse with the financing of terrorism and, overall, when it is applied – based on FATF recommendations – to black lists. There is a duty to apply the smart sanctions and a duty to investigate and freeze the assets of the listed persons and organizations. However, it is not necessary that they are suspects or convicted. It is enough that they are considered dangerous by the executive branch of government and therefore listed. The financial investigation as an autonomous path within our judicial systems expresses, in our opinion, an interesting development with regard to efficiency, but runs the risk of conflicting with classic legal guarantees and the rule of law.

Beside the new judicial track on financial investigations, criminal procedure has recently also included so-called special *investigation techniques*. The Palermo Convention against Transnational Organized Crime obliges states to introduce special techniques of investigation in their criminal procedure for the purpose of establishing a global, common standard. Many states are already applying it. The Netherlands has been applying such techniques since the 1980s. They consist in the fact that beyond the classic coercive measure of judicial investigation, new special legal provisions such as controlled delivery, undercover agents, infiltration in criminal organizations, and every kind of interception of telecommunications have become part of the tools of judicial investigation, at least for organized crime, terrorism and serious offences.

Moreover, the fight against organized crime and terrorism seems to justify relaxing thresholds and guarantees; that is, the more coercive the measures, the fewer the guarantees. These measures were installed under a very broad definition of serious criminality. In practice, the special measures of investigation are applied to all serious criminality based on the Palermo Covenant, which stipulates a maximum penalty of two years' imprisonment. This explains why the special investigative measure have become common, and the list of serious crimes which justifies special measures keeps growing.

28.8 HUMAN RIGHTS AND COOPERATION

When we refer to human rights and cooperation, we are referring to the norms of International Human Rights Law (IHRL): The UN Covenant on Civil and Political Rights, the Inter-American Convention of Human Rights, and the European Convention of Human Rights, amongst others.

With regard to terrorism, or at least, with regard to organized crime, the issue is more complex as 'human rights' define a whole series of protections for the citizen against the state, such as freedom of expression, the right to private life, the right to due process of law, and the rights to an impartial and independent criminal court. It is always about a protection against the state, which cannot violate these norms, the negative duty of the state which has to refrain from violating IHRL. In the last years, however, we have observed an evolution away from this. In other words, there is an increasing positive duty of the state to guarantee the human rights of citizens, especially the right to life, where unfortunately Latin America still shows serious and massive violations. To guarantee the life of persons, the state has the duty to investigate, prosecute, adjudicate and punish these crimes.

With regard to terrorism, the same reasoning should be applied: the state has the duty to protect the life of citizens and to offer security. With this reasoning, the right to security – which does not exist in human rights, but which is invented – has primacy over public freedoms. Then, the right to security guaranteed by the state becomes more important than due process of law. There, a conceptual abuse exists, because when speaking of the financing of terrorism and secret information utilized to register persons on black lists, or to ensure the criminal conviction of a person, it is *security* and not the *due process of law* that prevails.

In the inclusion of terrorist association as a criminal offense, several important questions can be raised on how to deal with secret information coming from intelligence services, and whether it is criminal evidence. In the Netherlands, for instance, there is a clear shift towards special features in criminal justice when it comes to terrorism and terrorist financing, creating a series of problems: the rights of the defense in relation to secret evidence, or how the judiciary can check the legitimacy and legality of the secretly obtained evidence. There are a series of doubts that are raised as a result of the rivalry between security and justice, and security versus human rights.

More concretely, we find very specific problems in this field, such as shifts in the burden of proof with regard to seizure. This is problematic, as the presumption of innocence, the obligations of lawyers, and the right to confidentiality in the lawyer–client relationship (legal privilege), could all end up endangered. Unfortunately, when it comes to terrorism we all know that human rights are not absolute, but susceptible to

limitations for specific purposes of general interest. The exceptions are the right to life, which cannot be restricted and the prohibition of torture (at least in Europe this cannot be restricted). Other rights can however be restricted, as they protect other human rights.

In certain countries, in relation to the crime of financing terrorism, lawyers are no longer free to choose their clients, but are state appointed, mostly based on a security screened list. These are state sanctioned professionals and as such they can access secret information of the state with the approval of intelligence services. These are policies labeled under the fight against terrorism, which, at this point, the European Court of Human Rights has declared in conformity with the European Convention of Human Rights.

Finally we shall deal with the issue of cooperation. The source of a crime can be in one country, but very rapidly covers the world and forms part of the scheme of concealment. Many operations and a smokescreens are essential to describe the elements of the crime. Once an investigation takes place, it becomes extremely difficult to bring to light what has happened with money or earnings, and to transform this obtained information into evidence. For this reason, if talking of the laundering of assets, the investigation is more complex and requires cooperation, not only between the border countries, but globally. We find financial centers and small countries which specialize in the laundering of assets counting on the protection of their authorities, making it very difficult to investigate, especially in the case of bank secrecy rules or special tax heaven regimes.

Cooperation, and all the instruments we indicated from the Vienna Convention up to the Palermo Convention, which deal with the financing of terrorism, stipulate many clauses and measures on administrative cooperation between the FIUs and judicial cooperation in the criminal domain.

Within the administrative domain, the situation is more complex because administrative preventive bodies such as FIUs have statutes in every country, which depend on many different bodies at the same time. If there are problems of access to information in individual countries, we can already imagine what these are at the international level. The FATF and the European Union have often intervened with specific regulations in order to oblige these FIUs and their states to change legislation so information can be shared, and countries can assist in the administrative investigation. Now, at the international level, there is the Egmont group, which regularly meets as a regulatory and enforcement body to facilitate the cooperation of the participating cooperation states. There is also a digital network to send and receive requests of cooperation.

Criminal and judicial cooperation is also complex, as it has to deal with new tools in criminal procedure: financial investigation, special investigation techniques and use of criminal procedure for freezing, seizing and confiscation of assets.

To develop cooperation, we not only need specific instruments, regulated in the international conventions, but also effective implementation of the domestic legal orders (in law and in practice). This means that whether they want it or not, member states of the European Union, and the United Nations must incorporate measures of financial investigation, special techniques of investigation, seizure, confiscation and practical capacity of cooperation in this regard. The Palermo Convention is developed to the point that it can now stipulate states that have joint investigation teams in place.

It must be stressed that in financial matters, the current measures of investigations not only accommodate new techniques and rules of cooperation, they also embrace

the classic forms of mutual legal assistance (letters rogatory, extradition, execution of sanctions).

28.9 CONCLUSION

After what has been discussed, there is a series of questions that we could raise from the point of view of criminal policies and criminal theory. One of them being whether socio-economic interests can and should deserve criminal law protection. If we belong to the Frankfurt School of Hassemer, the response would be that this cannot be accepted, and that therefore even money laundering should not be criminalized, but should be regulated by administrative law. But if we abide by the Tiedemann School, we would affirm the necessity of regulatory offences and justify the inclusion of money laundering as a criminal offense.

Far more complex are the following questions: Are we at the forefront of a new paradigm? Is it only a symbolic legal development? Are we faced with moral panic which justifies all kinds of measures and changes of our criminal justice systems? Is this preventive and proactive criminal justice paradigm a form of criminal law of the enemy? Or, in other words, are we leaving aside the classic concepts of criminal theory such as the principle of *nullum crimen sine injuria*, or the harm principle? The responses would depend on the autonomous character of money laundering and the financing of terrorism in relation to the predicate offences. Nevertheless, when we relate money laundering to the financing of terrorism and black lists, it is clear that we enter into the field of criminal law for the enemy, and that the key concepts of criminal law are set aside.

We can conclude that the concept of money laundering does involve a change of paradigm in the criminal justice system from several points of view. The classic AML approach of the FATF has resulted in several substantial changes: the elaboration of an autonomous offence; the elaboration of asset-freezing, asset-seizure and asset-confiscation into an autonomous control and sanctioning mechanism. The real paradigmatic chance has however been established by enlarging the AML-approach to CTF. This change entails the evolution of criminal law into a proactive law, of a preventive kind. We see an evolution from a judicial criminal law to a criminal law with a strong power of the executive branch of government. We also see an evolution from a criminal law based on the violation of a legally protected interest into a criminal law of dangerousness of a person.

We hope to have offered a cricital overview of the issue with a historical perspective, to see how it articulates or, according to some, how it fragments the classic system of criminal investigation, of criminal definitions, and the functioning of the criminal system as a whole. In our opinion, there is a paradigm shift with certain perils that must be studied in an in-depth manner, both by academia and by legal practitioners.

NOTES

* Based on a paper delivered at a conference celebrating the thirty years anniversary the University of Ibagué, Colombia on July 21st, 2010 and published in Spanish in J.A.E. Vervaele (2011), 'Delincuencia

Económica y lavado de activos. 'Un nuevo paradigma del sistema penal' *en Cuadernos de Derecho Penal Económico, Lavado de activos y delitos afines* Universidad de Ibagué, Ibagué, Colombia, **5**, 27–52.

1. FATF, *Money Laundering Typologies 2002–2003*, http://www.fatf-gafi.org/documents/documents/moneylaunderingtypologies2002–2003.html and GAFISUD. *Informe de tipologias regionales*, http://www.gafisud.info/documents/esp/doc_interes/gafi-tipologies/001-informe%20de%20Tiolog%EDas%20Regionales%20de%20GAFISUD%202005.pdf
2. The Hawala system has been used for hundreds of years to move money among countries. It started in the Middle East and in the south of Asia. It was installed by the Arab traders of the Silk Road in order to avoid being robbed. In actuality, millions of Pakistanis, Indians and many other migrant workers use this system to send money to their families.
3. H.H. Klein set up a selling scheme to avoid paying taxes. Whisky was bought by a New York based distributor, a Cuban subsidiary which falsified the records and returned excess profits to Klein and his employees through secret banks. See http://bulk.resource.org/courts.gov/c/F2/247/247.F2d.908.374.23905_1.html
4. http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf
5. The financing of the proliferation of weapons of mass destruction was added recently.

PART VIII

IMPLEMENTATION AND EFFECTIVENESS OF AML