

Chapter 4

The Creation of International Standards that Criminalize the Acts of Money Laundering

4.1. Introduction

As elaborated in the previous chapter, the 1988 United Nations Vienna Convention is the first international instrument for criminalizing the acts of money laundering. The criminalization of money laundering was considered a necessary weapon in the fight against money laundering and its predicate offences. More than 150 countries became members of the Convention, which then automatically considered money laundering as a criminal offence in their jurisdictions. In addition, efforts by the FATF and other international instruments for encouraging countries to criminalize money laundering continued to spread across the world. This chapter focuses on the process of criminalization and the extent to which the anti-money laundering regime concern to the repressive measures in fighting money laundering criminality.

4.2. Defining Criminalization

Criminalization can be understood as the classification of behaviors into crimes and individuals into criminals. In the same vein, criminalization refers to the process of categorizing conducts as criminal offences and imposing penalty on individuals. In the context of money laundering, the criminalization was started in a domestic level and then moved to an international level. The Bank Secrecy Act (BCA) of 1970 was the incipient stage for the laundering conduct towards criminalization. This Act emphasized the laundering conducts on the regulatory and preventive in nature. Through this Act, banks have to record financial transactions and report to the competent authorities if the transactions are suspicion related to money laundering. The laundering conducts were criminalized when the United States passed the 1986 Money laundering Control Act (MLCA). It could be said that the 1986 MLCA was the first legislation which criminalized money laundering in a domestic level.¹ On an

¹The core MLCA provision is 18 U.S.C. #1956 which consists of three different fronts who actively engage in money laundering: the crime of using financial transactions in laundering money (section 1956(a)(1)), the crime of transporting laundered funds across the United States

international level, the first international instrument that pursued the criminalization of money laundering is the 1988 United Nations against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The criminalization of any conduct is a response to the negative effect the conduct has on an individual or to a society at large. The criminalization occurs if a legal system declares a type of conduct to be a crime and punishable.² As a criminal offence, if the act has occurred, as a consequence, the perpetrator is subject to criminal prosecution. The question is what kind of conducts should be criminalized? Another question is which criterion, principle or value may be used in determining whether any conducts are to be criminalized? Two factors that must be considered in the light of criminalization are the 'harm principle' and 'legal moralism'.³ The 'harm principle' refers to the exercise of a state to minimize and prevent harm being done to its citizens.⁴ The level of 'harm' is defined by three variables, namely, the number of individuals committing crimes, the number of discrete crimes each individual has committed, and the intensity of crimes being committed harming victims.⁵ The concept of harm is not only limited to physical harm, but also non-material or intangible harm. Such harms involve harm to public safety, institutions, and personal reputation. Certain crimes, termed victimless crimes⁶, do not contain the element of harm to a person or its property. However, these crimes are deemed illegal because they are viewed as harmful to society as a whole. In addition, the idea of harm can also refer to the fear of crime, such as people who are living in high crime neighborhoods. From this perspective, Martz found in his study that various forms of harms caused by a crime which include economic, physical, psychological, and social harms.⁷

borders (section 1956(a)(2)), and crime as a product of money laundering sting operations (section 1956(a)(3)).

²T.J. Donahue, "What (If Anything) can Justify Criminalization?", Working Paper, Department of Political Science, the Johns Hopkins University, 2006, p.9.

³R.A. Duff and Stuart P. Green (Eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford New York: Oxford University Press, 2005), p.4. "The former takes harm and its prevention to be the primary concern of criminal law; the later takes wrongdoing or immorality, and its punishment, to be its primary concern". See also Susan W. Brenner, "Toward Criminal Law for Cyberspace: A New Model of Law Enforcement?", *Rutgers Computer & Technology Law Journal*, Vol.30, 2004, p.17.

⁴The harm theory was for the first time introduced by John Stuart Mill. See R.A. Duff and Stuart P. Green, *Ibid.* See also John Stuart Mill, *On Liberty*, in Bentham (1993), *On Liberty and Utilitarianism*, p.12-13.

⁵Susan W. Brenner, "Toward a Criminal Law for Cyberspace: A New Model of Law Enforcement?", *Rutgers Computer & Technology Law Journal*, Vol.30, 2004, p.17.

⁶Victimless crimes include offences such as prostitution, illegal drug use, sexual deviance, and gambling.

⁷James O. Finckenauer, "Problems of Definition: What is Organized Crime", *Trends in Organized Crime*, Vol.8, No.3, 2005, p.77.

It is at this point that the indicator of criminalizing any conduct depends on whether the conduct threatens to cause or causes harm or not. John Stuart Mill, for example, argued that society may interfere with the individual's freedom of action only 'to prevent harm to others'.⁸ He proposed the harm theory approach to criminalization in which a state may only exercise its power if it prevents harm to any member of a civilized community. In his words, he points out that:

'The only purpose for which [state] power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others. He can not rightly be compelled to do or forbear because it will be better for him to do so, because it will make him happier, [or] because, is the opinion of others, to do so would be wise, or even right'.⁹

On the other hand, legal moralism is a doctrine that can be used as a critical standard for assessing laws that should track morality.¹⁰ The legal moralism approach holds that immoral behavior is a reason for criminalizing any kind of conduct, thereby punishing this action.¹¹ Legal moralism concerns the idea that the law can be legitimately uphold certain types of behavior, even if the behavior does not result in physical or psychological harm to others.¹² In other words, the criminalization of any conduct can be justified if it is regarded as inherently immoral, even though the action does not cause harm to anyone or property.

What must be realized is that the criminalization of any conduct is the legislator's *ultima ratio*.¹³ As such, criminalization should be used as a last resort, or as the '*uttermost means in uttermost cases*'.¹⁴ In this context, Jereborg proposed three principles that can be used in determining whether or not to criminalize any conduct.¹⁵ They are the penal value principle, the utility principle, and the humanity principle.¹⁶ The penal value principle is concerned

⁸John Stuart Mill (1933), *Supra* note 4, p.12-13.

⁹*Ibid.*

¹⁰Robert E. Goodin, "An Epistemic Case for Legal Moralism", An Article, Philosophy Program, Research School of Social Science, Australian National University, 2008, p.2.

¹¹Seinberg, J., *Harm to Others* (Ney York: Oxford University Press, 1984), p.27. See also Leo Katz, "A Problem Concerning Criminalization", *Buffalo Criminal Law Review*, Volume 6, 2002, p.462.

¹²James Fieser, *Philosophy of Law*, the Internet Encyclopedia of Philosophy, at <http://www.iep.utm.edu/law-phil.htm#SSH2a.i>

¹³Nils Jareborg, "Criminalization as Last Resort (*Ultima Ratio*)", *Ohio State Journal of Criminal Law*, 2004, Volume 2, 523, 530.

¹⁴*Ibid.*

¹⁵*Ibid.*

¹⁶*Ibid.*

with identifying the arguments that accuse individuals of committing a crime. The utility principle determines the strength of each argument, placing weights to obtain a clearer picture of who is at fault. Lastly, the humanity principle assesses these weights based on moderation, the victim's interest, and the costs.¹⁷

With regard to money laundering, this type of crime can create effects on the economy, potentially threaten peace and safety in the 21st century, and destabilize the world. The International Monetary Fund (IMF) estimated money laundering accounts two to five percent of the world's gross domestic product and it can harm to economic and stability of financial institutions.¹⁸ Such effects involve eroding confidence on the banking system, discouraging investments, and creating a liquidity crisis due to the sudden disappearance of funds.¹⁹ Regarding the erosion of the banking system, money laundering may affect the erosion of the banking system in three negative ways. It increases the possibility that these individual will be defrauded by personnel from the bank, it increases the possibility that the bank will become corrupt and follow criminal interest, and it increases the possibility that the bank may fail if it chooses to defraud.²⁰ Banks also run a big risk in accepting fraudulent funds as they may suddenly disappear via wire transfer.²¹

Accordingly, policymakers are also convinced that money laundering harms a society as a whole by threatening 'healthy political and economic climates in a country'.²² In this context, the World Bank said that money laundering has potentially devastating economic, political, and social consequences.²³ In addition, the Asian Development Bank has said that money laundering has a significant negative effect on economic development.²⁴ The act of money laundering can also be used to reinvest money in other criminal

¹⁷*Ibid.*

¹⁸Schott, P., "Reference guide to anti-money laundering and combating the financing of terrorism", 2nd ed. (Washington: IBRD/IMF, 2006), p.23.

¹⁹Paul Kennedy, "Watching the Clothes Go Round: Combating the Effect of Money Laundering on Economic Development and International Trade". *Current International Trade Law Journal*, Vol.12, 2003, p.142.

²⁰*Ibid.*

²¹*Ibid.*

²²Kochan, N. *The Washing Machine. Money, Crime and Terror in the Offshore System*. London: Duckworth, 2006. Cited in Verhage, Antoinette, and Paul Ponsaers, "Power-seeking crime? The professional thief versus the professional launderer", *Crime, Law & Social Change*, 2009, p.410.

²³IMF/World Bank, *Reference Guide to Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT)*, chapter 10. Cited in David Williams, "Governance, Security, and Development", *Working Papers on Transnational Politic*, City University London, 2008, p.15.

²⁴Asian Development Bank, 'Enhancing the Asian Development Bank's Role in Combating Money Laundering', p. 3. Cited in David Williams (2008), *Ibid*, p.16.

activities.²⁵ Such criminal activities involve drug trafficking, corruption, terrorism, and tax evasion whereby those crimes generate enormous illegal funds. They all need to clean the ill-gotten gain, and as a consequence, they automatically depend on the process of money laundering.²⁶ Finally, money laundering can potentially lead to a shift of economic power to organized criminal groups.²⁷

Bearing those perspectives in mind, the objectives of criminalizing the act of money laundering are to protect the national economy and the integrity of financial systems.²⁸ In addition, criminalization can also be used to deter potential launderers, to reduce the potential types of crime that generate enormous illegal funds, and to protect the financial sector from operational and reputational risks.²⁹ In theory, loss of reputation can result in direct cost (lost of income), indirect cost (client withdrawal and possible legal cost), and opportunity cost (foregone business opportunities).³⁰ These costs will reduce the overall profitability of the firm. In addition, it can be noted that this type of conduct does not take the money away from financial system, but rather inject it.³¹ Therefore, it is worth noting that the criminalization of money laundering is a response to the threats of criminal on financial institutions.

²⁵When we fight money laundering we fight organized crime, we keep drug out of our playgrounds and away from our kids, we keep weapon out of the hands of terrorists, we protect small business, and we safeguard the human dignity of women and children trafficked into forced labor and prostitution'. See John Ashcroft, "Money Laundering Laws: Taking the Profit from the Criminal", Vital Speeches of the Day, September 1, 67,22, 2001; ABI/INFORM Global, p.683

²⁶During the 1980s. Another shift of strategy occurred as the focus came to be on the profits generated by crime. In the words of Senator Joseph Biden, Jr., the Ranking Minority of the Senate Committee of the Judiciary, when he introduced the Money Laundering Control Act 1986 (MLCA) in the United States Senate: Money laundering is a crucial financial underpinning of organized crime and narcotics trafficking. Without money laundering, drug traffickers would literally drown in cash. Drug traffickers need money laundering to conceal the billions of dollars in cash generated annually in drug sales and to convert his cash into manageable form. Regrettably, every dollar laundered means another dollar available to support new supplies of cocaine and heroin on the streets of this country'. Cited in Kris Hinterseer *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context*, (The Hague-London-New York: Kluwer Law International, 2002), p.168-9.

²⁷Kim-Kwang Raymond Choo, "Politically Exposed Person: Risk and Mitigation", Journal of Money Laundering Control, Vo.11, No.4, 2008, p.371.

²⁸Jackie Harvey & Siu Fung Lau, "Crime-money, reputation and reporting", Crime, Law, and Social Change, 2009, p.57. See also Harvey, J., "Just how effective is money laundering legislation?", the Security Journal, 21, 2008, 189-211.

²⁹Jeckie Harvey, "Compliance and Reporting Issues Arising for Financial Institutions from Money Laundering Regulations: A Preliminary Cost and Benefit Study", Journal of Money Laundering Control, Vol.7, No.4, 2004, p.335.

³⁰*Ibid*, p.336.

³¹Jackie Harvey & Siu Fung Lau, *Supra* note 28, p.57. Cited from Van Duyne, P. C. "Criminal Finances and State of the Art Case for Concern? In P. C. van Duyne, A. Maljevic, M. van Dijck,

4.3. International Instruments Supporting Criminalization

Several international instruments supporting the criminalization of money laundering include the UN Vienna Convention of 1988, the Council of Europe Convention of 1990, the UN Convention against Terrorist Financing of 1999, the UN Convention against Transnational Organized Crime of 2000, and the UN Convention against Corruption of 2003. At the same time, these instruments also function as repressive measures against money laundering. The following will analyze the role of these legal instruments in the scope of repressive measures in the fight against money laundering.

The United Nations Convention against Illicit Traffic in narcotic Drugs and Psychotropic Substances (The 1988 UN Vienna Convention)

The scope of the Convention is to oblige parties to criminalize and confiscate drug trafficking and money laundering. It also provides international cooperation in all aspects of investigation, prosecution, and judicial proceedings, including extradition and mutual legal assistance. Article 3(1)(a) regulates the criminalization of illicit drugs and psychotropic substances. This article obliges each party to establish a comprehensive list of activities involved in drugs-trafficking that are considered criminal offences under its domestic laws. This includes production, manufacture, cultivation, possession or purchase of any narcotic or psychotropic substances. This article also includes manufacture, transportation, or distribution of any equipment, materials or substances, known to be used for manufacturing illicit drugs.³² In addition, this article also required each participating party to criminalize the organization, management, or financing of the drug offences enumerated in the convention.³³

The criminalization of money laundering is regulated in article 3(1)(b). In this article, the term ‘money-laundering’ is defined in four ways: first of all, the conversion or transfer of property, knowing that such property is derived from a [drugs] offence, for the purpose of concealing or disguising the illicit origin of the property or of assisting any other person who is involved in the commission of a [drugs] offence to evade the legal consequences of his actions; secondly, the concealment or disguise of the true nature, source, location, disposition, movement or ownership of property, knowing that such property is derived from a [drugs] offence and from an act of participation of such offence;

K. von Lampe, & J. Harvey (Eds.), *Crime business and crime money in Europe: The dirty linen of illicit enterprise* (Nijmegen: Wolf Legal, 2007).

³²The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 3(1)(a)(i)-(iv).

³³*Ibid.*, Article 3(1)(a)(v).

thirdly, the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from a [drugs] offence; and finally, participation in, association or conspiracy to commit, attempt to commit and aiding, abetting, facilitating and counseling the commission of a [drug offence].³⁴

In addition to the creation of money laundering offence, the Vienna Convention allows for the confiscation of the proceeds of drugs-related crimes.³⁵ It also obliges each party to identify, trace, and freeze or seize proceeds, property, or instrumentalities for the purpose of eventual confiscation.³⁶ For this purpose, the principle of banking secrecy shall not interfere with the confiscation.³⁷ The obligations of the requested party in particular are mentioned in Article 5(4) (a) and (b). The party in whose territory the proceeds are found has two obligations: firstly, submit the request to its competent authorities for the purpose of obtaining an order of confiscation;³⁸ and secondly, submit to its competent authorities an order of confiscation issued by the requesting party'.³⁹

The Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (the 1990 Strasbourg Convention)

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (hereinafter: the Strasbourg Convention) was formed based on the consideration that in fighting serious crimes, which has become a global problem, there is a need for modern and effective methods on an international scale.⁴⁰ One of these methods consists of depriving the proceeds from crime.⁴¹ The Convention also recognizes the need for a well-functioning system of international cooperation in conducting the confiscation of property obtained from criminal conducts.⁴²

³⁴The third one is subject to its constitutional principles and the basic concepts of its legal system. See Article 3(c) of the UN Drug Convention.

³⁵*Ibid.*, Article 5(1)

³⁶*Ibid.*, Article 5(2)

³⁷*Ibid.*, Article 5(3)

³⁸*Ibid.*, Article 5(4)(a)

³⁹*Ibid.*, Article 5(4)(b)

⁴⁰The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990, Preamble.

⁴¹*Ibid.*

⁴²*Ibid.*

Regarding the criminalization of money laundering, this Convention adopted the formulation from the Vienna Convention.⁴³ The difference between these relate to the predicate offences that constitute the money laundering offence. If the Vienna Convention refers to drug-related crimes, the Council of Europe Convention does not limit the predicate offence to specified crimes. This convention lets state parties choose which types of crime are considered as predicate offences in their jurisdictions. It is due to varying local dynamics of development that has become complicated for individual states to regulate and enforce. In the Explanatory Report of the Convention, it is expressed that predicate offences should be applicable to serious criminality and to offences generate huge profits.⁴⁴ However, it is also mentioned in the Convention that this element is flexible depending on the relevant domestic legislation of the state party.⁴⁵ A new development of international cooperation in this Convention is coined 'spontaneous information'. Spontaneous information in this context means that a state party, without prior request, may forward to other parties, information on instrumentalities and proceeds if it considers that the disclosure of such information might assist the receiving party in initiating or carrying out investigations and prosecution.

The 1999 United Nations Convention for the Suppression of the Financing of Terrorism

The United Nations Convention for the Suppression of Terrorism concern to the financing of terrorism as a crime.⁴⁶ The Convention asks states parties to create criminal offences under their domestic law in respect of the financing of terrorism. The criminalization of terrorist financing is a new perspective that extends the criminal acts which include both committing of a terrorist attacks as well as financing of such actions. The notion of 'terrorist financing' actually

⁴³*Ibid*, Article 6.

⁴⁴Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Cited in William Gilmore, *Dirty Money: The Evolution of Money Laundering Countermeasures*, Second, Edition, Council of Europe Publishing, 1999, p.126.

⁴⁵The flexibility of this element is provided by Article 6(4) which reads: 'Each Party may, at the limit of the signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that paragraph 1 of this article applies only to predicate offences or categories of such offences specified in such declaration'.

⁴⁶This convention was opened for signature for all states from 10 January, 2000 to 31 December, 2001 and came into force on 9th April, 2002. By June 2004, 109 States had become parties to the convention, and 25 others had signed but not ratified it. The convention is based on a number of considerations, among others, that the financing of terrorism is a matter of grave concern to the international community, the number and seriousness of international terrorist acts depending on the financing that terrorists may obtain, and that there are no multilateral legal instruments which expressly address such financing.

has already existed in other counter-terrorism agreements, such as the 1997 International Convention for the Suppression of Terrorist Bombing. However, the Convention considers the financing of terrorism is not a primary offence but an aiding or abetting the commission of a terrorist act. Meanwhile, terrorist financing in this Convention is considered a primary offence and as severe as those who commit a terrorist offence.

Article 2.1 of the Convention defined 'terrorist financing as 'any person commits an offence within the meaning of this Convention if the person, by any means, directly or indirectly, unlawfully or lawfully, provides or collect funds with the intention that they should be used or in knowledge that they are to be used, in full or in part, in order to carry out [act of terrorism as define in the Convention]'. In accordance with the Convention, the Security Council Resolution 1373 provides the primary legal basis relating to the prevention and suppression of the financing of terrorist acts which obliges countries to take concrete steps and immediately to suppress terrorism and terrorist financing. Here in this context, the Convention prohibits any person from providing or collecting funds with the intention to use in full or in part for carrying out two types of actions. Firstly, any act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex.⁴⁷ Secondly, any act intended to cause death or serious bodily injury to civilians or other persons not taking in the hostilities of armed conflict.⁴⁸ This act is aimed to terrorize a population or compelling a government or an international organization to do or to abstain from doing any act.

⁴⁷The United Nations Convention for the Suppression of Terrorism, article 2 paragraph 1 and article 4. There are nine major conventions and protocols to states' responsibilities for combating terrorism as stated in the listed annex and those are (1) Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970; (2) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971; (3) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; (4) International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; (5) Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980; (6) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988; (7) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; (8) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988; (9) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997. There are penalization requirements in these respect offences, inter alia, offences related to civil aviation, offences based on the status of the victim, offences related to dangerous materials, and most importantly, offences related to the financing of terrorism.

⁴⁸The United Nations Convention for the Suppression of Terrorism, article 2(1)b.

Even though this Convention does not cover the criminalization of money laundering, the prevention of this type of crime has been regulated in article 18. Similar to the previous Conventions, this Convention also calls upon states parties to establish regulatory regime of anti-money laundering, especially, customer identification, report-keeping, and reporting suspicious transaction. Through these preventive measures, participating parties should provide measures for their financial institutions and other professions in identifying financial transactions from someone who interest accounts are open. Special attention should be focused on suspicious transactions and report these transactions if there is suspicion that the funds stem from a criminal activity. States parties also should detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments.

*The 2000 United Nations Convention against Transnational Organized Crime
(The Palermo Convention)*

The Convention aims to promote international cooperation to prevent and combat transnational organized crime. The scope of this Convention covers the prevention, investigation, and prosecution of participants in an organized criminal group (article 5), the laundering of crime proceeds (article 6), corruption (article 8), and obstruction of justice (article 23). However, one thing that should be noted is that these crimes must be transnational in nature.⁴⁹

Regarding the criminalization of laundering criminal proceeds, this Convention formulates it identical to the Vienna Convention and the Strasbourg Convention. The difference lies in the predicate crime as a result of which the proceeds have been generated. If the former links the predicate crime to drugs-related crimes and the latter does not link it to any specific crime but leaves it open ended to the state parties, this Convention encourages state parties to consider the widest range of predicate crimes including serious crimes, participation in organized criminal groups, corruption, and the obstruction of justice.

Within the measure of combating money laundering, the Convention calls upon state parties, through its banks and non-bank financial institutions, to establish a regulatory regime regarding customer identification, record-keeping, and reporting of suspicious transactions.⁵⁰ The Convention also

⁴⁹According to this convention, a crime is transnational if it meets the following requirements: 'it is committed in more than one state; or, it is committed in one state but a substantial part of its preparation, planning, direction, or control take place in another state; or, it is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; or, it is committed in one state but has substantial effects in another state'. See The United Nations Convention against Transnational Organized Crime of 2000, article 3, pr.2.

⁵⁰*Ibid*, Article 7(1)(a).

requires establishing Financial Intelligence Units as a national center for the collection, analysis, and dissemination of information regarding potential money laundering.⁵¹ Furthermore, the Convention calls upon state parties to detect and monitor the movement of cash across their borders.⁵² Finally, the Convention encourages state parties to promote international cooperation among judicial, law enforcement, and financial regulatory authorities.⁵³

The 2003 United Nations Convention against Corruption

Corruption is commonly defined as ‘the misuse of public office or power to gain’.⁵⁴ The 2003 UN Convention against Corruption⁵⁵ provides for the criminalization of certain corruption-related activities such as bribery (article 15, 16, and 21), embezzlement (article 17 and 22), trading in influence (article 18), abuse of functions (article 19), illicit enrichment (article 20), concealment (article 24), and obstruction of justice (article 25). In addition, the Convention also criminalizes the laundering of criminal proceeds derived from such corrupt-activities (article 23).

The criminalization of criminal proceeds obtained from corruption is very important because such corrupt-activities generate a large amount of illicit money that is necessary to conceal. By criminalizing the proceeds of crime, the Convention calls upon state parties to establish regulatory regime of anti-money laundering. Customer identification, record-keeping, and the reporting of suspicious transactions⁵⁶ are the main pillar of regulatory regime. The FATF recognized the close relationship between corruption and money laundering. In relations to Politically Exposed Person (PEP)⁵⁷, the FATF asks to financial

⁵¹*Ibid*, Article 7(1)(b).

⁵²*Ibid*, Article 7(2).

⁵³*Ibid*, Article 7(4).

⁵⁴Herbert V. Morais, “Fighting International Crime and Its Financing: The Important of Following Coherent Global Strategy based on the Rule of Law”, *Vill Law Review*, 2005, p.584.

⁵⁵The convention opened for signature from 9 to 11 December 2003 in Merida, Mexico, and thereafter at the United Nations Headquarters in New York until 9 December 2005. The convention aims to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption including in asset recovery; and to promote integrity, accountability and proper management of public affairs and public property. The convention concern the prevention, investigation and prosecution of corruption and the freezing, seizure, confiscation and return of the proceeds of offences as established in this convention.

⁵⁶Articel 14(a).

⁵⁷PEPs are defines as ‘individual(s) who are or have been entrusted with prominent public functions in a foreign country, for example, Head of States or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, imprtant political parti officials’.

institutions to exercise enhanced customer due diligence measures. The Convention also obliges state parties to establish a Financial Intelligence Unit (FIU) serving as a national center for the collection, analysis, and dissemination of information regarding potential money laundering.⁵⁸ Finally, the Convention calls upon state parties to monitor the movement of cash across their borders for detecting potential money laundering offences.⁵⁹

4.4. Money Laundering as a Crime: Analyzing of Criminal Act and Criminal Liability

This section aims to analyze constitutional elements of money laundering crime. Here in this context, it establishes criteria to classify the act of money laundering as a crime. With regards to the constitutional elements, prohibited conducts (*actus reus*) and mental elements (*mens rea*) are two components required for establishing a criminal conviction. The problem however lies in how, on a practical level, these two components ought to be applied to the complicated and sophisticated process of money laundering criminalities. This section applies on how theoretical studies and court practices encounter these problems.

4.4.1. A Theoretical Context of Criminal Act and Criminal Liability

The term criminal act can be defined as ‘the physical act involved in the commission of a crime or an offence’,⁶⁰ or ‘a willed movement or act as bodily movement whether voluntary or involuntary’.⁶¹ Criminal acts can be differentiated into a positive act or an act of commission, and a negative act or an act of omission. It is an act of commission if there is a physical conduct that is prohibited by a law. An act of omission, on the other hand, occurs when a person fails to do something that is required by law. In the act of omission, any crime can occur without criminal action actually being committed.

Another matter that is concerned with criminal action is the distinction between *mala in se*⁶² and *mala prohibita* crimes⁶³. The phrase *mala in se* stems

⁵⁸Article 14(b)

⁵⁹Article 2.

⁶⁰See <http://hjem.get2net.dk/safsaf/glossary.html>

⁶¹Paul H. Robinson, “Should the Criminal Law Abandon the *Actus Reus – Mans Rea* Distinction?” in Stephen Shute, John Gardner, and Jeremy Harder (Eds), *Action and Value in Criminal Law*, (Oxford: Clarendon Press, 1993), p.190.

⁶²*Mala in se* in this context is ‘evil in itself, behavior that is universally regarded as criminal’. See http://www.abanet.org/publiced/glossary_m.html

from the Latin and means ‘wrong in itself’. In contrast, *mala prohibita*, addresses a conduct that is wrongful not because of its intrinsic nature but because it is prohibited by statutes which are manifested into public welfare offences⁶⁴ or regulatory crimes⁶⁵. *Mala prohibita* crimes are not naturally evil or wrong, but have been deemed unacceptable acts by society. The term *mala in se* and *mala prohibita* can also be used to draw the distinction between ‘morally and legally proscribed offences’.⁶⁶ With regard to money laundering, the types of conducts as formulated in the Drugs Vienna Convention and other statutes can be categorized as a *mala prohibita* crime. In this context, money laundering is illegal because laws define them as such. The criminalization of money laundering, which is categorized as a recent phenomenon, indicates a shift of criminal actions in the scope of *mala in se* to the *mala prohibita*. This phenomenon also indicates what Karen called ‘the changing face of criminal law from its classic version to a modern one’.⁶⁷

The term *mens rea* or ‘guilty mind’, which means morally wrong, refers to the subjective element of a particular crime. A defendant is guilty if his conduct is criminal and if they are in a culpable mental state.⁶⁸ These states of mind consist of four levels of culpability: ‘intention or purpose’, ‘knowledge’, ‘recklessness or willful blindness’, and ‘negligence’. The early conception of *mens rea* has been described as ‘a general notion of moral blameworthiness’⁶⁹,

⁶³Mala prohibita is ‘behavior that is criminal only because society defines it as such’, or it is specifically defined as unlawful by statutes or regulations. See http://www.abanet.org/publiced/glossary_m.html. Davis points out that the distinction between *Mala in Se* and *Mala Prohibita* aims to differentiate between legally proscribed moral offences. See Mark S. Davis (2006), “Crimes *Mala in Se*: An Equity-Based Definition”, *Criminal Justice Policy Review*, Vol.17, No.3, 270-289, p.270.

⁶⁴Paul Rozenzweig, “The Over-Criminalization of Social and Economic Conduct”, Legal memorandum #7, see at <http://www.heritage.org/Research/LegalIssues/lm7.cfm>

⁶⁵The act is wrong because it is created by a legislative body to serve some perceived public good. See Paul Rosenzweig, *Ibid.* See also Eli Lederman (2000), “Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity”, *Buffalo Criminal Law Review*, Vol.4:641, p.665, 667. This kind of offence does not require proof of will.

⁶⁶Karen W, “Natural and Legal Crime”, 2008. Available at http://www.associatedcontent.com/article/1284741/natural_and_legal_crime.html

⁶⁷*Ibid.*, p.2.

⁶⁸In liberal theory, every imposition of criminal liability requires a sufficient justification. The central concepts by reference to which criminal law theory seeks such justifications are harm and fault. On this account, criminal liability is morally justified (at least) when sufficiently serious harm is brought about with a sufficiently culpable mental state’. See Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil recovery, Criminal laundering and Taxation of the Proceeds of Crime*, (Oxford and Portland, Oregon: Hart Publishing, 2003), p.25.

⁶⁹Remington & Helstad, *The Mental Element in Crime- A Legislative Problem*, *Wisconsin Law Review*, 1952, p.648-49.

an ‘evil-meaning mind’⁷⁰, or a ‘vicious will’⁷¹. These conceptions are based on ‘consideration that people can control their behaviour and choose alternative forms of conduct’.⁷² In other words, as Hart argues, ‘an individual should not be held criminally liable unless she had the capacity and a fair opportunity to do otherwise’.⁷³

The development of science and technology, which was followed by the advanced, complicated and sophisticated modus operandi of crimes, has affected the doctrine of *mens rea* in criminal law. *Mens rea*, which was based on a guilty mind, has extended its scope by employing liability without fault which comprises strict liability and vicarious liability. Strict liability refers to criminal offences where no *mens rea* is required due to the presence of one or more *actus reus*.⁷⁴ This kind of liability was developed in the practice of courts. For certain types of crimes,⁷⁵ judges in the common law system, made decisions to implement liability without fault. These were then formulated by legislators in the structure of criminal law. According to Marise Cremona, the main reason for implementing strict liability is the protection of society because in certain types of crimes there are some difficulties in proving the guilty mind of the offenders.⁷⁶

Vicarious liability, meanwhile, refers to a superior, who is not at fault, is more liable for the conduct of another.⁷⁷ Henry Compbell proposed another definition of vicarious liability, referring to the ‘indirect legal responsibility, the liability of an employer for the act of an employee, or a principle for torts and contracts of an agent’.⁷⁸ The basic difference between strict liability and vicarious liability is whether there is or is not an *actus reus* and *mens rea*.⁷⁹ Strict liability does not need *mens rea*; the existence of *actus reus* is enough,

⁷⁰Morissette v. United States, 342 U.S. 246, 251 (1952), *Ibid*

⁷¹W. Blackstone, Commentaries *21, *Ibid*.

⁷²Sayre, The Present Signification of Mens Rea in the Criminal law, in Harvard Legal essays, 1934, p.411-12. Quoted from Paul H. Robinson and Jane A Grall, “Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond”, Stanford Law Review, Vol.35, 1983, p.685.

⁷³H.L.A Hart, Punishment and Responsibility: Essays in the Philosophy of Law, Oxford: Clarendon, Press, 1968.

⁷⁴Marise Cremona, *Criminal Law*, (London: the Macmillan Press Ltd, 1989), p.54.

⁷⁵Types of crimes that proposed using strict liability are *mala prohibita* crimes or regulatory offences or public welfare offences.

⁷⁶Marise Cremona, *Supra* note 74, p.54.

⁷⁷Peter Gillies, *Criminal Law*, (Sidney: the Law Book Company, 1990), p.109.

⁷⁸H.Campbell, *Black’s Law Dictionary*, St Paul Minn, West Publishing, 1979, p.1404.

⁷⁹William Glanville, *Criminal Law: The General Part*, 2nd ed., (London: Steven and Sons, 1961), p.p.285-286.

whereas vicarious liability still requires *mens rea* from the employment in order for an employee to be held responsible.

Furthermore, in its development, criminal liability has extended its scope to legal persons. In the criminal law perspective, a legal person can be liable for the acts or omissions of individuals who act on behalf or for the benefit of the corporation. The imposition of criminal liability on the corporation was introduced based on the consideration that it would be unjust to only punish individual corporate actors for criminal punishment when it is the corporate culture that is the origin of the criminal behavior. Without corporate liability, many crimes would be insufficiently punished because the size and structure of many corporations make it impossible to adequately allocate responsibility to individuals.

4.4.2. Elements of Criminal Acts in the Laundering Process

As mentioned in the various international legal instruments, the formulation of money laundering offences consists of a criminal act (*actus reus*) and a criminal liability (*mens rea*). With respect to the criminal act, the offence of money laundering involves a set of actions: the first conduct is the conversion or transfer of property; the second is the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property; The third is the acquisition, possession, or use of property; finally, the fourth conduct is the participation in, association to, or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counseling the commission of such actions.

The first type of conduct in the laundering process is conversion or transfer of property. The idea of conversion is to transform the illegal cash into other types of assets or currencies for portability purposes. For example, the perpetrator uses the illicit funds for purchasing expensive goods, resells them with payment by traveler cheques, bank drafts, or letters of credit, and then places the illegal funds into a financial institution. These activities aim to convert money from an illegitimate (dirty money) to a legitimate (clean money). With regard to money laundering, transfer concerns the movement of illicit funds through a series of complex financial transactions in order to obscure the origin of the funds.

The object of the conversion or transfer is property. The UN Vienna Convention defined property as 'assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in such assets'⁸⁰.

⁸⁰The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, Article 1(g).

Property in this context is derived from criminal activity that refers to predicate offences generating illegal cash necessary to launder. Under these circumstances, the goal of these types of conduct is to conceal or disguise the illicit origin of the property or to obscure their link with the crime and make them appear legitimate.

The second type of conduct is the concealment or disguise of money that is illegally obtained, so as to make it appear legitimate. In the context of money laundering, concealment can be understood as the hiding of profits earned from criminal activities. Pinto and Chevalier differentiate between concealing and disguising by giving a description where ‘conceal refers to the property that belong to anyone or legally able to dispose, while disguise refers to the property of another’.⁸¹ The scope of the latter type of conduct is narrower than the former. ‘Disguise’ in this context is traditionally criminalized, and what Pinto and Chevalier call ‘a form of participation, through the so-called accomplice a posteriori’.⁸² However, if we look into the Vienna Convention and the Palermo Convention, differentiation is made between these types of conduct from the classic definition of disguise. According to these legal instruments, ‘a person commits this crime without having taken part in the predicate offence and without previously collaborating in its perpetration. He helps the author either to ensure the result of the predicate offence or to avoid punishment or prevent justice from being done’.⁸³

The third type of conduct is the acquisition, possession, or use of property, knowing at the time of receipt that such property was derived from a criminal activity or form of active participation in such activity. In this context, people other than professionals and criminals themselves can become money launderers either by possessing the proceeds or representing them if they know at the time of receipt that such property was derived from criminal activity. Although these typical types of conduct do not cover the author of the predicate offence, they are categorized as money laundering.

Finally, the fourth type of conduct is participation in, association to commit, attempt to commit, and aid, abet, facilitate, and counsel the commission of such actions. These types of conduct refer to the doctrine of complicity which provides the theoretical groundwork for holding criminally liable those who aid, assist, and encourage others in committing a crime. These conducts are independent and separated from the author of the predicate offence. However, authors are subject to criminal prosecution if they knowingly associate with money laundering. Lawyers, accountants, or notaries,

⁸¹Ricardo Pinto and Ophelie Chevalier, “Money Laundering as an Autonomous Offence: Analysis of the Consequences of the Autonomy of Money laundering Offence, Inter-American Drug Abuse Control Commission, Washington DC, 2006, p.18.

⁸²*Ibid*, p.11.

⁸³*Ibid*. p.19.

for example, who create the scheme of money laundering either willingly or accidentally, are involved in the commission of this crime. Due to these circumstances, they are exposed to criminal prosecution as *aider* or *abettor*.

Beside the four laundering categories as elaborated above, money laundering activities have extended to the diversification of these conducts, which involve failure to file a report⁸⁴ that is required by laws and tipping off or smurfing. The first conduct involves failure to file customer identifications, failure to keep transaction records, and failure to report suspicious transactions. In the meantime, tipping off or smurfing is breaking a large sum of illicit money into smaller sums and depositing them into banking account(s) to avoid the limited reporting requirement of currency. Both conducts are actually categorized as regulatory offences, but in the context of money laundering, they are similar to the predicate crimes that generate the criminal proceeds. Even the punishment of money laundering could be more severe than the offences that underlie the offences.

4.4.3. Criminal Liability of the Laundering Process

4.4.3.1. Criminal Liability of Individual

With respect to *mens rea*, the mental element of a money laundering offence in various legal instruments involves ‘knowledge’⁸⁵, ‘intent’⁸⁶ and ‘purpose’.⁸⁷ According to general principles of criminal justice, the prosecutor must prove that the launderer knew the money was derived from specified crimes. The prosecutor must also prove that by manipulating the funds, the launderer intended to hide its origin, nature, location, ownership, or any other aspect thereof as described in the definition of money laundering. Therefore, ‘intent’

⁸⁴Issues identified in the money laundering theme work included failures to:

- ✓ conduct, or the inappropriate conducting of, KYC checks;
- ✓ undertake full identification and address verification for introduced customers;
- ✓ carry out adequate verification of beneficial ownership for corporate accounts;
- ✓ subject account opening to appropriate management controls where necessary;
- ✓ acquire source of wealth information despite requirement to understand the nature of customer’s business. See Keith McCarthy, “UK Chapter 1: Laundering the Proceeds of Crime- Methodology?” in Mark Simpson, Nicole Smith, Arun Srivastava (General Editors), *International Guide to Money Laundering Law and Practice*, third edition, Bloomsbury Professional, Haywards, 2010, p.11.

⁸⁵‘Knowledge’ means ‘knowing that something has happened or is true’. ‘See Longmann, Dictionary of Contemporary English, *Op.Cit*, p.1003.

⁸⁶‘Purpose’ means ‘deliberately or the intent to do an act’. See *Ibid.*, p.948.

⁸⁷‘Intent’ means ‘to be determined to do something or achieve something’, *Ibid.* p.1459.

and ‘knowledge’ in this provision must be proven in order to establish a willful violation.

However, considering the complexity of money laundering operations, such proof of intent might be very difficult to obtain. As such, as explained earlier, the Vienna Convention and subsequent international instruments consider that ‘knowledge, intent, or purpose required as element of the offence may be inferred from objective factual circumstances’.⁸⁸ This means that the criminal liability may be proven if the objective factual circumstances indicate that the perpetrator has the ‘knowledge’ to commit the crime. Thus, it could be assumed that the laundering offences might be committed while the defendant either *knew* or *reasonably ought to have known* that the proceeds were derived from specified unlawful activities. In other words, this kind of liability is called ‘wilful blindness’.

Wilful blindness is ‘a term used in law to describe a situation in which an individual seeks to avoid civil or criminal liability for a wrongful act by intentionally putting himself in a position where he will be unaware of facts which would render him liable’.⁸⁹ Simply put, wilful blindness is deliberate ignorance – the tense that ‘I do not want to know about this’, and ignoring or not investigating certain ‘flags of suspicion’.⁹⁰ In the context of money laundering, wilful blindness acknowledges the individual’s intentional unawareness of the source of illegal funds.⁹¹ According to this standard, the defendant deliberately did not observe an act that would otherwise have been obvious to him/her.⁹² In the case of *United States v. Jewell*, the rationale behind

⁸⁸The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article 3(3).

⁸⁹Luban, *Contrived Ignorance*, Georgetown Law Journal, Vol.87, 1999, p.957.

⁹⁰*United States v. Smith*, 46 F.3d 1223, 1237 (1st Cir. 1999; finding that the defendant was willfully blind when he left the room during a discussion of the scheme saying, ‘I don’t want to hear this’. Citing in Marian Hagler, “International Money Laundering and United States Law: A Need to Know Your Partner”, Syracuse Journal of International Law and Commerce, Vol.31, No.2, 2004, p.254.

⁹¹*Jewel*, 532 F.2d at 700. It is also called ‘deliberate ignorance’, one standardized jury instruction for willful blindness reads, in pertinent part, as follows: The government may prove that the Defendant acted ‘knowingly’ by proving, beyond a reasonable doubt, that this defendant deliberately closed [his/her]eyes to what would otherwise have been obvious to [him/her]. No one can avoid responsibility for a crime by deliberately ignoring what is obvious. A finding beyond reasonable doubt of an intent of the defendant to avoid knowledge or enlightenment would permit the jury to infer knowledge. Stated another way, a defendant’s knowledge of a particular fact may be inferred from a deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact. Cited in Kirk W. Munroe, “Surviving the Solution: Extraterritorial Reach of the United States”, Dickinson Journal of International Law, Vo.14, 1995-96, p.510.

⁹²Edward J. Devitt, et al, “Federal Jury Practice and Instructions” § 17.09 (4th ed. 1992). Cited in Pamela H. Bucy, “The Fight against Money Laundering: A New Jurisprudential Direction”, Alabama Law Review, Vol.44, 1992-1993, p.844.

this standard is that no individual should be able to ignore the obvious, otherwise it is evident that he was being ignorant towards the criminal activity.⁹³ This means that as long as the participant knows the money is dirty, or is wilfully blind to the illicit source of money, there is a money laundering violation. By applying this kind of liability in money laundering, it is easier for the prosecutor to prove the element of criminal liability.

4.4.3.2. Criminal Liability of Legal Persons

It was not until the end of the 2000's, where a legal person, as the subject of money laundering, has become an issue in international law. The Vienna Convention of 1988, the Strasbourg Convention of 1990, and the Council Directive of 1991 do not contain any provisions that considered the liability of legal persons. The issue of corporate criminal liability was envisaged for the first time in the Palermo Convention of 2000⁹⁴. Subsequently, the issue is addressed directly by the UN Convention against Corruption of 2003,⁹⁵ the FATF Forty Recommendations (2003),⁹⁶ and the Council Directive of 2005.⁹⁷ These provisions call for State Parties to establish the liability of legal persons and provide sanctions in the field of civil, administrative, and criminal law. The acceptance of corporate criminal liability is proper and logical because it is apparent that money laundering may be conducted by, through, or under the cover of legal entities such as financial intermediaries.

However, the imposition of criminal liability on the legal person remains controversial. On the one hand, some legal systems reject the imposition of criminal liability on a corporation, since a corporation possesses no mental state. In this case, de Maglie argued that:

'Systems rejecting corporate criminal liability are usually justified not by policy analysis but, rather, by formal doctrinal theory.... These theories affirm that mankind alone is the focus of criminal law; only individuals have the capacity of self-determination and the capacity of moral choice, and the essence of criminal liability relies upon a sum of psychophysical factors unique to individuals'.⁹⁸

⁹³United States v. Jewell, 532 F.2d 697 (9th Cir); Ira P. Robins, "The Ostrich Instruction: Deliberate Ignorance as a Criminal *Mens Rea*", 81 J. Crim. L. & Criminology, 1990, p.191.

⁹⁴The United Nations Convention against Transnational Organized Crime of 2000, Article.10

⁹⁵The United Nations Convention against Corruption of 2003, Art.26.

⁹⁶Recommendation 3 of the FATF Forty Recommendations (2003).

⁹⁷The EU Directive on Money laundering 2005, Art.2(3).

⁹⁸C. de Maglie, "Models of Corporate Criminal Liability in Comparative Law", Washington University Global Studies Law Review, Vol.4, 2005, p.548.

On the other hand, however, there is another opinion which argues that a corporation may be held criminally liable with the intervention of a natural person.⁹⁹ Here in this context, corporation criminally liable by applying the technique used for human beings. From the latter perspective, the *actus reus* and *mens rea* of those individuals who act on behalf and for the benefit of the corporation are automatically attributed to the corporation.¹⁰⁰ Various systems of corporate criminal liability that stem from court practices as well as theoretical studies have emerged.¹⁰¹ However, there is no single theory on the corporate mental state that justifies the imposition of criminal penalties on corporations

By emphasizing on theoretical studies and court practices in common law system, there existed three models or theories of corporate criminal liability. The first is the adaptation and imitation model, the second one is the aggregation or collective knowledge model, and the last one is the faulty organization model. The following provides critical analyses of these three models and examine the reforms promoted by the anti-money laundering regime regarding these issues.

(i) Adaptation and Imitation Models

The models of adaptation and imitation originated from the law of torts, which transferred from the civil sphere to the criminal arena. These models actually reflect an anthropomorphic conception of the corporation.¹⁰² Anthropomorphism is ‘a concept whereby human characteristics or behaviour are attributed to inanimate objects or natural phenomena’.¹⁰³ In the context of a corporate mental state, an anthropomorphic model measures corporate *mens*

⁹⁹Hans de Doelder and Klaus Tiedemann (Eds), *Criminal Liability of Corporations*, (The Hague/London/Boston: Kluwer Law International, 1996), p.304. ‘The corporation itself can act, only with intervention of natural person. The actions of natural person are imputed to the corporation, within the context of the social reality’.

¹⁰⁰*Ibid.*

¹⁰¹‘The scope of criminal liability has been extended to include corporations in reponding the development of corporate liability which has moving into three things: from ommission to active behavior’ from absolute liability to criminal intet, and from vicarious liability to the direct liability’. See E. Lederman, “Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation, Toward Aggregation and Search for Self Identity”, Buffalo Criminal Law review, Vol.4, 2000, p.642-3.

¹⁰²Kris Hinterseer (2002), *Supra* note 26, p.p.112, 120, 121. ‘the effect is to anthropomorphise the company, which means to attribute some, but not all, human traits to the corporate entity... Anthropomorphism is useful to the extent that it enables the law to ‘breathe life’ into an entity that exist only on paper, so that its actions can be controlled, regulated, measured against social standards embodied in the law and, where appropriate, sanctioned for improper conduct’.

¹⁰³See <http://www.thefreedictionary.com/anthropomorphic>;

rea by using the standard applied to individual liability.¹⁰⁴ By relying on ideas of adaptation and imitation models, the law attempts to ensure that the existence of human characteristics might apply to a corporation as well.¹⁰⁵ Two different theories of corporate mental state, which are manifested into various domestic legal systems across the world, involve vicarious liability and identification liability.

The first theory is vicarious liability.¹⁰⁶ This theory was used for the first time in the realm of tort law where there is an automatic liability for the offences committed by officers, employees, and agents acting within the scope of their employment and for the benefit of the corporation.¹⁰⁷ Under this theory, the act and the knowledge of the agent are those of the corporation.¹⁰⁸ In other words, a corporation may become criminally liable for the conduct of its employees.¹⁰⁹ This theory is significant on three counts: an individual employee commits a crime and the liability of the individual is then imputed to the corporation; the employee must have acted within his or her employment; and the employee must have intended to benefit the corporation.¹¹⁰

The second theory of corporate liability is the identification liability theory. Identification liability relies upon ‘the notion of personification and identification of the legal body’.¹¹¹ Under this theory, activities committed by leading employees, such as directors and high-level managers acting on behalf and for the benefit of the corporation, can be attributed to the corporation.¹¹² The functions of the leading employees in this context are to control and manage the affairs of the corporation. In the case of *H.L. Bolton (engineering) Co. Ltd vs. T.J. Graham & Sons Ltd.*, it was Lord Denning who adopted the ‘directing mind and will’ theory of corporate liability.¹¹³ In his verdict, Lord

¹⁰⁴C. de Maglie (2005), *Supra* note 98, p.556.

¹⁰⁵E. Lederman (2000), *Supra* note 101, p.651.

¹⁰⁶The US federal courts adopted vicarious liability as a general model for corporate criminal liability. See J. Clough, “Bridging the Theoretical Gap: The Search for A Realist Model of Corporate Criminal Liability”, *Criminal Law Forum*, Vol.18, 2007, p.270.

¹⁰⁷E. Colvin, “Corporate Personality and Corporate Criminality”, *Criminal Law Forum*, Vol.6 No.1, 1995, p.6.

¹⁰⁸*Ibid.*

¹⁰⁹*Ibid.*

¹¹⁰Corporate Criminal Liability, Discussion Paper, March 2002. Available at <http://www.justice.gc.ca/eng/dept-min/pub/jhr-jdp/dp-dt/iss-ques.html>

¹¹¹E. Lederman (2000), *Supra* note 101, p.651.

¹¹²Leonardo Borlini, “Issues of the International Criminal Regulation of Money Laundering in the Context of Economic Globalization”, *Paolo Baffi Centre Research Paper Series No.2008-34*, 2008, p.42-3.

¹¹³J. Clough (2007), *Supra* note 106, p.271.

Denning argued that the corporation, like a human body, has a brain, nerve centre, and hands. The decision reads as follows.

‘A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.’¹¹⁴

It is at this point that questions arise about whether the individual who makes a corporation liable is also personally liable. In this case, multiple liabilities are accepted that penalize both corporation and individual, although it is not easy to reconcile this solution with the merger theory. With respect to money laundering, the first national case to impose a criminal liability on a corporation was the Bank of Boston case.¹¹⁵ In this case, the Bank of Boston was indicted for its failure to report a series of cash transactions, undertaken with a group of mostly Swiss banks, and involving more than \$1.2 billion. The Bank of Boston pleaded guilty and was fined \$500,000.

(ii) The Aggregation or Collective Knowledge Model

Considering the practical difficulties associated with adaptation and imitation models in facing the complex characteristics and unique nature of corporations, some scholars and policy makers proposed employing the aggregation model in examining the liability of a corporation.¹¹⁶ As an adjective, aggregate signifies ‘the conjunction or collection of particulars into a whole mass or sum; total, combined’.¹¹⁷ Aggregation as an idiom means ‘taken into account as a whole’.¹¹⁸ In the context of corporate liability, aggregation could involve matching the conduct of one individual with the state of mind or culpability of another individual. Alternatively, the behaviour of one agent can be joined with the knowledge of another in order to create a criminal offence.

¹¹⁴The case of H.L. Bolton (Engineering) Co. Ltd vs. T.J. Graham & Sons Ltd. See Richard Card (1984), *Introduction to Criminal Law*, 10th edition, Butterworths, London, p.123. See also Christina De Maglie (2005), *Supra* note 98, p.p.556-57.

¹¹⁵The indictment took place in February 1985.

¹¹⁶Some scholars assume that the doctrine of identification liability is ‘unsuited to modern decentralized corporations where considerable responsibility may be delegated to middle-management. See J. Clough (2007), *Supra* note 106, p.273.

¹¹⁷See <http://dictionary.reference.com/browse/aggregate>

¹¹⁸*Ibid.*

With regard to money laundering, a well-known illustration of collective knowledge liability is the *United States vs. Bank of New England*. The bank was charged of willfully failing to file reports relating to currency transactions exceeding a certain statutory amount. The case reads as follows:

'From May 1983 through July 1984, bank customer James McDonough engaged in thirty-one separate transactions with the Bank of New England, each in excess of \$10,000. On each occasion, McDonough would present several counter checks to the teller; each check was for less than \$10,000, with the aggregate total exceeding \$10,000 in cash in exchange for the counter checks. The bank did not file a CTR on any of these transactions until after it had received a grand jury subpoena. The bank was convicted on thirty-one felony counts and appealed on several alternative grounds, including the trial court's instructions with respect to willful violation'.¹¹⁹

The problem in the above case lies in proving the criminal intent of the corporation. It is apparent that the corporation can act only through its employees. This means that the prosecutor must prove some degree of willful violation by individual employees of the corporation. When the question of the bank's knowledge and intent to commit the offence was raised, in light of its obligation to report a transaction that follows from the aggregation of several checks, the judge in the lower court referred to the subject of collective knowledge and instructed the jury as follows:

'You have to look at the bank as an institution. As such, its knowledge is the sum of all the knowledge of all its employees. That is, the bank's knowledge is the totality of what all of the employees knew within the scope of their employment. So, if employee A knows of one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the banks know them all. So, if you find that an employee within the scope of his employment knew that the [reports] had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of the several employees knew a part of the requirement and the sum of what the separate employees knew amounted to the knowledge that such a requirement existed'.¹²⁰

From the above case, it can be said that the aggregation model expands the identification and vicarious liability models of corporate criminal liability. This expansion is done based on the consideration that a corporation's processes and structures are complex. Moreover, decisions in the corporation are made by a number of individuals at different levels of management. In any case, the act of one individual cannot make a corporation guilty. However,

¹¹⁹*United States of America, Plaintiff, Appellee, v. Bank of New England, N.A., Defendant, Appellant*, 821 F.2d 844 (1st Cir. 1987). See Joseph B. Mays, Jr, "The Mens Rea Requirements in the Money Laundering Statutes", *Alabama Law Review*, Vol.44, 1993, p.734.

¹²⁰*United States of America, Plaintiff, Appellee, v. Bank of New England, N.A., Defendant, Appellant*, 821 F.2d 844 (1st Cir. 1987) . See <http://vlex.com/vid/america-bank-new-england-defendant-37157346>

when combined with other acts of individuals, it can be proven that the corporation is guilty in its failure to comply with the law. In this case, the aggregation or collective knowledge model can be implemented. Furthermore, Munroe pointed out that ‘under U.S. legal theory, a corporation is deemed to have ‘collective knowledge’ of all of its employees. Even though no single employee knew all the facts, the corporation, under the ‘collective knowledge theory’, is deemed to know everything known by all of its employees’.¹²¹

(iii) *The Faulty Organization Model*

The faulty-organization model, otherwise known as a realist model, seeks to reflect the corporation as an entity with its own distinctive goals, cultures, and personality.¹²² The central assumption of the faulty organization model is the original responsibility of the corporate entity.¹²³ While in the identification and aggregation theory, the conduct is based on a representative of the corporation - an employee, agent, or officer - which is attributed to the corporation, in the fault-organization model, the prosecution is based on the corporation’s failure to act in its own right. C. de Maglie differentiates four theories using this model: corporate policy, corporate culture, preventive-corporate fault, and reactive-corporate fault.¹²⁴ These theories focus on the organization’s structure, practices, and policies. In her own words, she points out that:

‘(1) Under corporate policy, corporate liability may attack under any corporate policy that intentionally or foreseeable enables illegal actions. First, corporate crime may be found where the policies are illegal because they compel and or authorize criminal conduct. Second, illegal action may be found where the policies and practice, although lawful in themselves, encourage a crime in a foreseeable way. (2) Under corporate culture, a finding of culpability rests upon the assumption that the personality of the corporation encourages its agents to commit crimes. (3) The preventive-fault of criminal liability finds liability when a corporation fails to take reasonable steps to prevent or detect criminal conduct. (4) The reactive-fault exists when a corporation fails to react satisfactorily to the actus reus of an offence. Failure to undertake effective preventive and corrective measures in response to the discovery of an external element of a crime in a force of corporate fault’.¹²⁵

¹²¹Kirk W. Munroe (1995-6), *Supra* note 94, p.512.

¹²²J. Clough (2007), *Supra* note 116, p.275. *See also* E. Colvin (1995), *Supra* note 110.

¹²³Leonardo Borlini (2008), *Supra* note.115

¹²⁴C. De Maglie (2005), *Supra* note 101, p.558.

¹²⁵C. De Maglie (2005), *Supra* note 101, p.558.

4.5. The Repressive Measures of Anti-Money Laundering Regime

Repressive measures concern tackling the act of money laundering. They take place at the framework of private sectors, Financial Intelligence Unit (FIU), and Criminal Justice System (CJS). The private sectors, which consist of banks, non-bank financial institutions, and professional agencies, are obliged to report suspicious transactions to the competent authorities. The FIU is in charge of receiving, analyzing, and disseminating financial information. The CJS, finally, is in charge of investigating, prosecuting, and adjudicating the crime. The mechanism and relationship of these institutions are as follows: first of all, the private sectors were required to report suspicious transactions to the FIU. Afterwards, the FIU analyzes the report and then, if there is an indication of a criminal conduct, forwards the case to the CJS. Furthermore, the CJS continues handling the case by conducting investigation, prosecution, and conviction of the perpetrators. This section is going to analyze the role of private sectors, FIU, and CJS in the framework of repressive measures in countering money laundering offences.

4.5.1. The Role of Private Sectors

In the context of anti-money laundering policy, private sectors refers to the financial institutions (such as banks), non-financial institutions (such as insurance agencies, travel agencies, brokers, dealers, casinos, and the alternative remittance system), and professionals (such as lawyers, accountants, and notaries). These sectors have duties to identify customers, keep detailed records of clients and their transactions, and report any suspicious transactions to the government. Another task of the private entities is to monitor client transactions and report to the competent authority if there is a suspicion the transactions might involve the proceeds of crime. In this case, the role of the private sectors is as ‘private policemen’ with the task of detecting crime and gathering information. This means that there is a privatization of policing function from law enforcement authorities to the private sectors.

Privatization simply stands for the shifting of functions and responsibilities from the government to the private sector.¹²⁶ In the context of government, the term is conventionally understood to signify a transfer of public responsibilities to private hands.¹²⁷ Metzger differentiates it into two

¹²⁶The US General Accounting Office (GAO). Richard D. Young, Competitive Sourcing in State Government, <http://www.ipspr.sc.edu/ejournal/ejmay05/Privatization.pdf>, p.2.

¹²⁷Gillian E. Metzger, “Privatization as Delegation”, *Columbia Law Review*, Vol.103, 2003, p.1377. See also Paul Starr (1988), “The Meaning of Privatization”, *6 Yale Law & Policy Review*, 1988, p.p.6, 9.

categories: the shifting of governmental function to the private entities, and the government uses private entities to implement its programs or provide services to others on the government's behalf.¹²⁸ For the first category, the government uses private entities to implement its programs or provide services to others on the government's behalf. This category is usually carried out in the field of welfare sectors such as hospitals, education, prisons, and so on. For the second category, the government gives significant control and responsibility to the private entities. The second category of privatization can be differentiated into three types of authority which involve prescriptive, enforcement, and judicial power.¹²⁹ In the prescriptive power, the private agencies have a rule-making authority in the scope of their duties. In the enforcement power, private agencies have two kinds of functions which involve regulatory enforcement and the enforcement in the realm of criminal justice system. The former involves the duties to implement regulation in the scope of their entities. The latter involves the duties to carry out part of the criminal justice system as is done through policemen or prisons. Finally, in the judicial power, the private agencies have an authority to conduct judicial processes such as the Alternative Dispute Settlement in the World Trade Organization (WTO) and the International Criminal Court (ICC).¹³⁰ The important question in this regard is why privatization is needed. In other words, why do governments delegate their functions or powers to the private agencies?

Privatization, directly or indirectly, is caused by globalization.¹³¹ It creates the growing complexity of social and economic activities. A government does not have, under the current circumstances, enough power, expertise, or authority to govern the social and economic activities that expand

¹²⁸Gillian E. Metzger (2003), *Ibid.*

¹²⁹Heba Shams, *Legal Globalization: Money Laundering Law and Other Cases*, International Financial Law Series, 2004, p.162.

¹³⁰*Ibid.*

¹³¹*Ibid.* The term 'globalization' is understood the integration and interaction of people, companies, and government from different nations; it is a process driven by international trade and investment, and facilitated by information technology (http://www.globalization.org/What_is_Globalization.html). Globalization is also understood as the development of internationally-oriented social and economic relationships (*See* A. Giddens, *Beyond Left and Right: The Future of Radical Politics*, Cambridge: Polity, 1994, p.4). Likewise, globalization may be seen as the erosion of economic, political, social and cultural boundaries between countries. These include changes in the identity of peoples, greater acceptance towards out of state, and transformations in strategies that depend on the cooperation of international bodies in order to find solutions (*See*, i.e, Hans-Henrik Holm, "Globalization and What Governments Make of It", European University Institute, Firenze. Paper, Unpublished, p.4; Stephan Paul Haigh, "Globalization and the Sovereign State: Authority and Territoriality Reconsidered", University of Otago; Department of Political Studies; Refereed paper presented to the First Oceanic International Studies Conference; Australian National University, Canberra 14-16 July 2004, p.2.

beyond its borders.¹³² It is why the governments turn to the private entities to provide the personnel and expertise that need to fulfill the new tasks. In this way, the governments can reduce the cost and make greater efficiency for conducting their duties. As a result, parts of the government functions are delegated to private entities to run.

4.5.2. The Role of the Financial Intelligence Unit (FIU)

The embryonic Financial Intelligence Unit (FIU) was introduced in the 1990's when the Financial Action Task Force on Money Laundering (FATF) issued its first forty recommendations. In this document, the FATF stated the obligation for financial institutions to report suspicious transactions to the competent authority. There was no further explanation of 'competent authority' in this document. However, it can be interpreted that a 'competent authority' in this context refers to the law enforcement agency such as the police or prosecutor. The role of law enforcement agency in this context is to receive reports of suspicious transactions from a financial institution and to take further actions regarding investigations, prosecutions, and convictions. In other words, there is a direct interaction between the reporting entities and the law enforcement agencies.

The direct interaction model between these two institutions raised several problems. As the reporting entity, a financial institution is reluctant to report its findings regarding suspicious transactions to the law enforcement agency. This is because law enforcement tasks are usually direct investigation, whereas suspicious transactions require more analysis to disclose the criminal elements involved in it. This reluctance is also caused by the strict secrecy duty that financial institutions have in several jurisdictions, which makes it very difficult to disclose financial information. Another problem is that when handling suspicious transactions related to money laundering, it requires the knowledge of laws and regulations as well as of banking, finance, accounting, and other related activities. In this regard, law enforcement agencies lack the understanding of this knowledge. Lastly, there has been limited access to relevant financial information, unwillingness or inability to share such information, and obstacles of rapidly exchanging information with foreign countries. Based on these problems, a special institution is needed for processing suspicious transactions as reported by the financial institutions.

Considering the importance of this kind of institution, in 1995, a number of governmental agencies began working together in an informal organization known as the Egmont Group.¹³³ The Egmont Group, which was sponsored by

¹³²Heba Shams(2004), *Supra* note 133, p.181.

¹³³Named for location of the first meeting at the Egmont, Arenberg Palace in Brussels.

Belgium and the United States of America, was established to encourage and assist the exchange of financial information between countries.¹³⁴ The goal of the group is to provide a forum for FIUs to improve the support of their respective national anti-money laundering programmes.¹³⁵ On November 1996, the Egmont Group introduced the term “Financial Intelligence Unit (FIU)” and defined it as ‘a central, national agency responsible for receiving (and if permitted, requesting), analyzing, and disseminating to competent authorities the disclosure of financial information (i) concerning suspected proceeds of crime, or (ii) required by national legislation or regulation in order to counter money laundering’.¹³⁶ With its revised set of the 2003 forty-recommendations, the FATF adopted this definition by adding financial information on terrorist financing and recommended member countries to establish an FIU.¹³⁷

Based on its definition, the main functions of an FIU are to receive, analyze, and disseminate financial information. Regarding the first function, financial transactions are utilized, which include automatic or suspicious reporting. The former has to do with financial transactions received automatically from the reporting entities that are based on the objective criterion that the transaction is above a certain threshold.¹³⁸ As for the latter, a suspicious transaction must be based on a subjective judgment that there is an indication for the transaction to be related to money laundering or terrorist financing.¹³⁹ Additional information came in the form of information exchanges with agencies on domestic as well as international levels such as the police, world custom organization, Interpol, and FIUs’ counterparts.

The second function of an FIU is to analyze the reports received from the reporting entities. The purpose of this analysis is to establish whether the data contained in the reports provide sufficient evidence related to money

¹³⁴The Egmont Group, Information Paper on Financial Intelligence Unit and Egmont Group, p.3.

¹³⁵*Ibid.*

¹³⁶*Ibid*, p.4.

¹³⁷Recommendation 26 of the FATF Recommendations provides that ‘Countries should establish an FIU that serves as national centre for the receiving (and, as permitted, requesting), analysis, and dissemination of suspicious transaction reporting and other information regarding potential money laundering and terrorist financing’.

¹³⁸The objective model is based on the above threshold amount of financial transactions, for example, \$10,000. If the reporting institutions receive a transaction above the threshold, they are obliged to report to the competent authorities. The history of this model has its roots in the Bank Secrecy Act of 1970. *See* K. Nobel and C.E. Columbic, “A New Anti-Crime Framework for the World: Merging the Objective and Subjective Models for Fighting Money Laundering”, *International Law and Politics*, Volume 30, 1997-1998, p.107.

¹³⁹The subjective model, on the other hand, is based on the suspicion that the transaction is derived from illicit funds. This model has its roots in a series of multilateral initiatives introduced between 1980 and 1992. Great Britain, Switzerland and some other European Countries follow this system. *See* K. Nobel and C.E. Columbic (1997-1998), *Ibid*.

laundering or terrorist financing and the data could be used for further investigation and prosecution. Three kinds of analysis involved in it are the tactical, operational, and strategic analysis.¹⁴⁰

The third function concerns the dissemination of financial intelligence to the competent authorities. There are three dissemination aspects to an FIU. The first concerns the duty of the FIU to transmit information to the competent authorities for further investigation or prosecution whenever its analysis reveals money laundering or other criminal activities. The second concerns the exchange of information between the FIU and domestic agencies other than the ones to which files are transmitted for further investigation or prosecution. The third is the international exchange of information, mainly, but not exclusively, from FIU to FIU.¹⁴¹

Regarding the establishment and operation of an FIU, three basic models can be distinguished: the administrative, law enforcement, and judicial models. Each country has established an FIU that follows one of these models. An interesting question is why do countries tend to choose a specified model when establishing their FIU? There are some indicators that uncover the reasons why certain countries choose one of these models. Firstly, there is no internationally accepted model for all countries in the world. Secondly, there are different backgrounds and circumstances in all countries and they affect the model institution established by the country in question. If the country assumes that the FIU is part of or an additional tool for law enforcement, it tends to establish the law enforcement model. This usually happens if there is a mutual trust between the financial sector and other reporting entities and law enforcement agencies. On the other hand, if there is no or relatively little mutual trust between financial sectors and law enforcement agencies, the country tends to establish an administrative model of an FIU. In this case, the country usually assumes that the existence of an FIU is a buffer between the financial sector and law enforcement agencies.

¹⁴⁰Tactical analysis is the process of collecting the data needed to build up a case establishing any wrongdoing and the accompanying facts that clarify the reasons behind the commission of a criminal offence. Operational analysis uses tactical information to formulate different hypotheses of the possible activities of a suspected criminal. It supports the investigative process by using all sources of information available to the FIU to produce activity patterns, new targets, relationships between the subject and his accomplices, investigative leads, criminal profiles, and, where possible, indications for possible future behavior. Finally, strategic analysis is the process of developing knowledge (strategic intelligence) to be used in shaping the future work of the FIU. The main characteristic of strategic intelligence is that it is not related to individual cases, but rather to new issues and trends. See Paul Allan Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, 2003, p.VII-4-8.

¹⁴¹*Ibid.*

The first model of an FIU is an administrative model.¹⁴² An FIU in this model is usually attached to the regulatory or supervisory roles of other agencies. It may be under the supervision of the ministry of finance or the central bank of the country.¹⁴³ The FIU in this model is positioned in the middle of the financial sectors, acting as the reporting entity, whilst law enforcement agencies act as the investigator and prosecutor of the case. This model also makes a clear distinction between cases of suspicion and offences: the first are dealt in an administrative field, and the second by law enforcement services. The advantages of this model are that they avoid direct institutional links between the reporting entities and law enforcement agencies, where there exists no or limited mutual trust and provides more security when disclosing financial information to the FIU. This is due to the model's focus on a limited number of cases related to the money-laundering or terrorist financing, and the availability of expert human resources. On the other hand, the disadvantages of this model when compared with the law enforcement model include the delay in applying law enforcement measures, limited legal power to obtain evidence, and it being more subject to the direct supervision of political authorities.

The second model of an FIU is a law enforcement model.¹⁴⁴ In this model, an FIU is attached to a police agency, whether general or specialized.¹⁴⁵ However, the role and implementation of an FIU in many countries who follow this model are not exactly the same. In the United Kingdom for example, even though this follows the law-enforcement model, its function (named NCIS) is to centralize and filter reported suspicions; the NCIS is not an investigative service but purely an intelligence agency.¹⁴⁶ In other countries, police agencies may act to receive as well as analyze and investigate cases reported by the reporting entities.¹⁴⁷ The advantages of this model are that it is efficient because no new agency needs to be established. Law enforcement reacts quickly to indicators of money laundering or terrorist financing, and the exchange of information is relatively easy because there is an extensive network of international information exchange. The disadvantages of this model, however, is the reluctance of financial sectors to disclose financial

¹⁴²Examples of countries with administrative model include Andora, Aruba, Australia, Belgium, Bolivia, Bulgaria, Canada, Colombia, Croatia, the Czech Republic, France, Israel, Korea, Liechtenstein, Malta, Monaco, the Netherlands, the Netherlands Antilles, Panama, Poland, Romania, Russia, Slovenia, Spain, Ukraine, the United States, and Venezuela.

¹⁴³Paul Allan Schott (2003), *Supra* note, 140, p.VII-9-10.

¹⁴⁴Examples include Austria, Estonia, Germany, Guernsey, Hungary, Iceland, Ireland, Jersey, Slovenia, Sweden, and the United Kingdom.

¹⁴⁵Paul Allan Schott (2003), *Supra* note 140, p.VII-12.

¹⁴⁶Thony, "Processing Financial Information in Money Laundering Matters: The Financial Intelligence Unit", 2003, p.265.

¹⁴⁷*Ibid.*

information because law enforcement agencies are more suspicious, more focused on investigation, and it may be used in investigating other crimes not related to money laundering and terrorist financing. Moreover, another disadvantage of this model that gaining access to financial data usually requires a formal investigation that requires some financial expertise for carrying out such a dialogue.

The third model is the judicial or prosecutorial model. In this model, the FIU is established within the countries' judicial branch and most frequently under the prosecutor's jurisdiction.¹⁴⁸ A judicial or prosecutorial-type FIU can work well in countries where banking secrecy laws are so strong that a direct link with the judicial or prosecutorial authorities is needed to ensure the cooperation of financial institutions.¹⁴⁹ In this model, the prosecutor acts as the recipient as well as analyzes and investigates the case.

However, in the implementation level, there are several weaknesses that the majority of the FIUs in the world do not work effectively as Yepes noted: (1) In some countries the FIU is not in operation; (2) in some countries the FIU does not have enough staff to effectively manage the very high volume of Suspicious Transactions Reports (STR); (3) some countries do not publish periodic reports including STRs statistics typologies and trends; (4) some countries have not provided guidance and training to financial sector, law enforcement agencies, and other relevant entities on AML/CFT; (5) there is no evidence in some countries that the work of the FIU has resulted in the successful investigation, prosecution, and conviction on ML or FT.¹⁵⁰

4.5.3. The Role of Criminal Justice System (CJS)

A criminal justice system is 'a set of legal and social institutions for enforcing criminal law in accordance with a defined set of procedural rules and limitations'.¹⁵¹ In the context of anti-money laundering policy, the main role of the criminal justice system is to prosecute offender and to forfeit the proceeds of crime. The system also has equipped with new tools for seizing, freezing, and confiscating illegal assets. Cross-border character of money laundering which has a global scale poses new challenges for national criminal justice system that traditionally have operated within geographical defined

¹⁴⁸Paul Allan Schott (2003), *Supra* note 140, p.VII-13-14.

¹⁴⁹*Ibid*, p.VII-13.

¹⁵⁰Concepcion Verdugo-Yepes, "Enhancing International Cooperation in the Fight Against the Financing of Terrorism", *Journal of Global Change and Governance*, Vol.1(3), 2008, p.214.

¹⁵¹Criminal Justice System - Structural And Theoretical Components of Criminal Justice Systems, The Systems In Operation, The Importance Of Viewing Criminal Justice As A System. Available at <http://law.jrank.org/pages/858/Criminal-Justice-System.html>

jurisdictional limits.¹⁵² In this case, greater international cooperation and coordination among national criminal justice systems is inevitable. Such cooperation includes intelligence-gathering and sharing information with other countries for following the illicit funds, freezing, seizing, and forfeiture of the proceeds of crime. In the context of cross-border money laundering, globalization of law enforcement efforts has an extremely important.¹⁵³ The globalization of law enforcement, therefore, refers to the application of domestic law to criminal activities occurring beyond the territorial limits of the state concerned.

4.6. Final Remarks

As indicated earlier, in addition to the internationalization of anti-money laundering policy, it has also developed towards the creation of international standards that criminalize the acts of money laundering. The criminalization of money laundering was marked by the establishment of international instruments that resorted to repressive measures against this type of crime. The United Nations Vienna Convention of 1988, the European Convention on Money Laundering of 1990, and the United Nations Palermo Convention of 2000 are the main international instruments that promote and support the criminalization of money laundering. These instruments set up international legal mechanisms in seizing, freezing, forfeiting instrumentalities of the crime, and confiscating the proceeds of crime. These conventions also create effective mechanisms in enhancing international cooperation and harmonizing domestic legislations and international norms.

Regarding the criminalization of money laundering, criminal act and criminal liability are two components that have to be met before imposing criminal penalties on the perpetrators of money laundering. However, in its development as a complicated and sophisticated crime, money laundering might be conducted by, through, or under the cover of corporate entities.

¹⁵²Criminal law evolved as an expression of the sovereign will of independent states. Under the criminal law, the state assumes responsibility for maintaining peace and order within its boundaries. It discharges this responsibility by investigating and prosecuting crimes committed within its borders. The power or 'jurisdiction' of the state to charge, arrest, prosecute and ultimately punish those who commit crimes is founded on the connection between the crime and the state's territory, usually the fact that the crime was committed, in whole or in part, within the state's boundaries'. See Beverly McLachin, "Criminal Law: Towards an International Legal Order". Hong Kong Law Journal, Vol.29, 1999, p.448.

¹⁵³Globalization of law enforcement entails an expansion of criminal jurisdiction to conduct invariably occurring beyond the borders of a country and constituting the sort of conduct historically prosecuted where it occurred, not in a place having a limited, if any, physical nexus to the crime.' See Frank Tuerkheimer, "Globalization of U.S. Law Enforcement: Does the Constitution Come Along?". Houston Law Review, Vol.39, 2002-2003, p.309.

Theoretical studies and court practices have led to emerging theories or models of criminal liability meant to justify the imposing of criminal liability on individuals as well as corporations. These theories involve the adaptation and imitation model, the aggregation or collective knowledge model, and the faulty organization model.

In implementing the repressive measures of anti-money laundering regimes, coordination between the private sector, Financial Intelligence Unit (FIU), and Criminal Justice System (CJS) in detecting, apprehending, and prosecuting money laundering violators is a requirement. Anti-money laundering functions in the framework of repressive measures that started from the role of private sectors in identifying customers and keeping financial information for at least five years. The private sectors are also obliged to report suspicious transactions to the FIU. The FIU then analyzes the suspicious transactions, and if there is any indication of criminal activity, the case would then be passed on to the Criminal Justice System for further investigation.

From the framework of repressive measures of anti-money laundering regimes, it is worth noting that law enforcement efforts have been privatized, meaning a shift in duties from police officers to the private sectors. The role of the private sectors in this context is 'private policemen' with the task of detecting crime and gathering information. In this setting, parts of the government functions are delegated to private entities, which include financial institutions as well as non-financial institution and professional agencies. It is also worth noting that the position of the FIU is situated in between the roles of financial entities and law enforcement. Financial entities have the obligation to meet reporting requirement that aim at getting useful financial information concerning suspicious transactions related to money laundering from the private sectors, and utilizing the information for real investigations. In reporting suspicious transactions, the task of the private sector is to detect whether or not any financial transactions are related to money laundering or terrorist financing. Meanwhile, law enforcement agencies act as investigators and prosecutors in the case. Here in this context, it can be said that mutual cooperation between private sectors, the FIU, and law enforcement agencies is inevitable*****