THE CONTROL OF MONEY LAUNDERING IN
EMERGING ECONOMIES: THE CASE STUDY OF THAILAND

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ABSTRACT

This study examines the problems faced in enforcing the criminal anti-money laundering measures. For this purpose, the laundering offence and confiscation measures, both domestically and internationally, are discussed and suggestions are made for methods of enforcing those measures in order to make effective the control of money laundering in emerging economies in general and Thailand in particular. In approaching this task, this thesis uses the UK and the US legislation and their case law as well as relevant international instruments as comparative reference points for identifying the problems in enforcement and for making suggestions thereto.

The primary thesis is that states should design and enforce laundering and confiscation provisions in a manner that would overcome evidentiary problems relating to the proceeds of crime. Furthermore, states should provide for a flexible system of mutual assistance in confiscation matters that does not breach the legality principle.

Both money laundering and confiscation measures target the criminal proceeds, which often originate in the form of “money”. As money is fungible and has no specific identity, identifying it for the purpose of these measures is very difficult and, in some cases, even impossible. Unless these evidentiary problems are properly addressed, those measures would be ineffective.

In relation to mutual assistance for confiscation purposes, many states have differences in ranges, approaches, and limitations on measures for investigation, preservation and confiscation. While those differences are only optional grounds for refusing assistance under the concerned international instruments, the provision of assistance in some cases is legally impossible, particularly due to the violation of the legality principle in the requested state. For the effectiveness of mutual assistance in confiscation matters, a system should therefore be structured in a way that makes it legal to provide assistance despite these differences.

This study expounds this thesis in five chapters. Chapter I outlines the historical evolution of money laundering control. Chapters II and III examine the laundering offence and confiscation respectively. Chapter IV analyses international confiscation. In light of the findings in the previous chapters, Chapter V makes suggestions for the effective enforcement of the repressive measures in emerging economies more generally and in Thailand more particularly.
# Table of Contents

## Introduction 8

## Chapter I: Evolution of Money Laundering Control 14

1. Laundering the Proceeds of Crime 14
2. The Laundering Process 15
3. Laundering and Its Harms 20
4. Evolution of Money Laundering Control 23
   4.1 The US Response 24
   4.2 The Swiss Response 28
   4.3 International and Regional Initiatives 32
5. The Twin-track Control of Money Laundering 40
   5.1 Repressive Measures 40
   5.2 Preventive Measures 43
7. Concluding Remarks 56

## Chapter II: Comparative Examinations of the UK and the US Laundering Offence 57

1. The Nature of the Laundering Offence 57
2. Comparative Examinations of the UK and the US Laundering Offence: Selected Aspects 58
   2.1 The UK 58
   2.2 The US 59
   2.3 Comparative Aspects 60
      1) The Mental State 60
      2) Single Legislation vs. Several Pieces of Legislation 64
      3) Predicate Crime 66
      4) The Predicate Crime Perpetrator and the Laundering Offence 69
3. Proving the Criminal Origin of the Proceeds: Evidentiary Problems in Money Laundering 71
   3.1 Proving the Criminal Origin of Money Generally 72
      1) Original Property 72
      2) Substitute Property 80
   3.2 Proving the Criminal Origin in case of Mixed Money 82
      1) A Mix of Proceeds and Legitimate Money 83
      2) A Mix of Proceeds from Different Crimes 86
      3) A Mix of Proceeds from Different Occasions of Crime 87
      4) A Mix of Proceeds from Crime Committed before and after the Criminalisation of Money Laundering 89
4. Concluding Remarks 90
Chapter III: Comparative Examinations of the UK and the US Confiscation

1. General Concept of Confiscation 92
2. Types of Confiscation 93
   2.1 The First Criterion: Confiscable Property 93
      1) Contraband Confiscation 93
      2) Instrumentality Confiscation 93
      3) Proceeds Confiscation 94
   2.2 The Second Criterion: Confiscation Systems 94
      1) Property Confiscation 95
      2) Value Confiscation 95
   2.3 The Third Criterion: Confiscation Proceedings 95
      1) Non-judicial Proceeding 96
      2) Judicial Proceeding 96
         (1) Conviction-based Proceeding 96
         (2) Non-conviction-based Proceeding 96
3. The Nature of Confiscation 97
   3.1 Contraband Confiscation 97
   3.2 Instrumentality Confiscation 98
   3.3 Proceeds Confiscation 101
4. Non-conviction based Confiscation and Human Rights 105
   4.1 Case Law 106
      1) Contraband Confiscation 106
      2) Instrumentality Confiscation 108
      3) Proceeds Confiscation 108
   4.2 Examinations 110
      1) Contraband Confiscation 110
      2) Instrumentality Confiscation 110
      3) Proceeds Confiscation 112
5. Comparative Examinations of Proceeds Confiscation in the UK and the US 118
   5.1 Conviction-based Confiscation 119
      1) UK Criminal Confiscation 119
      2) US Criminal Forfeiture 121
   5.2 Non-conviction-based Confiscation 123
      1) UK Civil Recovery 123
      2) US Civil Forfeiture 124
6. Proving the Criminal Origin of the Proceeds: Evidentiary Problems in Confiscation 125
   6.1 The Proving of the Criminal Origin of Money Generally 125
      1) Original Property 125
      2) Substitute Property 137
   6.2 Identifying A Confiscable Part of Property of a Criminal Origin 138
      1) A Mix of Proceeds and Legitimate Money 138
      2) A Mix of Proceeds from Different Crimes 148
      3) A Mix of Proceeds from Different Occasions of Crime 151
      4) A Mix of Proceeds from Crime committed before Confiscation and Those from Crime committed thereafter 152
DEDICATION

TO MY PARENTS,
OTHER MEMBERS OF MY FAMILY,
AND DR. JONGKOL LERTIENDUMRONG
FOR UNFAILING LOVE AND SUPPORT
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Introduction

A stable financial system is one of the most important factors for the continued growth of any economy. Today, in the wake of the recent financial crises in Asia and their contagious effects, the stability of the financial system has become the issue of global concerns. In the 1997 Report of the G-10 on Financial Stability in Emerging Market Economies, it was concluded that a financial system that is robust is less susceptible to the risk that a financial crisis will erupt in the wake of real economic disturbances and is more resilient in the face of crises that do occur. While financial crises can erupt in developed financial markets as well as in those of emerging economies, experiences over the past decade have shown that those crises are more likely to occur in the latter than in the former, for example crises in Mexico, Thailand, Indonesia, South Korea, Russia, and Brazil. For emerging economies, the G-10 Report noted that banking and financial crises can have serious repercussions in terms of heightened macro-economic instability, reduced economic growth, and a less efficient allocation of savings and investment. Hence, for these countries, the stability of the financial system is crucial for their sustainable economic development.

A country cannot, however, have a stable financial system without also maintaining its financial integrity. It has been noted that one of the most valued assets held by investors, financial institutions, and jurisdictions is a reputation for integrity—soundness, honesty, and adherence to standards and codes. However, various forms of financial system abuses, financial crime, and money laundering may compromise the reputation of financial institutions and jurisdictions,

2 Indeed, international bodies such as the Basle Committee on Banking Supervision, the International Accounting Standards Committee (IASC), the International Organisation of Securities Commissions (IOSCO), the Joint Forum for Financial Conglomerates, and the Financial Stability Forum (FSF) have developed standards and codes of conduct to achieve financial stability and to develop robust financial systems. See JOSEPH J. NORTON, DEVISING INTERNATIONAL BANK SUPERVISORY STANDARDS (1995).
4 Id. at 1.
undermine trust of investors, and weaken the financial system. The protection of the system from these sorts of abuses is generally known as the protection of the integrity of the financial system. The financial stability and financial integrity, therefore, are inextricably linked. The connection between them is underscored by the Basel Core Principles for Effective Supervision and in the Code of Good Practices on Transparency in Monetary and Financial Policies.

Among many forms of financial system abuses, money laundering is of the most concern nowadays. Economic damage to the reputation of a country from being lack of integrity because it is used as a laundering channel can affect the willingness of economic agents, particularly those outside the country, to conduct businesses with it by, for example, making investment or set up banking correspondent relationship. Adverse effects may also be outwards. A country or jurisdiction whose lack of integrity is noted will find it very difficult to get access to foreign capital, for example, by way of offering shares in foreign markets. For emerging economies that generally depend on foreign investments to fund their own development processes, the damage to the reputation in this respect may seriously upset the economic developments in these countries. Money laundering also increases the potential for a country to get into financial instability. As will be fully demonstrated in Chapter I, the movements of funds for laundering purposes are likely to be temporary. Banks and financial institutions involved in money laundering are likely to develop unstable liability base and unsound asset structure which would expose the financial system to the increased risk of instability within a country.

5 Background Paper on Financial System Abuse, Financial Crime and Money Laundering, IMF, at 8-9 (12 Feb. 2001), available at http://www.imf.org/external/np/mypdf/pfx/2001/02/1201.pdf (last access 24 March, 2004). In this Paper, “Financial System Abuse” is broadly defined as including “illegal financial activities which have the potential to harm financial systems and legal activities that exploits legal undesirable features of tax and regulatory systems. “Financial Crime” is defined as any non-violent crime resulting in a financial loss. “Money Laundering” is defined as transferring illegally obtained money or investments through an outside party to conceal the true source. See Id. at 4-6.

6 These would refer to those principles and codes that most directly address the prevention, uncovering, and reporting of financial system abuse, including financial crime and money laundering, in particular the Basle Core Principles 14, 15, 18, 19, and 21. The Guidelines on Central Bank internal governance and audit on the conduct of public officials and on the accountability and assurances of integrity by financial institutions contained in the Code of Good Practices on Transparency in Monetary and Financial Policies. See Id. at 9.

7 Id.

The danger of money laundering to the integrity and stability of banks is explicitly recognised in the preamble of the Basle Statement of Principle for the Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering 1988. The Basle Committee said

“Public confidence in banks and hence their stability, can be undermined by their adverse publicity as a result of inadvertent association by banks with criminals.”

It is clear that money laundering must be effectively controlled. In developed countries, measures to fight against money laundering have been in place for quite some time. This is not the case in many emerging economies which have just started to address the problem. One of the reasons may be that the implementation and enforcement of countermeasures against money laundering in the developed markets has driven criminals to turn to these emerging economies to launder the proceeds of crime. Since their financial system is not robust and may easily run into crises, money laundering poses a serious threat to their financial stability and it follows that there is a pressing need for them to effectively control money laundering.⁹

There are two more reasons why the emerging economies should fight against money laundering. First, as earlier noted, these countries generally need foreign investments to funds their own development processes. To attract foreign investments countries must have a system free of corruption and organised crime. However, these countries often have severe and widespread corruption problems. As will be explained in chapter II, controlling money laundering is the most effective way to fight against crimes that produce a significant amount of profits and therefore corruption¹⁰ and organised crime. The fight against money laundering would help them to attract more foreign investments. Second, financial markets around the world are now integrated. As a result, money laundering is an international problem. The success of the control of money laundering in particular and therefore, organised crime in general will rarely be

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⁹ Indeed, the control of money laundering is a necessary part of the larger scheme to the financial sector law reform in emerging economies to ensure the stability of the financial system. See JOSEPH J. NORTON, FINANCIAL SECTOR LAW REFORM IN EMERGING ECONOMIES 29 (2000).

realised, if efforts to contain it is of a national dimension. Thus, the emerging economies should join developed nations in fighting against money laundering.

In fighting against money laundering, a number of legal measures must be provided to law enforcement agencies. As today recognised, they comprise of preventive (financial) and repressive (criminal) measures. On the prevention, those providing financial services are to conduct a number of duties, i.e., customer identification, due diligence with regard to transactions, records keeping, transaction reporting, and compliance programmes. On the repressive side, countries are to criminalise money laundering, enable confiscation, and provide effective mutual legal assistance in respect of confiscation of proceeds located abroad.

At present, many emerging economies have laws providing for those measures. However, the success of the control of money laundering depends not only on whether those measures exist under law but also on whether, at a practical level, they are capable of being enforced. So far as concerns emerging economies, these measures are relatively new. It is very likely that problems at the enforcement stage are to happen and if they are not properly addressed, the control of money laundering in these countries will not be effective or successful.

**Thesis Question:**

This thesis asks what problems stand in the way of effective enforcement of anti-money laundering measures and what responses could be used to address those problems in the context of emerging economies. In this regard, the thesis offers a different look at the control of money laundering; its focus is on the enforcement aspect in the context of emerging economies. Although anti-money laundering measures include preventive and repressive measures, this thesis, for the most part, deals with the repressive (criminal) measures. Hence, problems in relation to the enforcement aspect of the laundering offence and confiscation, both domestically and internationally, will be identified and responses will be made to address the problems in order to increase effectiveness in the control of money laundering in the emerging economies.

It should be noted that this thesis does not discuss the financing of terrorism, although there is a link between money laundering and terrorist finance. Evidence of this link may be found in a number of UN Security Council
Resolutions passed during the period since 1999\textsuperscript{11} and the FATF Eight Special Recommendations relating to the Financing of Terrorism.\textsuperscript{12}

Methodology:

This thesis's methodology relies on a comparative legal study approach. The control of money laundering, particularly with regard to enforcement aspects of measures against money laundering, is relatively new to many emerging economies. It is very unlikely that they have sufficient experience in this aspect. It will not be of much use to compare their experience, since they are roughly in the same stage of the fight against money laundering. Therefore, the comparison of controlling money laundering will be conducted between countries with extensive experience in respect of the matter. In this thesis, the UK and the US are countries chosen for this purpose. In addition, the relevant provisions of concerned international instruments will also be used when it comes to the issue of confiscating proceeds of crime located abroad. The reason for using the UK and the US, especially with regard to measures of the national scope, is that both have the most experience in the control of money laundering.

For emerging economies, Thailand will be used as a case study for a few reasons. First, Thailand, of course, is an emerging economy. It needs foreign investment to further its economy, and, for this purpose, its regime to control money laundering must be effective. Second, a part of Thailand is an area known as “golden triangle”, one of the locations for narcotics trafficking. It is generally agreed that the drug problems are very serious and of a global scale, and that most of the proceeds laundered worldwide are from drug trafficking. As such, improving the fight against money laundering in Thailand would contribute to the global efforts to contain drug problems. Third, Thailand is a member of Asia Pacific Group (APG) on Money Laundering whose purpose is to facilitate the adoption, implementation, and enforcement of internationally accepted standards


\textsuperscript{12} See the FATF Forty Recommendations 26-34 available at http://www.fatf-gafi.org/40Recs_en.htm (last access 11 Jan. 2005)
against money laundering and the financing of terrorism. The regime of each APG member in the control of money laundering would have to be assessed in light of the international standards in this regard. The study of the Thai regime to fight against money laundering will thus be useful to other APG members with regard to their regimes to control money laundering. Finally, Thailand is the jurisdiction of the author and, therefore, opinions expressed herein at least carry some authority.

**Thesis:**

This thesis argues that the laundering offence and confiscation should be designed and applied in a manner that would overcome evidentiary problems relating to the proceeds of crime. This would ensure effectiveness in the fight against money laundering at the national level. Further, differences in concerned countries with respect to the laundering offence, investigative measures, provisional measures and confiscation can cause mutual legal assistance for confiscation purposes legally problematic. Therefore, mutual legal assistance for the confiscation purposes should be flexible to the most extent in order to be effective at international control of money laundering but this flexibility should not be made at the cost of the legality principle.

This thesis is expounded in five chapters exclusive of introduction and conclusion. Chapter I outlines the evolution of money laundering control. Chapters II and III examine the laundering offence and confiscation respectively using the UK and the US legislation as well as their case law. Both focus on difficulties in proving the criminal origin of the proceeds for the purpose of these measures which are caused by their monetary nature. Chapter IV analyses the issues relating to international confiscation both through unilateral action and through a mutual legal assistance channel. Chapter V examines the control of money laundering in emerging economies generally and in Thailand particularly, in light of the findings in the previous chapters.
Chapter I: Evolution of Money Laundering Control

Money laundering is one of the major crimes with which countries around the globe are most concerned. This chapter examines the evolution of the fight against money laundering. It will be shown that the control of money laundering originated as a response to a number of hazards to the maintaining of the rule of law and the integrity and stability of the financial system caused by the rise of profit-motivated crimes and organised crime together with laundering the proceeds therefrom. It will further be shown that the control of money laundering may change the way law enforcement authorities conduct investigations, so far as concern criminalities producing significant amounts of proceeds. Instead of identifying the suspect first, investigating authorities would first locate the proceeds which will be used as a lead to uncovering the crime that has generated them and its perpetrator or will be used as a basis for charging him or those laundering his proceeds on the laundering offence. It will be finally shown that this approach is effective in controlling profit-driven and organised crime.

I. Laundering the Proceeds of Crime

Proceeds of crime mean financial benefits derived from crime. Like other types of fruits of crime, such as stolen goods, they could be used as evidence of crime. A person in possession of the stolen goods may be suspected of involvements in crime just as a person in possession of the proceeds of crime. To avoid detection, criminals disguise the criminal origin of those proceeds and also provide them with apparent legitimacy. This conduct is now commonly known as money laundering.

Money laundering does not need to be complex and sophisticated. As one commentator has stated:

Money laundering essentially represents two distinct practices:

"In its first and most limited sense, the term describes the conversion of cash by exchanging a volume of illegally earned currency for some types of negotiable instrument or other asset that can be used in commerce without revealing the illegal source of the funds used to purchase it.

In its second and more widely accepted usage, it refers to a sequence of discrete steps that begin essentially where the currency conversion process leaves
off. In this process, laundering is a method for acquiring an asset, or interest in an asset, so that the owner may both account for and enjoy wealth while remaining immune to successful probes into the tainted origin of that wealth."

The distinction between these two practices shows that money laundering need not be a process. A simple exchange of the proceeds of crime with property without disclosing their criminal origin could hardly be described as a process. This is in stark contrast with the second type of laundering which is clearly a process. It is this practice that the next section is concerned with.

II. The Laundering Process

The laundering process is generally explained as composing of three stages: “placement”, “layering”, and “integration”. The placement stage is where cash derived directly from crime is first placed either in a financial institution or used to purchase an asset. The layering stage involves attempts to conceal or disguise the criminal origin of the cash. The integration stage is where the cash is integrated into the legitimate economic and financial systems and is assimilated with all other assets in the system. While useful, this explanation does not reflect the reality of laundering currently practiced on a number of grounds.

As the placement stage focuses exclusively on the conventional banking institutions, its scope is limited in two aspects. First, the placement stage is no longer concerned only with traditional financial institutions. Money launderers have now used a whole range of non-traditional financial institutions to introduce money into the system, such as insurance companies and bureaux de change. Second, the placement stage under this model focuses on the introduction of “cash” into the system. It does not take account of the increasingly utilised underground banking business for placing the money into the system, such as Hawala. Instead of using cash, the underground banking business transfers money by using tokens considered within the structure of the system as having

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4 Id. at 12.
equivalent value to the transferred amount. The transfer of money may then be made without actual movements of cash and conventional banking records.\(^6\)

In introducing money into the financial system, criminals would prefer the methods which do not create records or paper trails. They may, for instance, do this by simply smuggling illegal cash out of jurisdiction in which case they would probably have to consolidate the relatively small denominations into a form that is more convenient to carry, for instance, larger notes. They may also use high turnover and relatively low investment enterprises for consolidation, particularly if those enterprises are outside the conventional banking system.\(^7\) In addition, where the threshold-based transaction-reporting system is used, they may avoid the creation of records by the so-called “smurfing” which is a practice whereby large amount of cash transactions is broken into smaller ones each of which is below the threshold amount.\(^8\)

Once the money has entered the system, the layering process begins. In this stage, the main purpose of the criminals is to conceal, disguise, or obscure the criminal origin of the money. They would create a complex web of transactions, often involving a multitude of parties, with various legal statuses in as many different jurisdictions as possible, through which the money will be washed on a wave of spurious or misleading transactions.\(^9\) The transactions entered into at this stage, however, need not be of a progressive manner, the character denoted by the term “layering”. Instead, they may be parallel, creating mutual obligations which can be married or crossed, often on a contingent basis and which would not be substantiated to the satisfaction of a court applying

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\(^6\) Indeed, the criminals have already used underground banking business for laundering. See Barry A. K. Rider, The Limits of the law: An Analysis of the Interrelationship of the Criminal and Civil Law in the Control of Money Laundering, 2 J. OF MONEY LAUNDERING CONTROL 209, 217 (1999).

\(^7\) Id. at 214.


\(^9\) Rider, supra note 6, at 215.
conventional legal rules. The laundering schemes of this nature look more like a mosaic and are especially likely in sophisticated laundering operations.¹⁰

This does not mean that the criminals would make the transactions entered into for layering purpose as much complex as possible. Since the criminals would need the money for further uses, they would not wash it for a period longer than necessary. It follows that the layering transactions would be complex only to the extent necessary for keeping the money beyond the relevant authorities. Accordingly, the criminals would not spend more than that required by all the circumstances to realise this objective. Indeed, costs and risks of detection would increase with the complexity and sophistication of the scheme. As Prof. Rider has observed:

[T]he larger the organisation that is employed to launder the money, the greater the costs and the higher the risk of detection or of something going wrong.¹¹

While layering, in theory, may begin after the placement of the money into the system, it is usually the case that the money is first moved to foreign jurisdictions.¹² This offshore nature may be explained by the advantages obtained therefrom. First, law enforcement authorities of the country where predicate crime has been committed would have considerable difficulties in investigation due to the territorial limitation of their power. While cooperation from those foreign jurisdictions may be sought, this would not guarantee that the result from cooperation would be efficient, since there are differences in legal systems and proceedings. For example, evidence taken by the foreign authorities pursuant to a request may not be admissible in the court of requesting state. More importantly, cooperation may even be refused on the ground of bank secrecy which is nonetheless in operation in certain jurisdictions.¹³

Second, the placement stage is but part of the process and the criminals gain nothing from its success. To be able to enjoy the proceeds, they would need to conduct further transactions. If the country where the predicate crime was

¹⁰ Id.
¹¹ Id.
¹² In this connection, it is important to note that the FATF stated: virtually every member represented reported having experienced problems in pursuing anti-money laundering investigations with links to off-shore financial centres⁹. Report on Money Laundering Typologies, FATF, at 6 (1998-1999).
¹³ Rider, supra note 6, at 214.
committed has legal rules which make it difficult to cleanse the proceeds, they would have to find other places to do this. In other words, they need to transfer the money to places or countries where legal environments are conducive to laundering, for example, countries with comparatively less stringent laundering regulations, with simple incorporation process but with comparatively strict financial secrecy and with efficient infrastructure to allow for speedy transactions.

Many techniques may be used in the layering stage. Money may be used to purchase investment and monetary instruments. The criminals may use international systems such as SWIFT (Society for Worldwide Interbank Financial Telecommunications) to wire it to other countries. The use of international wire transfers is one of the most effective layering techniques due to a great number of such transfers around the world in every hour as well as a number of advantages in terms of speed, distance, least audit trail, and increased anonymity. The FATF has observed that the use of international wire transfers among various accounts is more common in countries that do not cooperate in money laundering investigations.

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14 Harms, supra note 8, ¶7-700.-¶7-750, at 3234-4001.
Having successfully concealed the criminal origin of the funds, the integration stage begins. It should be observed that at this stage the funds are already within the legitimate financial system; otherwise they would not have an apparent legitimate origin. The criminals launder the proceeds of crime in order to enjoy them without the risk of detection. Therefore, the proceeds with an apparent legal origin or part thereof would be in most cases transferred back to them for further uses, either legitimate or unlawful. However, wealth without sources is by nature suspicious. They, therefore, would have to conduct transactions in a way that can explain and justify the increased wealth in their possession.

Many methods found in the placement and layering stages may also be used at this stage. Generally, these methods involve the use of normal, but fake or sham, businesses or financial transactions. For example, the criminals may set up dummy, front or shell companies in foreign countries, often those with strict corporate and banking secrecy laws. They then disguise the transfers of the proceeds from these companies to themselves as loan proceeds. Overvaluation of imports and exports may also be used. The overvaluation of imports allows them to explain that the money subsequently deposited at domestic banks is the payment for imported goods or the profit from the resale of such goods. The overvaluation of exports is used to justify the money transferred from abroad.

So far, the use of the term “launderer(s)” has been avoided in our explanations on the laundering process. Instead the word “criminal(s) has almost always been used. Of course, the perpetrator of the predicate crime who launder the proceeds therefrom is also the launderer. However, these two terms have been used in order to emphasise the purpose of avoiding detection of the perpetrator of the predicate crime. It does not mean that only the perpetrator of the predicate crime engages in money laundering. Indeed, those who actually conduct money laundering may be other individuals and the perpetrator of the predicate crime might have little role in actual laundering activities. For example, many professionals, such as company formation agents, bankers or professional advisers such as lawyers, accountants, or brokers have been used for laundering. They are often called professional launderers. In many countries, therefore, legal

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17 Harms, supra note 8, ¶7-825, at 4001. For detailed explanations, see Id. ¶7-875-¶8-275, at 4002-4004.
regulations or codes of conduct which require them to take precautions in regard to money laundering have been adopted. For example, professional bodies such as “The Law Society of England and Wales” and “The Institute of Chartered Accountants of England and Wales” have provided their members with guidance on money laundering.

III. Laundering and Its Harms

Proceeds of crime, if laundered successfully, will not be recognised as such and thus will escape confiscation. The possibility of enjoying the proceeds acts as an incentive to commit a crime and the wealth obtained also allows its continuation to produce further harm. In the past, criminal activities were individual-oriented, of predatory nature, and generally produced the relatively small amount of proceeds. Traditional criminal sanctions, such as imprisonment, probably produced sufficient deterrents. However, in modern times, there is an increase in crimes which produce significant proceeds, especially organised ones focusing on the distribution of forbidden consumption needs of the complicit public. Drug trafficking is the prime example. In these crimes, traditional criminal sanctions alone are unlikely to produce sufficient deterrents, as the returns are generally huge and, in the case of organised crime, convicted members could be easily replaced. The lack of sufficient deterrents

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18 This is why “money laundering” has been shortly defined as rendering the proceeds of crime unrecognisable as such. See Simon Gleeson, The Involuntary Launderer: The Banker’s Liability for Deposits of the Proceeds of Crime, in Laundering and Tracing 115 (Peter Birks ed., 1995).
19 Prof. Naylor has identified seven characteristics of predatory crime as follows: it involves the redistribution of existing wealth, the transfer of existing wealth is bilateral between victims and the offender, the transfer is involuntary, the victims are readily identifiable and the losses to them are simple to determine, the total sums of all predatory offences are generally small in relation to the economy as a whole, the morality is unambiguous, and finally the restitution to the victims is the response, in addition to direct punishment of the offender. See R. T. Naylor, Wash-out: A critique of follow-the-money methods in crime control policy, 32 Crime, Law and Social Change 1, 8 (1999).
20 Prof. Naylor has called the crime of this nature “enterprise crime”. He has offered seven features of enterprise crime as follows: it involves the production and/or distribution of new, but illegal, goods and services, the exchanges are multilateral like legitimate market transactions involving, among others, producers, distributors, retailers, and money-managers on the supply side and consumers on the demand side, the transfers are voluntary, the victims are not identifiable unless some abstract concept like society is so treated, the total sums involved are often claimed to be considerable to the economy as a whole, the morality of the act is ambiguous, and finally, forfeiture of profits is additional penalty. Id. at 8-9.
21 This is generally the case, due to the illegal nature of the goods and services and the monopoly position of the supplier.
22 This applies to both the “generals” and the “soldiers” of the organisations, although the organisations may find it more difficult to replace the generals than the soldiers. Indeed, even if the generals could not be replaced, they could still direct the organisations from prison. The Head
may also apply to other individual-oriented criminal activities that yield a lot of proceeds, such as large-scale frauds or other forms of economic crime.

In the context of organised crime, money laundering is indispensable. It is the lifeblood of organised crime. Organised crime often engages in activities which produces large amount of proceeds. These proceeds could not probably be consumed or invested in a legal economy without attracting attentions of law enforcement authorities. They, therefore, have to be laundered in order to be safely used. In addition to criminal activities organised crime inflicts upon society, wealth unlawfully accumulated but successfully cleansed through laundering also allows it to acquire or penetrate legitimate businesses. This poses a serious threat to the society. While some say that there are benefits in terms of wealth and employment for the people, it should not be forgotten that the primary motive of organised crime is not just to “make” but “maximise” profits. When it controls legitimate businesses, it will attempt to dominate the market, engage in predatory pricing, extortion, and corrupt public officials and governments.

Second, money laundering produces negative economic and financial implications. To show this, understanding of the concept of an efficient allocation of resources is necessary. An efficient allocation of resources exists where there is a free play of market forces and risk-adjusted returns from all the various forms of economic activity are equalised at the margin. While the efficient allocation in this regard is that of the public, the private efficiency is publicly efficient where market failures and externalities are negligible.

of the US Drug Enforcement Administration once said in 1978 before Congress that: We recognise that the conviction and incarceration of top-level traffickers does not necessarily disrupt trafficking organisation; the acquisition of vast capital permits regrouping and the incarcerated trafficker can continue to direct their operations. Therefore, it is essential to attack the finances that are the backbones of organised drug trafficking. See, citing STEVEN KESSLER, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE 140 (1994), Naylor, supra note 19, at 4.

28 Id.
In relation to money laundering, it is clear that criminals maximise their returns with the risk of detection, but this private maximisation is not socially efficient, since laundering produces significant externalities in terms of costs upon the society from both laundering and the predicate crime. The costs associated with the predicate crime need not be elaborated, as they are evident, for example, costs from drug trafficking. The economic costs from laundering is not so obvious but can be appreciated from the directions of the movements of the funds.

As noted above, the purpose of laundering is to obscure the criminal origin of the funds and make them appear as having come from a legitimate source. The funds would be transferred to or invested in countries with a lower rate of return, provided that this laundering objective could be easily realised. In a world with money laundering, therefore, the investment of capital tends to be less optimal and the world growth rate is correspondingly reduced. The large inflows or outflows of those funds could, furthermore, significantly influence variables, such as the exchange rates and the interest rates or create price bubbles of particular assets towards which the funds are invested, such as lands and houses. As the changes in these variables bear no relation to economic fundamentals, the policymakers could get confused as to these changes and possibly implement incorrect economic policy.

In addition, the transfers of funds for a laundering purpose are only temporary. Thus, financial institutions involved therein or groups of those institutions are likely to develop an unstable liability base and unsound asset structures that would bring a risk of systemic crisis and monetary instability within a country. Such national financial difficulties, moreover, can easily turn into those with international dimensions due to the integration nature of the global financial markets nowadays. Money laundering, therefore, could produce destabilising effects on the world financial system.

30 Id. at 8.
31 QUIRK, supra note 27, at 18.
32 Id. at 28.
33 TANZI, supra note 29, at 8.
It is also recognised that capital market operates with efficiency only if the public has confidence in it. Money laundering produces damaging effects in financial institutions that have been used, either knowingly or unwittingly, to launder the proceeds. The public perception of their being associated with crime could seriously erode public confidence in the transparency and soundness in the operation of the institutions. For example, the public may be led to believe that decision-making process of the institutions is not market-based or even the bank staff could be bribed to conduct businesses in an unsafe and unsound manner for facilitating laundering. This may deter the public from conducting even perfectly legal transactions with the institutions. Further, it could even lead the market to be more sensitive to rumours and false statistics; thus creating more instability to the market.

Lastly, the accumulated balances of laundered assets further the potential for economic instability. Since they are likely to be larger than the annual money laundering flow figures, negative impacts on economic stability caused by inefficient movements, either domestically or internationally, would be more severe. Moreover, the balances accumulated after laundering, if controlled by criminal organisations, could be used to corner the markets or even smaller economies.

In sum, money laundering increases motivations for individuals to commit crime, finances organised crime, and damages the integrity and stability of economic and financial system. These hazards have led to the control of money laundering at both domestic and international levels. We address the evolution of the control of money laundering immediately below.

IV. Evolution of Money Laundering Control

Any discussions on the control of money laundering must begin with the examination of the US response to the problem. It is there that the measures against money laundering were first introduced, although subsequently some other countries particularly Switzerland as well as international and regional initiatives have adapted or improved the measures in this regard. The examination of the control of money laundering, therefore, begins with the US

34 Quirk, supra note 27, at 19.
35 Id. at 10.
36 Id. at 19.
response to be followed by that of the Swiss, and international and regional initiatives.

1. The US Response

In 1970, as a response to organised crime, Congress passed the Racketeered Influenced and Corrupt Organisation Act (RICO), and Continuing Criminal Enterprises Act (CCE) both of which provided for criminal forfeiture of a variety of property as well as the proceeds from violations thereof. The primary purpose of criminal forfeiture under RICO was to strip the convicted offender of the business which he corrupted and of the proceeds from his unlawful activities. In 1978, forfeiture of the proceeds from crime was incorporated into the context of the war on drugs. Instead of being criminal forfeiture like that of RICO and CCE, however, Congress this time permitted forfeiture of drug proceeds through civil in rem actions. The use of forfeiture brought home to the notion that forfeiture of the proceeds of crime is a powerful deterrent; perhaps is more effective than imprisonment.

Another measure implemented in 1970 as well was the Bank Secrecy Act (BSA). Despite its name, this Act indeed mandates disclosures of financial information. According to the Act, there are three types of reports. First, financial institutions are to file reports of all transactions in currency and monetary instruments of a prescribed amount. As authorised, the Secretary of Treasury issued regulations that currency transaction reports must be filed with the Internal Revenue Service where such transactions are in excess of $10,000. The BSA also requires monetary instrument reports from a person who transports or has transported monetary instrument of more than $10,000 or receives monetary instruments of that amount “from a place in the US to or through a place outside

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42 Courts, legislative committees and presidential commissions have sometimes advanced this idea. See David J. Fried, Rationalising Criminal Forfeiture, 79 J. OF CRIM L. & CRIMINOLOGY 328, 366 (1988) which has cited US v. Walsh, 700 F.2d 846, 857 (2d Cir. 1983) (“a more potent weapon than fines and prison terms....
the US” or vice versa.44 The Secretary of Treasury issued regulations that those reports must be filed with the Custom Service. Finally, the BSA requires a resident or citizen of the US or a person in, and doing business in the US, to file reports, or keep records, or both when he makes a transaction or maintain a relation for any person with a foreign financial agency.45 Apart from the obligations to file reports, the Secretary of Treasury is also authorised to require financial institutions to identify and record the identity of a customer, keep records of transactions,46 and maintain appropriate procedures to assure compliance with the BSA.47

After the terrorist attack in 2001 in the US, Congress passed the International Money Laundering Abatement and Anti-Terrorist Financing Act (known as the Patriot Act) which extended the reporting obligation to foreign financial institutions which maintain interbank payable-through accounts or correspondent bank accounts with US financial institutions or other financial firms.48 The Treasury Secretary is authorised to impose five special measures on covered financial institutions involved with jurisdictions, financial institutions, or transactions of primary money laundering concern to the US:

- additional record-keeping or reporting for particular transactions;
- identification of the foreign beneficial owners of accounts at US financial institutions;
- identification by foreign banks of any of their customers using an interbank correspondent account opened by those foreign banks at a US bank;
- identification by foreign banks of any of their customers using interbank correspondent account opened by those foreign bank at a US bank; and
- after consultation with the Federal Reserve Board, the State Secretary and the Attorney General, restrictions or prohibitions of opening or maintaining certain interbank correspondent, payable-through or private bank accounts.49

47 31 U.S.C. § 5318 (2). As amended, the guarding against money laundering is expressly included as one of the purposes of compliance programmes.
49 For more information on these measures, see id. at 6/2823-6/2831.
In May 2002, the Treasury Secretary exercised this authority and these measures are now applicable to all US banks and certain foreign banks that are based on or operate in jurisdictions that have not adopted and implemented the FATF Forty Recommendations on money laundering and Eight Recommendations on terrorist finance.\textsuperscript{50}

Although Congress was probably aware of laundering activities when it enacted the BSA in 1970,\textsuperscript{51} the BSA did not criminalise them. The BSA sought to require the filings of certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.\textsuperscript{52} Thus, the BSA simply provided an additional mechanism by which an investigatory lead in the form of a report was obtained and used in investigations into the crime that generated the proceeds. As one commentator has put it clearly:

\textquote{[T]he primary purpose of this statute [BSA] was to enable federal investigators to identify large monetary transactions or transportations that might reflect the proceeds of crime and, using those transactions or transportations as investigatory leads, to trace them back to the perpetrators of the prior criminal activity.\textsuperscript{53}}

The expectation of Congress from the BSA, however, was not met in practice. A number of factors accounted for this. First, financial institutions did not largely comply with the BSA requirements; the government also did not vigorously enforce them.\textsuperscript{54} The reporting requirements, further, could be circumvented by "structuring", \textit{i.e.}, breaking a deposit of a large sum of cash into smaller sums each of which was below the prescribed amount.\textsuperscript{55} Finally, the lack of a separate laundering offence forced the prosecution to frame the charge against bank customers who laundered criminal funds on a violation of reporting requirements or conspiracy to defraud the government by obstructing the filing

\textsuperscript{50} Id. at 6/2823.
\textsuperscript{51} This is because one of the concerns of the Congress in enacting the BSA in 1970 was the infusion of criminal money particularly from organised crime activities into legitimate businesses. See Norman Abrams, \textit{New Ancillary Offences}, 1 CRIM. L. F. 1, 6 (1989).
\textsuperscript{52} 31 U.S.C. \textsection 5311.
\textsuperscript{53} Abrams, \textit{supra} note 51, at 6-7.
\textsuperscript{55} Id. at 97.
of accurate reports. This is difficult, since the BSA generally applied to financial institutions, not customers.

In response, Congress passed the Money Laundering Control Act (MLCA) in 1986 creating a separate offence of money laundering. 18 U.S.C. § 1956(a)(1)(A) makes it criminal to knowingly conduct or attempt to conduct financial transactions involving proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity. 18 U.S.C. § 1956(a)(1)(B) makes it an offence for any person who conducts or attempts to conduct financial transactions involving proceeds of specified unlawful activity with the knowledge that they are designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity or to avoid a transaction reporting requirement. 18 U.S.C. § 1956(a)(2) makes it an offence to move monetary instruments into or out of the United States, provided that there is intent to promote specified unlawful activity or to conceal or disguise the nature, location, source, ownership, or control of the proceeds of unlawful activity or to avoid a transaction reporting requirement. 18 U.S.C. § 1956(a)(3) specifically addresses criminal sting operations directed at money laundering. It criminalises conduct, or attempt to conduct financial transactions involving property that a law enforcement officer represents to be the proceeds of specified unlawful activity with the said intents. 18 U.S.C. § 1957 penalises knowingly engaging or attempting to engage in a monetary transaction in property derived from specified unlawful activity in excess of $10,000. Lastly, 31 U.S.C. § 5324 addresses the act of structuring for the purpose of evading the reporting requirements by making it illegal to cause or to attempt to cause a domestic financial institution to: (i) fail to file a required report (CTR); (ii) file a CTR with a material omission or factual misstatement; or (iii) structure or assist in structuring or attempt to do so any transaction with one or more domestic financial institutions. Congress also authorises civil and criminal forfeiture of any property involved in any of the said money laundering offences or any property traceable to such property.

The MLCA made it possible to pursue bank customers who sought to launder criminal proceeds on the laundering offence, instead of a violation of the

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56 Id.
reporting requirements or conspiracy to defraud the government by obstructing the filing of accurate reports which was more difficult. Furthermore, financial institutions could possibly incur civil and criminal liabilities for money laundering in a case where they failed to observe obligations under the BSA, especially those regarding compliance programmes. The criminalisation of money laundering forced financial institutions under the threat of liabilities to fully comply with the requirements under the BSA, thereby making the control of the criminal proceeds more effective.

As explained, in 1970, although Congress was aware of laundering the proceeds from organised criminal activities, particularly from drug trafficking, it did not criminalise laundering but simply introduced forfeiture of those proceeds and provided for certain obligations on financial institutions to facilitate the uncovering of those proceeds and the crime generating them. Perhaps, this was because organised crime was the only evil that had to be controlled. Congress might not have considered laundering as posing so serious a threat to financial integrity and stability that the conduct ought to have been criminalised. Even the justification for its criminalisation in 1986, furthermore, had much to do with avoiding problems in the enforcement of the BSA but was much less concerned with the perception that laundering operations threatened the integrity and stability of the financial system. As will be immediately shown below, this is in stark contrast with Switzerland where concerns about the negative effects of money laundering on its financial integrity were the forces behind its response.

2. The Swiss Response

The Swiss response to the proceeds of crime began in 1977 when the Swiss Bankers Association, the Swiss banks individually and the Swiss National Bank jointly adopted a Code of Conduct on the acceptance of funds and the use of bank secrecy (CDB). Since its adoption, it was revised in 1982, 1987, and 1992. It should be noted that although the Swiss National Bank was a Party, the CDB was nonetheless a private agreement.

The original purpose of the 1977 CDB was to ensure careful clarification of the identity of bank customers and to prevent the right to banking secrecy

58 Whitney Adams, Effective Strategies for Banks in Avoiding Criminal, Civil, and Forfeiture Liability in Money Laundering Cases, 44 ALA. L. REV. 669, 690-701.
59 STESSENS, supra note 24, at 102. Indeed, the Swiss National Bank was no longer a Party to the CDB since 1987.
from being used to facilitate the making of transactions contrary to the CDB, one of the situations of which was a case where the funds were criminally derived.\footnote{Rebecca G. Peters, \textit{Money Laundering and Its Current Status in Switzerland: New Disincentives for Financial Tourism}, 11 NW. J. INT`L L. & BUS. 104, 111 (1990).} When the banks knew or should have known by exercising due care that the funds were criminally derived, they were to refrain from entering into transactions or to sever relations with the customers.\footnote{Id. at 111-112.} A subsequent revision in 1982 deleted the express prohibition in regard to the criminally derive funds, since it was contended, although wrongly, that money laundering was already an offence under the law.\footnote{Id. at 112.} In addition, there was no longer the duty to investigate the origin of the funds. The banks were only to conduct the verification of the identity of the customer and the verification of actual beneficial ownership in certain circumstances.\footnote{Id. at 112-117.}

The CDB, despite being a private agreement, also contained an enforcement mechanism whereby the Swiss Bankers Association, upon receiving from internal or independent auditors a notice of possible violation of the CDB, had to investigate the alleged violation and suggest the Oversight Board of the fines to be imposed upon the bank found in violation thereof. The Oversight Board was to inform the Swiss Banking Commission as to its decision in this regard.\footnote{Id. at 120-122.}

In this connection, Article 3(2)(c) of the Swiss Bank Act required as a prerequisite for obtaining and holding a banking licence that the character and qualifications of both banks management and its board of directors be without reproach. The Swiss Banking Commission held that this provision required the Swiss banks to investigate the economic background of proposed banking transactions which were complicated, unusual, or significant in scope, or which appeared immoral or illegal.\footnote{Id. at 125.} Although the duty to investigate the economic backgrounds of the transactions (duty of care) under the Swiss Bank Act was different from the verification of identity of the customer under the CDB, both the Swiss Banking Commission and the Swiss Court maintained that compliance with the latter duty was a minimum for the compliance with the former broader
duty of care. Failing to comply with the CDB on verifying the identity of the customer, then, also constituted a violation of the duty of care required under Article 3(2)(c) of the Swiss Bank Act the penalties of which included declaring such violation and/or requiring the transfer or replacement of an executive employee, or revoking the licence of the violating bank.

In 1990, the Swiss introduced two new offences in regard to the proceeds from crimes. Article 305 bis of the Penal Code is the laundering offence. This Article makes it an offence for any person to execute a transaction which could frustrate the determination of origin, discovery or forfeiture of assets where he knew or must have assumed the assets were derived from crime. Article 305 ter makes it criminal for persons professionally engaged in the acceptance, safeguarding, investment or transfer of the asset of another person, to fail to exercise the due care necessary under the circumstances to establish the beneficial ownership with respect to that asset.

With these offences, the banks are under a duty to refuse to execute a transaction involving the proceeds of crime, but this does not mean that they could disclose to the authorities information protected under the bank secrecy laws. It was not until 1994 that the Swiss passed the law permitting the banks, on their own initiative, to disclose information covered by the bank secrecy laws and this was made a legal duty in 1997. The effect of the disclosure provision was that the banks would incur no liability, whether civil or criminal, from making disclosure.

The examination of the US and Swiss approaches to money laundering has demonstrated the stark contrast between the two at least on beginning. The factor that distinguishes the approaches of the US and the Swiss in this regard is when the obligation of the banks to file a transactional report or the disclosure obligation came into existence. While US banks were required to file a report to the authorities as early as 1970, the Swiss banks were first permitted to do so in 1994. Given the fact that the reports could be used as a lead for investigation of the offence that has produced the proceeds and the laundering offence, where it exists, the US approach to controlling the proceeds of crime is repressive-oriented since the beginning.

66 Id. at 126.
67 STESENS, supra note 24, at 104-105.
The Swiss response in the early period was not repressive, since there was no disclosure provision. The lack of disclosure provision in Switzerland during that time was perhaps due to the location of the crime that generated the proceeds. While most proceeds, particularly from drug trafficking, were generally laundered through Swiss banks, the trafficking activities were mostly committed outside Switzerland. The Swiss, therefore, had little interest, if any, to fight those criminal activities. The US-invented reporting obligation was not necessary in the Swiss context. Switzerland, however, could not be indifferent as to money laundering, since laundering could damage its reputation as a leading financial centre. As explored, the Swiss banks were to identify a customer, verify beneficial ownership and exercise due care with regard to the economic background of the transactions. They were obliged to refuse to enter into, or sever a relation with the customer where they knew or should have known that the funds involved were criminally derived. Clearly, if the banks properly discharge these obligations, they will be more likely to avoid being involved in money laundering. The Swiss approach to controlling the criminal proceeds at the beginning, therefore, focused on the prevention. The criminalisation of money laundering in 1990, although it was a repressive measure, furthered the preventive goal, since it forced the banks, upon the threat of criminal sanctions, to observe the existing preventive duties. The laundering offence could not substantially improve the repression of laundering unless the banks were permitted or required to disclose transactions suspected of money laundering to the authorities. Hence, the Swiss control of money laundering should still be described as mostly preventive even after the criminalisation of money laundering in 1990. It was only when disclosure was permitted in 1994 that the Swiss fight against money laundering began to have repressive effects.

We will see in the following section that actions against money laundering at the international and regional levels have adopted elements of both the US and the Swiss approaches in this respect. The US-invented laundering offence and forfeiture of proceeds have been internationalised through the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 adopted in Vienna, Austria in so far as drug proceeds are

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68 Id. at 110.
concerned. These two elements have been adopted in a number of subsequent regional and international instruments, such as the FATF Forty Recommendations, the European Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime 1990, and the UN Convention Against Transnational Organised Crime 2000, adopted in Palermo, Italy. The measures on the part of financial institutions invented by the US and the Swiss have been internationally adopted as a standard under the Basle Statement of Principle, the FATF Forty Recommendations, and the EC Directive. We now address international and regional actions against money laundering below.

3. International and Regional Initiatives

This section examines major initiatives that call for international and regional community to adopt measures to control money laundering. As examined, these measures have been developed into two tracks: those on the repression side and those on the prevention aspect. As a result, the examinations are divided into three parts exploring first, repressive initiatives; second, preventive initiatives, and, third; an initiative that contains both aspects.

3.1 Repression

A. The UN

The UN role in the fight against drug trafficking and drug money laundering was marked by the adoption of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in Vienna, (Vienna Convention), Austria on 20 December 1988. This Convention came into force on 1 November 1990 upon being ratified by twenty countries.

The Vienna Convention is important in three aspects. First, it requires Parties to criminalise drug money laundering which is defined in Article 3 as follows:

-The conversion or transfer of property, knowing that such property is derived from drug-related offence or offences...for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

See Articles 3 and 5.
See Articles 6 and 2.
See Articles 6 and 12.
- The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property knowing that such property is derived from drug-related offence or offences; and

- Subject to the Constitutional principles and the basic concepts of its [the Party's] legal system, the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from drug-related offence or offences.

Second, it requires Parties to put in place measures to immobilise proceeds of drug offences. The Parties must enable their authorities to identify, trace, freeze, seize, or confiscate property, proceeds, and instrumentalities used in or derived from drug-related offence or offences and also enable their court or other competent authorities to order the production or seizure of bank, financial, or commercial records for the purpose of identification, tracing, freezing and confiscation. In this regard, it expressly prohibits the Parties to refuse these requirements on the ground of bank secrecy. These requirements reflect one of the aims of the Vienna Convention: to deprive drug traffickers of illicit proceeds, thereby eliminating their main incentive for engaging in drug traffics.

Third, it recognises as well the international nature of drug trafficking and drug money laundering and thus expressly contains provisions on mutual legal assistance generally and with respect to confiscation specifically as well as extradition in regard to drug-related offence or offences. In addition, like in domestic context, banking secrecy is no ground for refusal of assistance. The convention also encourages cooperation among State Parties to permit the sharing among cooperating countries either on regular or case by case basis of proceeds or property, or funds derived from the sale of such proceeds or property in accordance with domestic law, administrative procedure, bilateral or multilateral agreements entered into for this purpose.

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72 Articles 5(1) and 5(2).
73 Article 5(3).
74 Article 7.
75 Article 5(4).
76 Article 6.
77 Article 7(5).
78 Article 5(5)(b).
In view of these requirements, it comes as no surprise that the Vienna Convention has been described as one of the most detailed and far-reaching instruments ever adopted in the field of international criminal law, and if widely adopted and effectively implemented, will be a major force in harmonising national laws and enforcement actions around the world.\(^7\) With 168 Member States as of November 2003, the Vienna Convention has already become an established international mechanism of criminal law enforcement, in so far as illicit drug activities are concerned.

**B. The Council of Europe**

The most important product of the Council of Europe in the fight against money laundering is the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990 (Money Laundering Convention). It was opened for signatures in November 1990 and went into effect on 1 September 1993. While the definition of money laundering is taken from the Vienna Convention, the Money Laundering Convention does not limit the predicate crime for the laundering offence to drug-related crimes but includes other criminal activities, especially serious ones which generate significant amounts of profits. Furthermore, laundering of criminal proceeds is to be made illegal even though the predicate crime was not committed within the criminal jurisdiction of the concerned countries.\(^8\) In addition, Article 6(3) also permits the criminalisation of money laundering on a negligence standard.

As the Money Laundering Convention has as one of its purposes to deprive criminals of instrumentalities and proceeds of crime, the Parties are to enact, at national level, laws and other measures which enable the authorities to investigate, take provisional measures against, and confiscate instrumentalities and proceeds of crime. To this end, the Parties are to empower the courts or other competent authorities to compel the production of bank, financial or commercial records and the Parties are prohibited from refusing to comply with this requirement on the bank secrecy ground. The Parties are called upon to cooperate with each other "to the widest extent possible" in investigating, freezing or seizing, and confiscating instrumentalities and proceeds of crime.

\(^7\) David P. Stewart, *Internationalising the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 DENY J. INT'L & POL'Y 387, 388 (1990).

\(^8\) Article 6(2)(a).
It should be noted that the Money Laundering Convention, although developed within the Framework of the Council of Europe, is also open to other countries outside Europe to become Parties. As of November 2003, there are 31 Parties to this Convention.

3.2 The Prevention

A. The Balse Committee on Banking Regulations and Supervisory Practices

In December 1988 the Basle Committee issued a Statement in which it acknowledged that money laundering can undermine public confidence in banks and their stability. With a view to preventing this hazard, it recommends banks to identify customers, to comply with ethical standards and laws in conducting financial transactions, to fully cooperate with law enforcement authorities to the extent permitted by laws on customer confidentiality, and to adopt policies consistent with this Statement and ensure that their staff are informed of the policies in this regard.

The Statement has no legal force. However, different methods have been adopted to provide the force in this regard. First, formal agreements among banks committing them to comply with the Statement were adopted in Austria, Italy and Switzerland. Second, bank regulators indicate that failure to comply with the Statement could lead to administrative sanctions. This is the case in France and the United Kingdom. Finally, some country makes references to the principles in the Statement in its legally binding texts, such as Luxembourg.

B. The European Community


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82 The Basle Committee comprises of representatives of the central banks and supervisory authorities of G-10 countries- Belgium, Canada, France, Germany, Italy, Japan, The Netherlands, Sweden, Switzerland, the United Kingdom, the United States, and Luxembourg.
83 See the sixth paragraph of the Preamble.
Member States to criminalise money laundering. Unlike the Vienna Convention, the predicate crime for the purpose of money laundering covers a broad range of criminal activities\(^87\) not only drug related crimes. Further, these criminal activities may be committed in the territory of other Member States or of third countries.\(^88\) Therefore, it takes the same approach as the Money Laundering Convention. The Directive also imposes certain duties on credit and financial institutions. These include duties to identify customers,\(^89\) to verify beneficial ownership,\(^90\) to keep identification and transactional records for five years,\(^91\) to exercise due diligence,\(^92\) to report any suspicion about laundering operations without liability,\(^93\) and to establish programme against money laundering including training employees to help them detect laundering operations.\(^94\)

### 3.3 Both Repression and Prevention

**The Financial Action Task Force (FATF)**

The FATF is an inter-government organisation exclusively committed to fighting money laundering. Established in the G-7 summit held in Paris in July 1989 as a response to concerns about negative implications of money laundering on the financial system, it has, as of November 2003, 31 member Countries and Governments, 2 International Organisations—the European Commission and Gulf Cooperation Council, and more than 20 observers.\(^95\) Its mission was initially to examine techniques and trends in money laundering, to review measures taken at

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\(^87\) These include organised criminal activities, serious fraud, corruption, and offences which may generate substantial proceeds and which is punishable by a severe sentence of imprisonment. See Article 1(E).

\(^88\) Article 1(C).

\(^89\) Article 3(1).

\(^90\) Article 3(7).

\(^91\) Article 4.

\(^92\) Article 5.

\(^93\) Articles 6 and 9.

\(^94\) Article 11.

\(^95\) Since countries in many regions of the globe are members of the FATF, it may be considered that the FATF is an international body. There are FATF-like bodies at the regional level, such as the Asia Pacific Group on Money Laundering (APG), the Caribbean Financial Action Task Force (CFATF), the Organisation of American States (OAS/CICAD), the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), and the Financial Action Task Force for South America (GAFISUD). For the reason of word limit, this thesis will not cover the role of these bodies in shaping the fight against money laundering in their respective regions. Suffice it to state that these bodies have adopted and made into their own many FATF recommendations in the fight against money laundering. Those interested in having more information about this should see their respective websites.
national and international levels, and to set out measures still necessary to be taken. After producing in 1990 the Forty Recommendations as to anti-money laundering measures, the FATF continued monitoring and promoting the adoption and implementation of those Recommendations in member and non-member countries.

In 1996, the Forty Recommendations were first revised. In 2001, after the terrorist attack in the US, the FATF expanded its mandate to include the fight against the financing of terrorism, in addition to money laundering and thus, the latest 2003 revision contains the Forty Recommendations together with the Eight Special Recommendations on the financing of terrorism. These Recommendations are divided into four groups: repressive measures, preventive measures, other institutional measures, and international cooperation.

In respect of repressive measures, the FATF recommends that countries criminalise money laundering in accordance with the Vienna Convention. However, the predicate crime is not limited to drug-related crimes but extends to all serious crimes which at a minimum include a range of criminalities within the designated categories of crimes. It also calls for the introduction of corporate criminal liability. Further it suggests that countries provide for measures enabling the identification and tracing, the freezing, seizure, and prevention of the transfer or disposal of the proceeds of crime, and the confiscation of those proceeds. It, however, only suggests countries to consider the non-conviction-based confiscation regime.

The second group of Recommendations concerns preventive measures on the part of financial institutions and certain businesses and professionals. The

96 See http://www.oecd.org/fatf/aboutfatf_en.htm (last access 24 March 2004).
97 For excellent account of the continuing FATF work until 1999, see WILLIAM C. GILMORE, DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTERMEASURES 93-113 (Council of Europe 2nd ed. 1999).
98 See the FATF Forty Recommendations available at http://www.fatf-gafi.org/40Recs_en.htm (last access 11 Jan. 2005)
99 Recommendation 1. These crimes are participation in organised crime and racketeering, terrorism and terrorist financing, human trafficking, drug trafficking, arms trafficking, trafficking in stolen and other goods, corruption and bribery, counterfeiting currency, counterfeiting and piracy of products, environmental crime, murders and grievous bodily injury, kidnapping, robbery and theft, smuggling, extorting, forgery, piracy, insider trading and market manipulation. See the definition of designated categories of offences in the glossary attached to the FATF Forty Recommendation.
100 Recommendation 2.
101 Recommendation 3.
FATF makes it clear at the beginning that countries should not refuse to implement these measures on ground of financial secrecy.\textsuperscript{102} The preventive measures include customer due diligence, record-keeping, suspicious transaction reporting and compliance programmes. As currently formulated, the duty to identify customers is part of the customer due diligence. It should be noted that more than half of the Recommendations in this group are devoted to help financial institutions detect potential money laundering. The reason for this emphasis is that money laundering is most likely to be detected at the point where the proceeds first enter the legitimate financial system. As the FATF stated in its first report:

"Key stages for detection of money laundering operations are those where cash enters into the domestic financial system, either formally or informally, where it is sent abroad to be integrated into the financial systems of regulatory havens, and where it is repatriated in the form of transfers of legitimate appearances"\textsuperscript{103}

The FATF suggests that customer due diligence and record-keeping duty also apply to designated non-financial businesses and professions which include casino, real estate agents, dealers in precious metal and stones, lawyers, notaries, and legal professionals and accountants, and trust and company service provider in certain situations.\textsuperscript{104} Similarly, those designated non-financial businesses and professions are to report suspicious transactions and implement compliance programmes, although there are some qualifications for these two duties in case of lawyers, notaries, and legal professionals and accountants, dealers in precious metal and precious stone, and trust and company service providers.\textsuperscript{105} The FATF also suggests that countries consider apply the Recommendations to businesses and professions other than designated non-financial businesses and professions that pose a risk of money laundering or terrorist financing.\textsuperscript{106} The FATF further calls for the supervising or regulatory authorities to ensure that those supervised institutions implement the Recommendations.\textsuperscript{107} They should also establish

\textsuperscript{102} Recommendation 4.
\textsuperscript{104} Recommendation 12.
\textsuperscript{105} Recommendation 16.
\textsuperscript{106} Recommendation 20.
\textsuperscript{107} Recommendation 23.
guidelines and provide feedback which will assist the institutions in applying national measures to combat money laundering and terrorist financing, in particular, in detecting and reporting suspicious transactions.\textsuperscript{108}

The third group relates to institutional and other measures necessary in the systems. The FATF suggests the setting up of Financial Intelligence Units (FIUs) for receiving, requesting, where authorised, analysing, and disseminating suspicious transaction reports and other information on potential money laundering.\textsuperscript{109} It also suggests that countries authorise law enforcement officers to use special investigative methods, such as controlled delivery or undercover operations,\textsuperscript{110} or to compel production of financial records held by financial institutions, to conduct search and seizure to obtain evidence.\textsuperscript{111} It further calls for countries to equip supervising authorities with power to monitor and ensure compliance with the requirements to combat money laundering and terrorist financing and power to impose administrative penalties for failure to comply with these requirements.\textsuperscript{112} Finally, comprehensive statistics on matters relevant to effectiveness and efficiency of the systems to control money laundering and terrorist financing should be maintained to enable concerned authorities to review effectiveness of the systems. These may include the statistics on suspicious transaction reports, on investigations, prosecutions, and convictions of money laundering and terrorist financing, on freezing, seizure, or confiscation of property, and on international cooperation.\textsuperscript{113}

The last group addresses international cooperation. The FATF first calls for countries to be members of the relevant international instruments: the Vienna Convention, the Palermo Convention, the UN International Convention for the Suppression of the Financing of Terrorism 1999, and other relevant conventions, such as the Money Laundering Convention and the Inter-American Convention against Terrorism 2002.\textsuperscript{114} It envisages the widest possible range of mutual legal assistance in investigation, prosecution and related proceedings in respect of money laundering and terrorist financing. Of notable aspect is that request for

\textsuperscript{108} Recommendation 25.  
\textsuperscript{109} Recommendation 26.  
\textsuperscript{110} Recommendation 27.  
\textsuperscript{111} Recommendation 28.  
\textsuperscript{112} Recommendation 29.  
\textsuperscript{113} Recommendation 32.  
\textsuperscript{114} Recommendation 35.
assistance should not be refused on grounds of the offence being involved fiscal matters or the secrecy or confidential duty of the institutions. Double criminality should not to the most extent possible be obstacle to mutual assistance. It also calls for countries to provide expeditious and effective confiscation assistance, extradition, and other forms of cooperation.

Given their comprehensiveness, the FATF Forty Recommendations would certainly be a blueprint for a programme of actions against money laundering for the international community as a whole. While the Recommendations, as the name suggests, are simply recommendations without force under international law, the influence of the FATF in shaping the global fight against money laundering cannot be over-estimated. Some inter-governamental organisations, for instance, the European Community through the Directive as well as many countries have transformed many of these Recommendations into laws.

V. The Twin-track Control of Money Laundering

The strategy that aims both to prevent and repress money laundering is now known as the twin-track control of money laundering. Both aspects are now examined in some detail below.

1. Repressive Measures

Legal measures on the repressive aspect are the laundering offence and confiscation. As money laundering is an offence of derivative nature, there must always be criminalities that have generated the proceeds in the first place. This is known as “predicate crime”. It is therefore important to consider what crimes constitute the predicate crimes for the purpose of the laundering offence. In this regard, initially, the predicate crime is limited to drug-related crimes. The current trend is to cover all serious crimes, particularly those that generate large amount

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115 Recommendation 36.
116 Recommendation 37.
117 Recommendations 38-40.
118 William C. Gilmore described this in respect of the previous version of the Forty Recommendation. See William C. Gilmore, Money Laundering: The International Aspect, in HUME PAPERS ON PUBLIC POLICY VOL. 1 NO 2: MONEY LAUNDERING 7 (Hector L. McQueen ed., 1993). It is even more so with the latest version of the Forty Recommendations which were revised in light of change in laundering techniques.
119 Sherman, supra note 26, at 18.
of profit. A number of reasons have accounted for this trend. First, ample evidence has indicated that criminal organisations engage in a number of criminalities, such as fraud, extortion, corruption etc. not just drug trafficking. Proceeds from these criminalities have also been laundered. Next, proceeds from drug-related crimes as well as from other crimes, when laundered, similarly undermine the integrity of financial institutions and the stability of financial system. Third, limiting the application of the laundering offence to only proceeds for drug trafficking creates practical difficulties and unacceptable situations in both domestic and international contexts. In a domestic setting, it may be difficult for the prosecution to tie the proceeds to drug trafficking, since criminals may engage in many criminalities. In an international context, international cooperation may be refused on the lack of double criminality.

Another aspect relates to the application of the laundering offence to the proceeds from a foreign predicate crime. Many international instruments suggest this. While the Vienna Convention is silent on the issue, the Commentary to it notes that the drug-related crime may be committed outside the jurisdiction of the country which criminalises drug money laundering. The Money Laundering Convention expressly provides that the laundering offence applies to the proceeds from a predicate crime committed abroad. The Palermo Convention takes the same approach as the Money Laundering Convention. Similarly, the

120 See Article 1(e) of the Money Laundering Convention, Article 1(E) of the Directive, Recommendation 1, Article 1 of the FATF Forty Recommendation, and the Resolution S-20/4 D on Countering Money Laundering No. 2 (a) adopted as part of the Political Declaration and Action Plan against Money Laundering at the Twentieth Special Session of the UN General Assembly devoted to "countering the world drug problem together" in New York, June 10, 1998.

121 It should be noted that the UN has stated in regard to the application of money laundering to other offences, in addition to drug-related crime that:

"The international community, through the adoption of the 1988 Convention, has expressed its universal abhorrence of drug related money laundering. However, there would seem to be little policy justification for proscription of money laundering arising from some profit-generating criminal activities and not others. Double standards, particularly in criminal law, are not conducive to the maintenance of the rule of law or to international cooperation, and there may be difficulties in proving that particular proceeds are attributable to particular predicate offences. In any event, drug trafficking may not remain—or for that matter still be—the most profitable form of trans-border criminal activity."


123 Article 5(2)(a).

124 Article 6(c).
FATF suggests that predicate crime includes conduct committed in another country which constitutes a crime in that country and which would have constituted a predicate crime had it occurred domestically. At the domestic level, some countries take this approach. For example, predicate crime in the UK Proceeds of Crime Act (PCA) 2002 includes criminal conduct committed abroad which would constitute an offence in the UK if it occurred there. Similarly, in the US, predicate crimes include foreign predicate crimes.

There is also an issue whether the laundering offence applies to the perpetrator of the predicate crime. The Vienna Convention is silent in this aspect; however, its Commentary notes that the laundering offence could be committed by the perpetrator of the predicate crime, at least in so far as the concealing offence in Article 1(b)(i) is concerned. Subsequent conventions leave this issue to countries to decide whether the laundering offence should be made applicable to the perpetrator of the predicate crime. This is the case in the Money Laundering Convention and the Palermo Convention.

The mental standard of criminal liability for laundering also differs from country to country. The Vienna Convention requires knowledge of the drug origin of property, although it may be inferred from objective circumstances. The Palermo Convention similarly requires knowledge of property being the proceeds of crime. The Money Laundering Convention allows Parties to criminalise money laundering on a negligence standard. There are variations of the mental standard in this regard in the domestic law of some countries. In the UK, for example, the laundering offence in the PCA 2002 requires knowledge or suspicion of property being criminal property. However, the suspicion is subjective-based. It is not comparable with negligence which is objective-based under the Money Laundering Convention. In the US, the requisite mental

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125 Recommendation 1.
126 Section 340(2)(b).
128 COMMENTARY, supra note 122, at 64.
129 Article 6(2)(b).
130 Article 6(2)(e).
131 Article 3.
132 Article 6(1).
133 Article 6.
134 Section 340(3).
standard is knowledge of property being the proceeds of crime. There is no money laundering on the basis of suspicion or negligence.

The other repressive measure is confiscation of proceeds of crime. This type of confiscation is of recent origin in comparison to confiscation of the subject and instrumentality of crime. Most members of the FATF only recently allowed confiscation of this type, for example, Switzerland in 1994, Greece in 1994, Ireland in 1994 and 1996, and Austria in 1997. There are some variations as to confiscation introduced, however. Some countries have only conviction-based confiscation while others have both conviction-based and non-conviction-based regimes. The UK and the US have both. In addition, some countries use value confiscation system in the conviction-based confiscation regime while other countries employ property confiscation system in their conviction-based regime.

2. Preventive Measures

In general, preventive measures refer to obligations of designated institutions to take certain actions to discourage money laundering. As we have seen, these obligations, while initially limited to banks, have been extended to non-bank financial institutions as well as other non-financial businesses and certain professions, such as casino, dealers in precious metals and stones, lawyers, etc. The principal justification for this extension is that criminals turn more and more to those institutions to launder proceeds from crime because of the implementation of the preventive measures on the banks. For convenient purpose, however, the word "institutions" will be used for our examination purpose.

The institutions are encouraged or required to take the following measures to prevent money laundering: identifying customers, exercising due diligence, keeping records, reporting transactions, and introducing compliance programmes. As earlier explained, customer identification is now included as

\footnote{135 18 U.S.C. §§ 1956 and 1957.}

\footnote{136 Evaluation of Laws and Systems in FATF Members Dealing with Asset Confiscation and Provisional Measures, FATF, at 1 (1997).}

\footnote{137 The FATF defines the term “financial institution” very broadly. It means any person or entity who conducts as a business a wide range of activities on behalf of a customer. See the list of activities in the Glossary to the FATF Forty Recommendation (2003).}

\footnote{138 See the definition of non-financial businesses and professions in the Glossary to the FATF Forty Recommendation (2003). See also Recommendations 12 and 16.}
part of customer due diligence under the latest (2003) version of the FATF forty Recommendations. It will, however, be explored separately from due diligence

2.1 Customer Identification

Most criminals prefer not to have their identity revealed, particularly at the placement stage where immediate proceeds of crime are to be introduced into a legitimate financial system. Thus, requiring disclosure of customer identity reduces the risk of the institutions being used to launder the proceeds of crime to a certain extent. The identification of customers should not stop at immediate customers, however. In many cases, it extends to the identification of beneficial owners.\(^\text{139}\)

Customer identification need not be performed in every case. The FATF suggests that it be made where the institutions establish business relations, carry out transactions above a specified sum, have suspicions about money laundering, or have doubts about the veracity or adequacy of previously obtained data.\(^\text{140}\) In case of the financial institutions, the FATF suggests in Interpretive Notes that customer identification be conducted where the transaction is above USD/EUR 15,000 whether carried out in a single operation or several operations which seem to be linked.\(^\text{141}\)

The FATF suggests the institutions to use reliable, independent source documents in the customer identification.\(^\text{142}\) In case of individual customers, copies or records of official identification documents may be used, such as passports, identity cards, driving licenses or similar documents.\(^\text{143}\) In its Interpretive Notes, where the customers are legal entities, identification may be conducted on proof of incorporation or similar evidence of the legal status of the entities, information on customers' name, the names of the trustees, legal forms, addresses, directors, and provisions regulating the power to bind the entities. In addition, the institutions have to verify that the person purported to act on behalf of the entities is so authorised and also to identify that person.\(^\text{144}\) As the customers are in general the persons who provide identification documents, it is

\(^{139}\) Recommendation 5(3)(b).
\(^{140}\) Recommendation 5(2).
\(^{141}\) Notes to Recommendations 5, 12, 16.
\(^{142}\) Recommendation 5.
\(^{143}\) Recommendation 10.
\(^{144}\) Notes to Recommendation 4(a) and 4(b).
desirable that cross-checking data contained in these documents with those from independent sources be performed to verify their accuracy.\textsuperscript{145}

Where the institution cannot identify customers, the FATF suggests the institutions not to open an account or start business relations or perform transactions or it to terminate the existing business relations and consider making a suspicious transaction report in relation to the customers.\textsuperscript{146}

2.2 Due Diligence

Institutions are to properly examine the transactions to ensure that they are not likely to be related to money laundering. The focus of due diligence is on the nature of the transactions. It is not concerned with the identity of customers. The obligation of the institutions to exercise due diligence in this respect is very important when the reporting system to be examined below is suspicion-based. While the institutions must identify a customer, this alone often is inadequate to know whether the transactions are suspicious, since simple declarations, whether in the case of a customer acting on his own behalf or on behalf of another, are in most cases sufficient for this purpose. As has been observed:

Transactions suspected of money laundering will be detected only when the institutions are able to match information on the transactions obtained through due diligence with data from a customer and even their knowledge of his performance over some time.\textsuperscript{147}

Thus, due diligence obligation significantly improves the ability of the institutions to notice suspicious transactions.

It would be clearly impractical if the institutions would be required to exercise due diligence with respect to "all" transactions. The focus should therefore be on those likely to be related to money laundering. For instance, the FATF suggests the institutions to exercise due diligence when customer identification must be performed\textsuperscript{148} and when the transactions are complex, unusually large, or of unusual patterns which have no apparent economic or visible lawful purposes or they come from countries which do not or

\textsuperscript{145} STESSENS, supra note 24, at 159.
\textsuperscript{146} Recommendation 5(6).
\textsuperscript{148} Recommendation 5(3)(c) and 5(3)(d)
insufficiently apply its Recommendations.\(^{149}\) It must be stressed that the institutions should exercise due diligence when faced with the transactions of these descriptions, even though they have not had a suspicion about money laundering as to them. Otherwise, there would be no point in requiring them to exercise due diligence.

2.3 Record-Keeping Obligation

The purpose of this duty is to produce a paper trail for use as evidence in subsequent criminal investigations into money laundering. Thus, it is necessary that the records be kept in a form admissible as evidence in courts. They must also contain sufficient information that would enable law enforcement authorities to re-constitute individual transactions that have been entered into for laundering purpose.\(^{150}\) The records that need to be kept are those of customer identification and of executed transactions. Most instruments relevant to money laundering have set a minimum standard of five years for the record-keeping requirement.\(^{151}\)

While the obligation to keep records is useful for investigations into money laundering, it should not be considered repressive. Without the laundering offence and confiscation, this obligation alone cannot repress money laundering. In addition, it is not criminal law but financial law that imposes this duty. As stated, the aim of the preventive measures is to discourage criminals from using the institutions to launder the proceeds of crime. This obligation serves this objective to the extent that criminals would be deterred from laundering by the keeping of the customer identification and executed transactional records which may be further used by investigators. Accordingly, this obligation should be considered preventive.

2.4 Reporting Obligation

Clearly, the purpose of this obligation is to supply information as to potential money laundering to the authority (Financial Intelligence Unit—FIU)\(^{152}\) for further investigations. This should not mean that it is repressive. For the

\(^{149}\) Recommendations 11 and 21.
\(^{150}\) Recommendation 10.
\(^{151}\) Id.
\(^{152}\) It is a central national agency responsible for receiving, (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected proceeds of crime or (ii) required by national legislation or regulation, in order to counter money laundering. For further information on the FIU, see STESSSENS, supra note 24, at 183-199. Also see Information paper on Financial Intelligence Units and the Egmont Group, The Egmont Group, (2001).
reasons similar to those in the records-keeping obligation, the reporting obligation should also be considered preventive to the extent that criminals avoid laundering for fear that the transactions would be reported to the FIU.

The reason for this reporting obligation is that in practice it is very difficult for the investigators to uncover money laundering on their own efforts. At least three factors account for this difficulty. First, a number of criminal activities that generate substantial amounts of proceeds and money laundering are victimless. There are no victims who provide the investigators with the account of the crime and the potential suspects. Second, the process of laundering is in general involved the systems which are not easily accessible to investigators, such as financial institutions and other economic sectors including black market operations. Third, while economic backgrounds of the person concerned are of great value in identifying suspicious transactions, investigators do not generally have this information. It is within the expertise of the institutions. Without the reporting duty, there would not likely to be investigations into money laundering.

Currently, there are two models of reporting systems: objective and subjective models. Under the objective model, the institutions file a report whenever transactions are in excess of the prescribed amount. This reporting system may be called a threshold-based system. The subjective model, by contrast, requires the filing of a report only where the institutions have already determined that a particular transaction is suspected of money laundering.

The preference of the subjective model to the objective one may be explained on two grounds. The first relates to the usefulness of the reports made under the objective model. Since this model requires the filing of the reports above the specified amount without regard to the probability of the transactions involving money laundering, the number of the reports filed is certainly enormous. For example, in the US which operates this model, approximately 13

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153 STESENS, supra note 24, at 160.
155 Note that some of these countries also require the filing of reports in cases where transactions are not above the specified amount but are suspected of money laundering. See, for instance, 31 C.F.R. § 103.21 (a)(2)(1999) for the US and sections 7 and 16 of the Financial Transaction Reports Act 1988 for Australia.
million CTRs were filed in 1997 alone. It is doubtful that a significant number of reports filed under this model are related to crimes. Even if some of those reports do disclose criminal activities, chances of discovering them among the vast number of the filings are not likely. Furthermore, the institutions in the objective model may content themselves with mere filings of the reports without subjective evaluations about the transactions not required to be reported, thereby preventing investigators from benefiting from the expertise of the institutions in determining the transactions in light of their knowledge of and understanding in business of their customers. The second reason concerns costs of compliance with the reporting requirement under the objective model. No doubt, costs to the institutions are huge in this model. In the US, these costs reach into hundred of million of dollars each year. Given dubious benefits in terms of providing investigatory leads and huge costs associated therewith, it is not a surprise that few countries follow the US-led objective model. They are Australia, Thailand, Brazil, Costa Rica, Ecuador, Norway, Paraguay, and Uruguay.

The subjective model is more cost-efficient, since only transactions likely to be related to criminal activities would be reported to the FIU. It also allows law enforcement to capitalise the expertise of the institutions in the evaluations of the transactions in light of the business of their customers. Furthermore, the supervisory authorities may issue guidelines to assist the institutions in identifying suspicious transactions. Finally, the requirement that the institutions implement proper and adequate systems to guard against money laundering to be examined later on also helps improve their capacity in detecting suspicious transactions.

It has nevertheless been argued that the objective model yields significant benefits. First, the knowledge that large transactions must always be reported to law enforcement drives criminals to avoid banks and financial institutions and

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154 Noble & Golumbic, supra note 54, at 82.
155 It has been noted that The BSA's mandatory reporting requirements have created a database of 100 million CTRs, mostly of innocent transactions. See Diane Marie Amann, Spotting Money Launderers: A Better Way to Fight Organised Crime?, 27 SYRACUSE J. INT'L & COM. 199, 220 (2000).
156 Noble and Golumbic, supra note 54, at 133.
157 Id. at 140.
158 Id. at 131.
159 Id. n.236.
160 Id. at 83.
It is not, however, necessarily true that a deterrent is absent in the subjective model. It is the institutions which examine whether the transaction is suspicious. Criminals may never be certain that the institutions would consider the transaction concerned unsuspicious so long as they make it so look. An unsuspicious transaction in the eyes of a criminal may become suspicious when the institutions examine it in light of their expertise and knowledge of the business affairs of their customer. In addition, the filings of the reports under the objective model do not necessarily deter criminals. They may seek to file more reports in order to frustrate effective reviews of those reports. It has been noted that criminals take advantage of backlog in CTR analysis by actually filing CTRs. In addition the CTRs were not even in the US used as a clue for beginning investigations. Finally, uniformity and consistency in the enforcement alone, it is submitted, is not sufficient to justify more than necessary infringements of financial privacy rights and costly burdens upon the institutions in making the reports, especially in light of the fact that a significant number of those reports do not offer benefits in detecting crimes, the main purpose for which the reporting obligation is designed.

Given the advantages of the subjective model as compared with the objective counterpart, it is no surprise that even the U.S. with extensive experience of the objective model started to rely more on subjective model, although it also operates the objective model in tandem. The FATF, while suggesting the suspicion-based reporting system in Recommendation 13, still encourages countries in Recommendation 19(b) to consider the feasibility and utility of a threshold-based system but only in the case where reports would be

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163 Id. at 82-83.
165 Mr. Terrence M. Burke, Deputy Assistance Adm'r Operation Div., Drug Enforcement Administration states that CTRs are primarily used a source of information that we go to confirm other information that we have developed from other sources. See id. at 820 n.84.
made to a national central agency with a computerised database, available to competent authorities for use in money laundering cases, subject to strict safeguards to ensure proper use of the information.

The reporting obligation, if it is to be strictly observed, the institutions should be made liable for failure to report. Depending on the approaches taken in this regard, this liability may be of administrative or criminal nature. For example, Belgium and Luxembourg have taken the former approach. The UK and the US have opted for the latter. With respect to this reporting obligation, there is a concern about potential liability for disclosure, in particular in case of banks, since they owe a confidentiality duty to their customers. It is submitted that so long as disclosure is legally required, as in this case, they are not liable for the breach of this duty. This should be so even if the law does not so state expressly. Nevertheless, an explicit provision may be desirable. The FATF suggests the explicit protection in this respect and this protection is explicitly provided for in the UK.

Once a report is made, it is necessary that the suspect be kept from knowing that he is under investigations. For this purpose, a provision should be made to prohibit individuals who may become aware of the investigations from warning the suspect as to the investigations. The FATF suggests such a prohibition and the UK provides for the crime of tipping-off the suspect in this regard.

As a principle, until being instructed from the authority, the institutions should refrain from carrying out the transaction. In accordance with the law, the authority may instruct that they are not to execute it. However, where the law

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167 Steessen, supra note 24, at 164.
168 In the US, see 31 U.S.C. §§ 5321 and 5322. For the UK, see sections 330-332 of the PCA 2002.
169 For England and Wales, see Tournier v. National Provincial & Union Bank of England 1 KB, CA 461 (1924). A violation of this duty renders the banks civilly liable to the customers. In some countries, for example, France and Switzerland, the banks are even criminally liable from the breach of this duty. See Article 378 of the French Penal Code and Article 47 of the Swiss Penal Code.
170 In Tournier, the court subjected the duty of confidentiality to four exceptions one of which was where disclosure is under compulsion by law.
171 Recommendation 14(a).
172 Sections 337(1) and 338(4) of the PCA 2002.
173 Recommendation 14(b).
174 Section 333 of the PCA 2002.
175 Steessen, supra note 24, at 175.
permits, the authority may allow the institutions to carry it out. The reason for this may be, for example, that the authority wants to widen investigations. This practice may be called “controlled money laundering”. Like controlled delivery of drugs which exonerationes participating police officers, not traffickers, controlled money laundering absolves criminal liability of participating institutions, not those laundering the criminal proceeds. The FATF suggests this technique in Recommendation 27; however, this technique may be used only when the institutions have made a report to the authority and are ordered to take part in the operation.

There, however, may be cases where a report has been made but it appears that refraining from carrying out the transaction until being instructed from the authority would not be possible or would be likely to frustrate law enforcement efforts. This case does not fall within the FATF controlled money laundering technique. The EC Directive provides for such a case by permitting the institutions to execute the transactions if the authority is immediately informed afterwards. While it does not state whether the institutions are liable for money laundering in this case, it must be understood that they do not incur that liability. In the UK, the PCA 2002 provides for an explicit defence against money laundering in this regard.

2.5 Introduction of Compliance Programmes

The institutions are finally to introduce internal compliance programmes designed to increase their ability to detect and prevent money laundering. They must develop internal policies, procedures and controls, appropriate compliance management arrangements and adequate screening procedure to ensure high standards when hiring employees. They must also provide for an ongoing employee training programme and carry out the audit function to test the system.

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176 See, for example, section 335 of the PCA 2002.
177 STESENS, supra note 24, at 175-176. In the UK, this constitutes the defence against the laundering offence. See sections 327(2)(a), 328(2)(a), and 329(2)(a) read in conjunction with section 335 and section 338(1) and 338(2). Note also that the authority allowing the execution of the transaction has a defence against the laundering offence. See sections 327(2)(c), 328(2)(c), and 329(2)(c).
178 Article 7.
179 See sections 327(2)(a), 328(2)(a) or 329(2)(a) read in conjunction with sections 338(1) and 338(3) of the PCA 2002.
180 Recommendation 15.
Adequate compliance programmes are important in two respects. First, where corporate liability exists, the existence of compliance programmes may be used as a defence against criminal and civil liabilities including forfeiture as a result of money laundering. This is probably because the institutions can argue that they have done all they could to prevent money laundering and thus should not be liable for money laundering that has occurred particularly on the wilful blindness theory. Second, their employees will be more able to provide relevant information as to possible money laundering to the authority.

In concluding, measures to control money laundering have been grouped into the categories of repression and prevention. Nevertheless, it is submitted that each group could not be described as having only repressive or preventive function. From the perspective of criminals who seek to launder their proceeds, the laundering offence and confiscation are obviously repressive measures. Yet, from the point of view of the institutions, both induce them to fully observe the preventive measures and therefore both have the preventive value in this respect. Similarly, customer identification, due diligence, and the introduction of compliance programmes, while grouped into preventive measures, also further the repression of money laundering in that those measures enhance the ability of the institutions to detect money laundering. These obligations, when coupled with the reporting obligation, would enable them to make more useful reports to the authority for investigations into money laundering. The obligations to file reports and keep records of the transactions, while assisting the authority in investigating money laundering, also have a preventive role to the extent that both discourage criminals from using the institutions to launder the proceeds of crime.

Therefore, the repressive measures encourage the institutions to fully comply with the preventive duties and full compliance of the preventive duties enhances their capability of detecting and making more relevant reports for use by investigators. As such, effective operation of the preventive measures requires effective functioning of the repressive counterparts and vice versa. Either one

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181 Adams, supra note 58, at 690-701.
182 STESSENS, supra note 24, at 178.
183 Id. at 179.
being ineffective in operation, there can hardly be prospects in the control of money laundering.

VI. Money Laundering Control: An Effective Way to Fight against Profit-Driven and Organised Crime

As examined, the focal point in controlling money laundering is identification of the proceeds of crime as an investigatory lead to uncovering the crime. This represents a new way of criminal investigations. Traditionally, investigators place less emphasis on using the proceeds as the investigatory lead. The principal reason is that in many cases victims can provide investigators with evidence of crime and/or its perpetrator. There is not much need to use the proceeds for uncovering crime. In modern times, with the increase in crimes which produce significant amounts of monetary proceeds and are victimless in nature, in particular drug trafficking, traditional investigations which rely on the role of the victims in providing information does not correspond to the reality of these crimes. As a result, a new way of criminal investigations which has its focus on the identification of proceeds has been developed. It is often known as the “follow-the-money-trail” approach comprising of the laundering offence and confiscation.

Upon being identified, the proceeds, in addition to being subject to confiscation, would be used as the investigatory lead to uncovering the crime that has produced them and its perpetrator or to build a case on the basis of the laundering offence against such perpetrator. This new approach to crime is effective in fighting against profit-driven crime and organised crime for a number of reasons.

Profit-driven crimes are crimes committed for gains. The potential profitability from crimes acts as an incentive for further commission. Thus, confiscation counters this incentive by removing what has been criminally obtained. It provides deterrent effects to those committing crimes for profits. Some have argued that confiscation provides no deterrence, since it only forces the offender to return what he has obtained through the crime, i.e., to return to the status quo ante.¹⁸⁴ This argument, however, ignores the value of time and

¹⁸⁴ Fried, supra note 42, at 371-372.
effort spent in accumulating unlawful wealth. Further, in many countries, it is not the profit but the proceeds that are subject to confiscation. It cannot be denied that confiscation has deterrent effects.

Many profit-driven crimes are business-related and are committed by individuals in such businesses. Many of them are very difficult to prove due to their complexity, for instance, commercial frauds. The laundering offence may be used to control these crimes. The laundering offence is in essence any dealing in the proceeds of crime for the purpose of disguising their criminal origin. The laundering offence is almost always proved, once it is established that the property concerned is the proceeds of crime. Of course, as will be shown in Chapter II, proving that the property is the proceeds of crime is very difficult, given the fact that the proceeds often originate in the form of money which is fungible and has no specific identity. However, once the suggestions offered in Chapter II are followed, the difficulties caused by the monetary nature of the proceeds would be much reduced. Further, this may also render in some cases easier proving that the property is the proceeds of crime than proving the crime on a stand-alone charge. This is particularly so where the crime is complex and there is no or not sufficient evidence of particular or specific occasions of the crime committed, such as commercial frauds or securities frauds. This is because the prosecution may be able to prove the crime which is the source of the proceeds in the laundering offence without identifying a specific act of the crime. It should not then be a surprise that the Head of Investigations of UK prosecuting Agency has observed that “more than 30% of the cases handled by his agency would have been brought to trial one year earlier has they also been considered for laundering charges.

In addition, controlling money laundering is the most effective way to fight against organised crime. Organised crime, like other businesses, requires management teams and working capital to grow. It is a well-known fact that

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187 One commentator has also made a similar observation. See Abrams, supra note 51, at 34.
188 See, for example, US v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990).
189 THE PERFORMANCE AND INNOVATION UNIT OF THE CABINET OFFICE, RECOVERING THE PROCEEDS OF CRIME: A REPORT 87 (Box 9.8) (June 2000).
those managing or directing criminal organisations are ordinarily too distant to be linked to the crimes they direct. Thus, traditional criminal offences principally directed at those actually committing the crime, for example, street drug sellers, are likely to be of little relevance to those managers or directors. Further, the arrest of members, whether front-line soldiers or leaders, would not be likely to have much effect as long as the organisations have working capital, since replacements would probably be easily found.190 Thus, effective control of organised crime requires that the leaders and their working capital be amenable to the law. Since significant amount of proceeds generated by organised crimes need be laundered before they can be safely used, money laundering is a key point where organised crime can be attacked. The laundering offence enables the pursuit of the leaders at the point where they are most observable and vulnerable: the surfacing of unexplainable wealth. While it has been argued that the laundering offence is not necessary, since complicity liabilities based on instigator or conspiracy could be used against those leaders,191 it is submitted that the fact that they have unexplainable wealth is not enough for the prosecution to be successful on those grounds. More need be offered, particularly, evidence of them directing the principal offenders to commit the crime. The laundering offence, however, is established as long as the wealth is shown to be of a criminal origin. Further, as noted above, the showing of the criminal origin of the proceeds need not be specific.192 This is particularly relevant to the leaders of organised crime who only take the proceeds from crime but rarely come into contact with the commission of specific criminal acts. Confiscation, further, addresses the capital of organised crime. Unlike the re-filling of those arrested which is relatively easy, the re-filling of emptied capital is not easy. Without them, organised crime cannot continue its criminal operations. The control of money laundering, therefore, enables law enforcement to attack organised criminal groups at their two most important aspects: leaders and working

190 In the senate hearing of what was the forerunner of criminal forfeiture under RICO, Sen. McClellan states: .....But you say the fact that you may finally arrest and convict the top man in a family does not destroy the family. Someone else just move up to take his place. The Attorney General John Mitchell responds: That is correct, sir. Sen. McClellan continues: And they continue to operate. John Mitchell responds: That is correct, sir. These are quoted in Spaulding, supra note 40, at 201.
192 See n.188 above.
capitals. The gaps that were not heretofore adequately addressed in the combat against organised crime will be closed. Finally, controlling money laundering is also important in the fight against organised crime which has been known to operate on a cross-border basis, since mechanisms for international criminal law enforcement in respect of money laundering are already in place: the Vienna Convention and the Money Laundering Convention.

VII. Concluding Remarks

As demonstrated, the rise of profit-driven and organised crime together with laundering the proceeds thereof is dangerous to the maintaining of the rule of law and economic and financial stability. The US and Switzerland were among the first countries to respond to the dangers in this regard by implementing measures to control money laundering. Subsequently, a number of instruments herein examined adopted and further refined this strategy. The result is the global recognition of the control of money laundering as an effective way to fight against those crimes. As today recognised, this strategy comprises of repressive measures: the laundering offence and confiscation, and preventive measures applicable to banks and non-bank financial institutions as well as certain non-financial institutions and professions: customer identification, due diligence, record-keeping, reporting obligations, and compliance programmes.
Chapter II: Comparative Examination of the UK and the US Laundering Offence

The first chapter has shown that controlling money laundering is the most effective way to fight against profit-driven crime and organised crime. To successfully control money laundering, both preventive and repressive measures must be effectively enforced. This thesis, however, mainly deals with the criminal aspect of the control of money laundering. In this chapter, the laundering offence would be examined and we will leave confiscation to be explored in chapter III. The examination of the laundering offence here is conducted with a view to making it capable of being effectively used as a weapon in this regard.

Proceeds of crime often originate in monetary form. Money is fungible and, unlike good, it has no particulars or specific identity. Whether criminal or legitimate, money is the same. It is impossible to prove the criminal origin of money by relying on its particulars. The absence of the victims, the likely lack of direct evidence and laundering techniques further the difficulties in this regard. Thus, proving the laundering offence is very difficult. Moreover, when mixed with other money, whether criminal or legitimate, both the proceeds and other money lose their identity; both are indistinguishable. It is impossible to identify the proceeds of crime in the mix. As a result, where money in the mix is used to conduct further transactions, the laundering offence grounded on the transactions could not be successfully proved. It will therefore be the principal argument in this chapter that the laundering offence will be capable of being effectively used only if it is approached in a way that overcomes the difficulties arising from the monetary form of the proceeds.

I. The Nature of the Laundering Offence

The laundering offence is a type of derivative offence which has been described as crime an element of which involves proof that a primary offence was committed or was intended to be committed.\(^1\) As money laundering is in essence an act to conceal or disguise the proceeds of crime, there must always be the crime which is the source of the proceeds before laundering can take place. In addition, if money laundering is successfully carried out, the proceeds of crime

appear to have come from a legitimate origin, thereby reducing chances of their confiscation and of the perpetrator being apprehended. So viewed, when someone other than the person whose crime has produced the proceeds engages in laundering, it may be considered that the person assists the perpetrator of the crime.

Criminal liability for assistance is known in laws as accessory liability. Traditionally, this criminal liability exists when assistance is given before, or at the time of, the commission of an offence. Assistance in the form of laundering of the proceeds of crime, however, is quite different, because it is given after the crime is committed. Thus, money laundering may be considered as a form of accessory-after-the-fact offence, similar to the handling or receiving offence. While, in most countries, a thief cannot be at the same time a receiver or handler of the stolen good, the perpetrator whose crime has produced the proceeds can commit the laundering offence with respect to his own proceeds. Because of its derivative nature, the extension of criminal liability for laundering in the case of the perpetrator of the crime should be properly structured in order to make the laundering offence capable of being effectively used in this regard. This will be subsequently examined.

II. Comparative Examination of the UK and the US Laundering Offence: Selected Aspects

The relevant provisions in the UK and the US legislation are set out below.

2.1 The UK

Before 2002, the UK had three pieces of legislation on money laundering: the Drug Trafficking Act (DTA) 1994, the Criminal Justice Act (CJA) 1988, and the Prevention of Terrorism Act (PTA) 1989 applicable to drug proceeds, proceeds from other indictable crimes, and terrorist funds respectively. In 2002,
the PCA was enacted which created money laundering offences applicable to proceeds from any crime.

Section 327 makes it an offence to conceal, disguise, convert, transfer, or remove from the jurisdiction criminal property. The concealment or disguise includes concealing or disguising the nature, source, location, disposition, movement or ownership of property or any rights with respect to it.

Section 328 makes it a crime for any person to enter into or become concerned in an arrangement, knowing or suspecting that the arrangement facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

Section 329 criminalises the acquisition, use, or possession of criminal property.

There are defences to money laundering offences in these sections.
1. The person makes disclosure and if the disclosure is made before he does the prohibited act, he has the appropriate consent,
2. The person intended to make a disclosure but had reasonable excuse for not doing so; or
3. In respect of section 329, the person acquired or used or had possession of the property for adequate consideration.

Section 340 provides:

Property is criminal property if it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and the alleged offender knows or suspects that it constitutes or represents such a benefit.

2.2 The US

The legislation that provides for the laundering offence is the Money Laundering Control Act (MLCA) 1986, particularly 18 U.S.C. §§ 1956 and 1957

Section 1956: offence of laundering monetary instrument

This section makes it an offence for any person, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, to conduct or attempt to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity (SUA)

(1) with the intent to promote the carrying on of SUA; or
(2) knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of SUA.

“Knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity” means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State or Federal law, regardless of whether or not such activity is a SUA.

“Specified Unlawful Activity” is defined to include approximately two hundred types of crimes a number of which are organised crime-related.

**Section 1957: offence of engaging in monetary transaction in property derived from specified unlawful activity**

This section makes it an offence for any person to knowingly engage or attempt to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from “SUA”.

Just as in case of section 1956, it is expressly provided that the prosecution need not prove that the defendant knew that the property was derived from a SUA.

“Criminally derived property” means any property constituting, or derived from, proceeds obtained from a criminal offence.


**2.3 Comparative Aspects**

1) **The Mental State**

The definition of “criminal property” in the PCA 2002 makes it that the UK laundering offence requires knowledge or suspicion of the property concerned being criminal property. Further, so far as concerns the concealing offence in section 327, there is no purposive element. On the contrary, 18 U.S.C. §§ 1956 and 1957 requires knowledge of the property being the proceeds of crime. Suspicion is not enough. Moreover, § 1956 contains also the purpose to conceal or disguise the nature, the location, the source, the ownership or the
control of the SUA proceeds. Thus, it is proposed to examine first whether a suspicion of the criminal origin of the property should be permitted as the mental state of the offence and, second, whether the concealing offence should also require the purpose to conceal or disguise the proceeds.

A few reports have suggested with respect to the first issue that knowledge is too high a standard in the laundering offence. Several lower alternative standards, such as suspicion, reasons to assume, or negligence standard should be used. However, it is submitted that knowledge is preferable to other lower alternative standards.

First, knowledge of the criminal origin of the proceeds is obvious in respect of the perpetrator of the predicate crime. Thus, proving this knowledge may be difficult in case of laundering the proceeds of the crime of another. In this category, there are two kinds of third parties who may be involved in laundering: those whose professions are conducive to furthering laundering or the so called “professional launderers, such as lawyers, accountants, and etc. and non-professional launderers.

It is submitted that proving knowledge of the property being the proceeds of crime against professional launderers is probably not difficult. These professionals are involved in money laundering because of their expertise in the relevant fields. As will be shown later on, one of the pieces of evidence to prove the criminal origin of property is irregularity or unusual complexity of the transaction. Apart from showing that the property has a criminal origin as a matter of fact, this type of evidence also indicates the knowledge as to this fact on the part of those engaging in the transaction. This is important because laundering is frequently complex when professionals are involved. Thus, the fact that the defendant is a professional whose expertise may help further laundering, when coupled with evidence of the transaction being irregular or unusually

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5 There are two alternative specific intents: to promote the carrying on of the SUA and to avoid a transaction-reporting requirement under the law. It is sufficient for the present purpose to examine only the specific intent to conceal or disguise the nature, location, source, ownership, or control of the SUA proceeds. The reason is that this offence is comparable to the concealing offence in section 327.

complicated, would indicate his knowledge of the property being the proceeds of crime. Moreover, these professionals are often subject to the relevant codes of conduct or guidelines designed to prevent money laundering. When they fail to follow the codes or the guidelines in regard to a particular transaction, this may be indicative of a desire to avoid becoming aware of the criminal origin of the property in which case they would be considered as having knowledge under the wilful blindness theory.7

Thus, the probative problem with respect to knowledge appears concerned only with non-professional launderers or, in other words, normal businesspersons. In this aspect, it should be noted that criminal liability is not generally imposed upon ordinary business activity, combined only with knowledge of an illegal connection.8 This is to avoid placing a significant burden on people doing business and on the legitimate commerce.9 Of course, the notable exception to this principle is the receiving crime. However, this crime is not likely to significantly burden the legitimate commerce, since it typically involves circumstances where it can be reasonably inferred that the defendant knew that the good was stolen: an unusually low price, the unlikely source of the goods, or secrecy surrounding the transaction.10

Money laundering, however, is far broader than the receiving crime. An act of laundering includes any conduct.11 Further, money laundering applies to the proceeds of crime which, by law, are indefinite in time or space, as compared to the former which is mostly concerned only with the “original or direct” product of crime.12 In addition, the laundering offence is generally considered serious as evidenced by severe penalties in most countries.13 Even upon the

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7 Wilful blindness, at least, requires a subjective-based suspicion of a person as to the criminal origin of the proceeds, coupled with failure to make any inquiry for fear that it will confirm his suspicion.
8 For instance, complicity liability in a substantive offence is not usually imposed on a person who only supplies a good, knowing that it will be put into illegal use. See Abrams, supra note 1, at 9.
9 Id.
10 Id. 11.
12 Abrams, supra note 1, at 10. Of course, under section 24(2) of the English Theft Act 1968, the stolen good need not be the original thing; it may be subsequent proceeds from the sale of the original.
13 Id.
knowledge standard, the burden on the legitimate commerce could be significant, because money laundering may not involve cases where an inference of knowledge can reasonably be drawn. The alternative of lowering the required mental state would increase this potential. It is submitted that this should be avoided.

Let us turn to the purposive element. It has been suggested that the laundering (concealing) offence should not require the prosecution to prove the purpose to conceal or disguise the criminal origin of property, because this makes the prosecution for the laundering offence less likely to be successful. It is, however, submitted that requiring this purpose is not likely to be a significant obstacle in this respect. First, it need not be the only purpose. It is hard to imagine cases where the perpetrator of the predicate crime could have conducted the transaction in the proceeds without at least having this purpose in mind. Second, where laundering is grounded upon the concealment or disguise of the property of a criminal origin, it is very likely that the purpose to conceal or disguise would be found.

In case of professional launderers, the probative problem in this aspect would not likely to arise, as the complexity of the scheme would indicate the purpose to conceal or disguise. In addition, as will be subsequently expounded, evidence to prove the knowledge of the property being the proceeds of crime may also prove the purpose to conceal or disguise, for instance, evidence of unusual complexity, secrecy or convoluted nature of transactions, and evidence

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14 Id. at 11.
16 In the US, see US v. Wynn, 61 F.3d 921 (D.C. Cir. 1995) and in the UK, see R. v. Causey (Unreported) Court of Appeal, 18 October 1999.
17 In this connection, the Commentary to the Vienna Convention observes that although the concealing offence under Article 3(b)(ii) does not explicitly require the purposive element, this element is implicit in the language. This suggests that the act of concealing or disguising is by all means indicative of the intent to conceal or disguise. See U.N., Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, [hereinafter “Commentary”], at 64, U.N. E CN.7/590, U.N. Sales No. E.98.XI.5, ISBN 92-1-148106-6 (1998).
18 For instance, US v. Tencer, 107 F. 3d 1120 (5th Cir. 1997) (evidence of intent to conceal included depositing proceeds in geographically distant accounts, mixing proceeds commingled with legitimate funds to mail drop address, trying to convert account to cash as investigators close in).
of using names of third parties, false names, etc. Indeed, evidence of this kind also proves the property being the proceeds of crime as a matter of fact. Thus, in practical terms, this evidence would probably be used in any event and thereby requiring the prosecution to prove the purpose to conceal or disguise the proceeds of crime imposes no further evidential difficulty. In case of ordinary businesspersons, proving the purpose to conceal or disguise may be difficult. Nevertheless, this purposive element should be kept with a view to preventing the offence from being easily used at the expense of the legitimate commerce.

It is then submitted that both knowledge of the property being the proceeds of crime and the purpose to conceal or disguise it in case of the concealing offence should be retained. Requiring both does not make the laundering offence difficult to be proved. An evidence of this may be found in the FATF observation that the US has far more convictions of money laundering than any other country even if the elements of the US laundering offence require both knowledge and purpose.20

2) Single Legislation vs. Several Pieces of Legislation

Until 2002, one of the most marked differences between the UK and the US with respect to the laundering offence is that the UK had three pieces of law that criminalised the activity: the DTA 1994, the PTA 1989, and the CJA 1988. The US, however, has only one law, the MLCA 1986, which covers a wide spectrum of crimes.

Having different pieces of laws criminalising money laundering in this respect means that the defendant must be proved to know the crime of which the property is the proceeds. Except the case of own proceeds laundering, insisting on the knowledge as to the type of the predicate crime would probably make the proving of the offence difficult, since in many cases it is not possible to prove more than that knowledge relates to some form of criminal activity.21 This is especially true where funds from various crimes are mixed, for example, in case of organised crime which has been known to engage in a number of criminal activities. It cannot be expected that launderers would identify or would want to know which criminal activity produced the property because they are likely to be

19 For instance, US v. Short, 181 F. 3d 620 (5th Cir. 1999)(having wife deposit drug proceeds in safe-deposit box in the name of relative shows intent to conceal).
20 FATF Review, supra note 6, at 11.
indifferent with regard to the exact criminal origin of the property. The result is that they can escape liability by simply not inquiring about the specific source of the proceeds. This is particularly troubling with regard to professional launderers who know too well that the property being the proceeds of crime, since that is why they are engaged. Therefore, where laundering the proceeds from different crimes is criminalised in different pieces of laws, it must be proved that the knowledge of the defendant in this regard relates to the predicate crime for the laundering offence with which he is charged under the concerned legislation. Failing that, the defendant is to be acquitted, even though the fact of laundering is proved.

Where laundering of the proceeds from various crimes is criminalised in a single legislation, it is suggested that the prosecution need not prove that the knowledge in this regard relates to which crime, among those predicate crimes, is the source of the proceeds. As the laundering offence is similar to the receiving crime, it may be useful to look at the position as to this issue in respect of the latter. According to the UK Theft Act 1968, section 2(4) provides that a good is stolen not only when it is obtained from theft as defined in section 1, but also when it is obtained by blackmail or by deception in accordance with section 15. While the receiver must know or believe that the good is stolen, the class of “theft” concerned need not be identified. Thus, the defendant need not know the crime which makes the good a stolen good as a matter of law. Consequently, he is still guilty of the receiving crime even though he mistakes one type with another type of the theft offences. The provision which prescribes various crimes as predicate crimes for the purpose of the laundering offence, it is submitted, is like section 1 of the UK Theft Act 1968. Just as the receiver need not identify the class of “theft” concerned or his classification need not be correct, the launderer need not know the crime which produced the property or his knowledge in this regard need not be correct either. It is sufficient as long as his knowledge relates to any of the predicate crime. In light of this, a single legislation criminalising money laundering is preferable to several pieces of legislation.

See Abrams, supra note 1, at 10.

At the present in the UK, because money laundering is criminalised on any crime basis, the defendant need know or suspect only that the property is criminally derived. He need not know of what crime the property is the proceeds. As long as he knows that the property is criminally derived, it matters not whether he mistakes one crime with another. This is clearly an advantage of the any crime approach to the laundering offence. However, money laundering need not be criminalised on any crime basis to achieve this advantage. For instance, the MLCA 1986 explicitly provides that knowledge means simply knowledge that the property is the proceeds of “some” form of unlawful activity; it need not relate to any of the SUA. As will be shown in the next section, there are costs associated with the criminalisation of money laundering on an any crime basis. Thus, it is submitted that the US approach as to the mental state in this regard would be preferable.

3) Predicate Crime

Money laundering is conduct to conceal or disguise the proceeds of crimes. These crimes are often referred to as predicate crimes. There are two ways of defining predicate crime for this purpose.

The first is the list of enumerated crimes approach. Here, the legislation spells out criminal activities which serve as predicate crimes for the purpose of the laundering offence. Some countries expressly stipulate crimes which constitute the predicate crimes for this purpose, for example, the US. Others do not explicitly provide as such, but employ some criteria in characterising crimes as predicate crimes, for example, the length of imprisonment\(^4\) or the indictable nature of crime.\(^5\) The second approach is to criminalise laundering activities on an any crime basis—the any crime or all crime approach.\(^6\) The PCA 2002 takes this approach.

In a prosecution for the laundering offence, the prosecution need prove that the property concerned is the proceeds of the predicate crime. The need to

\(^4\) For example, the laundering offence in New Zealand applies to crimes with a five-year minimum period of imprisonment.

\(^5\) This is the UK approach in the CJA 1988.

\(^6\) This approach is different from the serious crime approach to making money laundering an offence, as urged by the Money Laundering Convention and the FATF Recommendation 4. This is because the there must be some standard to define seriousness for this purpose and it necessarily follows that some criminal activities would not be considered serious and thus, predicate crimes for the purpose of the laundering offence.
prove this is clearly one of the difficulties faced by the prosecution in enforcing the laundering offence, particularly where the predicate crime occurs in a foreign jurisdiction or the proceeds are mixed either with legitimate funds or with other criminal proceeds. To alleviate this difficult burden, it has been suggested that money laundering be criminalised on any crime basis, as is currently the case in the UK. This would dispense with, it has been argued, the need to prove that the property is the proceeds of a specific predicate crime. The prosecution need prove only that the property is the proceeds of some type of criminality. It is submitted that this argument is wrong. The reason for this relates to the particularity requirement in the indictments.

Generally, indictments must contain such particulars as may be necessary for giving reasonable information as to the nature of the charge. This requirement mandates that the prosecution specify of what crime the property is the proceeds. Thus, even under the PCA 2002 which criminalises money laundering on any crime basis, the prosecution must state what criminal conduct makes the property concerned criminal property. Of course, it is unnecessary to prove that the property is the proceeds of the predicate crime because there are no longer predicate crimes. However, this does not mean that the prosecution need not identify the crime which is the source of the property. It is submitted that the indictment for the laundering offence is not sufficiently particularised if what crime produced the property is not spelt out. As this crime must be

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27 R. E. Bell, Abolishing the Concept of "Predicate Offence", 6 J. OF MONEY LAUNDERING CONTROL 137 (2002)
28 Id. at 139. He relied on the cases of R v. El-Kurd (Unreported) 26 July 2000 and R v. Hussain and Others 2 Crim. App. R. 26 (2002). In these two cases, the Court of Appeal approved the practice of charging conspiracy to launder drug money or conspiracy to launder money from non-drug crimes. However, these two cases are concerned with the conspiracy crime of which the essence is an agreement to commit a crime. Whether the proceeds come from drug or non-drug source is not an essence of the crime. The nature of the conspiracy crime is different from substantive laundering offence where the provenance of the proceeds, whether drug trafficking or other indictable crimes, is at the heart of the offence. It is submitted that these two cases do not support the position that the prosecution need not prove from what crime the proceeds are derived where the substantive laundering offence is at the issue.
29 Section 3 of the Indictment Act 1915. This right is also recognised under Article 6 of the European Convention on Human Rights which states "Everyone charged with a criminal offence has the right......to be informed promptly,........and in detail of the nature and cause of the accusation against him.
30 In this regard, it is interesting to note that in R v. Causey (Unreported) Court of Appeal, 18 October 1999, although any indictable offence is a predicate crime for the purpose of the laundering offence under the CJA 1988, the prosecution alleged that the defendant laundered the proceeds from the crime of conspiracy to steal and to handle motor vehicles and car ringing.
identified, the prosecution has to prove it. Thus, irrespective of whether money laundering is criminalised on a some crime or any crime basis, the prosecution still has to specify and prove the crime of which the property is the proceeds.31

Before the PCA 2002, the UK had three pieces of laws criminalising laundering activity: the DTA 1994, the PTA 1989, and the CJA 1988. Thus, the prosecution has to prove that the property is the proceeds of the crime under the concerned legislation. The consolidation of the offence of laundering the proceeds of different crimes into one piece of legislation in the PCA 2002 does not free the prosecution of this burden. Due to the particularity requirement, the prosecution still has to specify and prove the crime which produced the property. Accordingly, although it is correct to assert that having different laws criminalising laundering the proceeds from different crimes causes a probative problem in this respect,32 it would be wrong to assume that the consolidation of money laundering in the PCA 2002 would solve the problem.

This, of course, is not to argue that the scope of the predicate crime should not be extensive, because what crime produced the property must be alleged and proved anyway. In fact, the scope of the predicate crime should be as wide as possible for the offence to be used against many crimes that generate significant proceeds and organised crime which has been known to engage in various criminal activities such as drug trafficking, loan sharking, illegal gambling, fraud, embezzlement, extortion, prostitution, human trafficking and other offences.33 However, the extensive scope of the predicate crime does not mean any crime. Granted, it makes no moral sense to criminalise laundering the

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31 See, for example, examples of indictments for the laundering offence in BENJAMIN GUMPERT ET AL., PROCEEDS OF CRIME ACT 2002: A PRACTICAL GUIDE 56-57, (2003).

In addition, it is also useful to point out in relation to the UK civil recovery of the proceeds of unlawful conduct that if Article 6 of the European Convention on Human Rights applies to civil recovery, it is unlikely that this Article will allow the Asset Recovery Agency to allege criminal conduct in general as having been the source of the proceeds without specifying the particular crimes which gave them rise. See PETER ALDRIDGE, MONEY LAUNDERING LAW: FORFEITURE, CONFISCATION, CIVIL RECOVERY, CRIMINAL LAUNDERING AND TAXATION OF THE PROCEEDS OF CRIME 244 (2003). Note that section 242(2)(b) of the PCA 2002 explicitly provides that it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct. In spite of this explicit provision, the Government admitted that it is likely that the Asset Recovery Agency would have to identify the crime which produced the proceeds. See, citing House of Lords Debates 11 July 2002 Cols 850 et seq., id.

32 This assertion is made in ANDREW R. MITCHELL ET AL., CONFISCATION AND THE PROCEEDS OF CRIME 185 (2nd ed. 1997).

33 Bell, supra note 15, at 104, 105.
proceeds of one crime but not others.\footnote{Bell, supra note 27, at 140.} In addition, the any crime approach to the laundering offence also permits the offence to be used on a broader basis without defining what crime is covered and therefore makes it unnecessary to keep reviewing and updating the law.\footnote{EC Review, supra note 6, at 10.} There are, however, policy reasons for limiting the application of the offence to the proceeds of serious crimes only.

The principal purpose of controlling money laundering is to fight against organised crime effectively. Money laundering investigations and prosecutions are resource-intensive. Given the limited resource, care should be taken to ensure that those resources will not be spent in unimportant cases. The focus of money laundering should be on cases where traditional offences are not likely to be successful as in the case of organised crime. To criminalise laundering activity on any crime basis would bring into money laundering investigations a number of petty offences such as simple thefts which are appropriately dealt with through traditional criminal offences, for instance, the receiving crime.\footnote{Law enforcement officers may lose sight of what money laundering law is principally aimed at. Further, in most countries, the laundering offence is a very serious offence and it carries very harsh sentences. It is very difficult to justify this severe sentencing regime to the petty offenders. It is so disproportional to the gravity of the offence. It is submitted that the criminalisation of money laundering on any crime basis is undesirable; money laundering should be reserved only for serious criminality or organised crime.}

Law enforcement officers may lose sight of what money laundering law is principally aimed at. Further, in most countries, the laundering offence is a very serious offence and it carries very harsh sentences. It is very difficult to justify this severe sentencing regime to the petty offenders. It is so disproportional to the gravity of the offence. It is submitted that the criminalisation of money laundering on any crime basis is undesirable; money laundering should be reserved only for serious criminality or organised crime.

4) The Predicate Crime Perpetrator and the Laundering Offence

In both the UK and the US, the perpetrator of the predicate crime can commit the laundering offence.\footnote{In the UK, it has been noted that the current laundering offence covers many types of conducts which would normally be prosecuted under the Theft Act 1968 provisions. See, citing the Response of the Lord Chief Justice, Deposited Paper 01 1466 No. 26, Sally Broadbridge and Christopher Blair, Proceeds of Crime Bill (Bill 31 of 2001-2002): Research Paper No. 01/79 77 (29 October 2001).} We call this own proceeds laundering. Until the PCA 2002, however, there was a difference between both as to how own proceeds laundering is criminalised. In the US, 18 U.S.C. §§ 1956 and 1957 do...
not expressly provide for this case, courts have interpreted them to cover it.\textsuperscript{38} But, the UK explicitly provided for it.\textsuperscript{39}

The UK and the US approaches in this regard have a difference with respect to proof of the defendant committing the crime which produced the laundered proceeds. In the UK, for example, the laundering offence in section 49(1) of the DTA 1994 applies to a person who launders the proceeds of "his" drug trafficking. Thus, in order to prove money laundering in this section, the prosecution need prove on a criminal standard both that "the defendant" committed drug trafficking and also tie the laundered property to this proved drug trafficking.\textsuperscript{40} If it fails to prove either, the laundering offence cannot stand. It is submitted that this is inconsistent with the use for which the laundering offence is designed. Money laundering should be capable of being used separately from the predicate crime, when it applies to the perpetrator of the predicate crime in order to enable the pursuit of the perpetrator indirectly. As one commentator has observed,

"Congress' intent in passing this statute (MLCA 1986) was to provide an indirect means for the government to investigate such criminal activity and organisations by criminalising certain transactions conducted with the proceeds from their illegal activity.\textsuperscript{41}"

In the US, for money laundering, the prosecution need not prove that the defendant committed the SUA, even if he did.\textsuperscript{42} Therefore, the prosecution can

\textsuperscript{38} With respect to § 1956, see \textit{US v. Jackson}, 935 F.2d 832 (7th Cir. 1991) where the defendant who is a drug dealer is found guilty of laundering the proceeds of his drug trafficking. \textit{See}, for example, \textit{US v. Allen}, 129 F. 3d 1159 (10th Cir. 1997) with regard to § 1957.

\textsuperscript{39} Section 49(1) of the DTA 1994 and Section 93C(1) of the CIA 1988.

\textsuperscript{40} There is no direct case law on this point. However, the case of \textit{R. v. Causey} (Unreported) Court of Appeal, 18 October 1999 which was concerned with the proceeds of criminal conduct appears to support our argument. In this case, the prosecution charged the defendant with laundering of the proceeds of his conspiracy offence under section 93C(1) of the CIA 1988. While the prosecution introduced as evidence a conviction of the defendant on the conspiracy offence, it did not prove that the laundered proceeds were derived from such offence. Thus, the Court of Appeal overturned his conviction of money laundering in the Crown Court. This would seem to suggest that the laundered proceeds must be proved to be derived from his convicted conspiracy offence which has also to be proved beyond a reasonable doubt in order to sustain his conviction on money laundering.

\textsuperscript{41} Peter J. Kacarab, \textit{An In Depth Analysis of the New Money Laundering Statutes}, 8 AKRON TAX J. 1, 18 (1991).

\textsuperscript{42} In \textit{US v. Smith}, 46 F.3d 1223, 1234 (1st Cir. 1995), it was held that although the defendant is charged with and convicted of the predicate crime, bank fraud, § 1957 contains no requirement that he must have committed the predicate crime from which the fraudulent proceeds are derived.
prove on a criminal standard that the proceeds are derived from the SUA without necessarily proving its perpetrator on the same standard. In effect, the laundering offence is practically separated from the predicate crime, even if the proceeds must still be proved to be derived from the latter. For instance, in *US v. Tencer*, it was held that acquittal of the defendant on particular mail fraud counts did not require acquittal on money laundering where the jury could have found that property being laundered was proceeds of other parts of the fraud scheme. The fact that the “defendant” was not charged with mail frauds with respect to other parts of the scheme suggests that evidence to prove those frauds against “him” was not sufficient, even though the same evidence was sufficient to support the existence of those other mail frauds from which the laundered proceeds were derived. This shows that the laundering offence is likely to be a viable alternative against individuals against whose evidence on the basis of the crime that produced the laundered proceeds is not sufficient.

It is then suggested that where the laundering offence is applicable to the perpetrator of the predicate crime, it should be structured in a way that eliminates the need to prove this perpetrator as in the US approach. The UK has now in the PCA 2002 dispensed with proof of the perpetrator of the predicate crime in respect of the laundering offence.

**III. Proving the Criminal Origin of the Proceeds: Evidentiary Problems in Money Laundering**

In a prosecution for money laundering, it must be proved that property is the proceeds of crime. While we have used the term “property” to refer to what

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43 107 F.3d 1120 (5th Cir. 1997).

44 See sections 327, 328, and 329. The Explanatory Report notes that these sections apply to the laundering of an offender's own crime proceeds as well as those of someone else. See HOME OFFICE, EXPLANATORY NOTES TO THE PROCEEDS OF CRIME ACT 2002 (C.29) 90 (2002).

45 In the UK, under the PCA 2002, the proceeds of crime are termed criminal property. It has been suggested that the arrangement offence in section 328 does not require that the defendant deals with criminal property. This offence simply prohibits the arrangement that facilitates the acquisition, retention, use or control of criminal property. So long as the defendant enters into or become concerned in such arrangement, he is guilty of this offence. This means that criminal property need not be the subject of the arrangement, although it is so in most cases. An example is given that A is a drug trafficker and he gives drug proceeds of $50,000 to B to launder. B arranges with C for C to give $50,000 to A. B pays C $50,000 of lawful money. Here, while C has not dealt with any property traceable to drug crimes, he is still guilty of this offence because he has entered into an arrangement which has facilitated the retention or control by A of his drug
is laundered, this property in so far as it immediately connected with a crime, i.e.,
what is originally obtained from it, is often money. Thus, proving that property is
the proceeds of crime often involves proving that money is of a criminal origin.
This part examines difficulties in proving the criminal origin of money for the
purpose of the laundering offence. It is divided into two sections. First, it
explores the proving of the criminal origin of money in general and, second, it
considers this issue in case of mixed money.

3.1 The Proving of the Criminal Origin of Money Generally

One of the elements that the government has to prove in the prosecution
of the laundering offence is that the property concerned is the proceeds of crime.
Proceeds of crime include what is directly derived from crime—"original
property"— and what is obtained from the disposal of the original property—
"substitute property" or what is obtained from the disposal of the substitute
property. Thus, this part is divided into two sections. The first examines the
proving of the criminal origin of the original property and the second explores
the same issue in relation to the substitute property.

1) The Original Property

(1) Problem

In proving the proceeds of crime, the prosecution has to prove the link
between the proceeds and the crime. Proceeds of crime often originate in the
form of money. As a property, money is not different from a good. However,
most goods have a specific identity; each has its own particulars and is distinct
from another. It is possible to distinguish each by its particulars. Identifying the
criminal origin of the good, for instance, being stolen, for the purpose of the
receiving crime may be made by matching its particulars with the descriptions by
the victim of that which has been stolen. That is not possible with respect to
money because money has no particulars or specific identity and is fungible.46
Further, direct evidence as to the criminal origin is not likely to be available.

46 As one commentator has said, "the cash cannot speak for itself as to its illegitimate origin". See Bell, supra note 15, at 108. See also Note, Investing Dirty Money: Section 1962(a) of the Organised Crime Control Act 1970, 83 YALE L. J. 1491, 1511 (1974) n.97 which has noted that in relation to the Organised Crime Control Act 1970 that [B]ecause money is fungible, it would be virtually impossible to prove with direct proof that the money invested was the money derived from racketeering acts..."
Many crimes which generate significant amounts of proceeds are victimless. Of course, some crimes are not victimless. A fraud victim, for instance, may be able to identify a specific transaction as deposit of a cheque paid by him to the defendant. Similarly, in some cases, a witness may be able to identify a specific transaction as a deposit of a drug sale. Cases where direct evidence as such exists are rare, however, given that laundering is designed to conceal or disguise or to prevent the tracing of the proceeds back to their criminal origin. For these reasons, it is very difficult to prove that the money is the proceeds of crime.

(2) Response

Given the fungibility and lack of specific identity of money as well as the likely lack of direct evidence, it is inevitable that circumstantial evidence should be heavily relied on. Of course, using circumstantial evidence to prove a crime is not new; it has been used to prove the stolen character of the good in the receiving crime. However, the stolen good is typically sold in fairly limited and informal channels, for instance, those with whom a thief is acquainted. Proving that the good is stolen is relatively not difficult. By contrast, money laundering is usually conducted through a whole range of financial services providers with virtually instantaneous service. The use of circumstantial evidence to prove the proceeds of crime in money laundering is therefore different and clearly more difficult. It is desirable that a guideline as to types of circumstantial evidence in this regard be developed which would help countries with a recent regime to control money laundering, especially emerging economies, to make effective use of the laundering offence. For this purposes, US case law will be examined.

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47 Evaluation of Law and Systems in FATF Members Dealing with Asset Confiscation and Provisional Measures, FATF, at 3.
48 R. E. Bell, Proving the Criminal Origin of Property in Money-Laundering Prosecutions, 4 J. OF MONEY LAUNDERING CONTROL 12, 16 (2000).
49 Accomplices are examples of those witnesses. While the credibility of accomplice evidence is not strong due to his motive to lie, it may be corroborated by other evidence. For cases approving the use of accomplice evidence in this regard, see id. at 13-14 (2000).
Before beginning our examination, it is useful to distinguish between own proceeds laundering and laundering the proceeds of the crime of someone else.52

The following cases deal with the first scenario. In US v. Misher,53 proof of defendant connected to drug trafficking paying for a car with suitcase full of small bills and putting title to it in a fictitious name supports the finding that cash is drug proceeds. In US v. Heater,54 evidence of the drug trafficker having limited legitimate income, use of large amounts of cash to buy consumer goods, and use of third-party names are sufficient to establish that property is drug proceeds. In US v. Webster,55 evidence of the differential between drug dealers' legitimate income and cash outflow is sufficient to establish that cash is drug proceeds. In US v. King,56 a drug dealer's lack of sufficient income to explain large wire transfers implies that wired money is drug proceeds. In US v. Black,57 proof of involvement of defendant in drug trafficking, his lack of legitimate source of income, and expert testimony explaining that drug dealers prefer to use wire services and to drive cars encumbered by a lien to avoid police seizure, are sufficient to prove that wired money is drug proceeds.

The following cases deal with the second situation. In US v. Wynn,58 where the defendant operated an expensive clothing business of which the major customers were drug traffickers, the court held that evidence of the defendant paying for the car with many cashier's cheques from different banks bought with cash and evidence of his attempts to disguise the identity of the trafficker as the true purchaser of the car are sufficient to prove that the cash is drug proceeds. In US v. Saccoccia,59 where the defendant was a precious metals dealer engaging

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52 Indeed, one commentator has divided patterns of prosecution for drug money laundering into four categories. He has further divided each group into cases where the money is specifically and directly linked to a particular drug distribution and where the money cannot be traced to any particular drug deal, or can only circumstantially linked to a narcotic enterprise. See Thomas M. DiBiagio, Money Laundering and Drug Trafficking: A Question of Understanding the Elements of the Crime and the Use of Circumstantial Evidence, 28 U. Rich. L. Rev. 255, 272. For our purpose, however, it is sufficient to simply distinguish between cases where one launders the proceeds of his crime or the proceeds of the crime committed by another because it is rarely the case that the funds involves in the transaction can be specifically and directly linked to a particular instance of criminal activity.
53 99 F.3d 664 (5th Cir. 1996).
54 63 F.3d 311 (4th Cir. 1995).
55 960 F.2d 1301 (5th Cir. 1992).
56 169 F.3d 1035 (6th Cir. 1999).
57 904 F.2d. 1250 (8th Cir. 1990).
58 61 F.3d 921 (D.C. Cir. 1995).
59 58 F.3d 754 (1st Cir. 1995).
in money laundering for the Colombian drug cartel, the court held that cash is drug proceeds on the basis of a number pieces of evidence: huge quantity of cash in small worn bills, the canine alert to the cash, several wire transfers of huge sum to Colombia (the nerve centre of the world's traffic in cocaine), and expert testimony likening defendant's *modus operandi* to typical drug money laundering operation. In *US v. Golb*, where the defendant was an airplane brokerage for drug traffickers, the court found that the payment for the plane is drug proceeds upon proof that the account from which the payment is made is fed by laundering operations. This fact was established upon evidence that large volumes of low-denomination cash full of cocaine traces were delivered by men with beepers and were then used to purchase gold in a number of unprofitable circular transactions producing cheques or wire transfers to Panamanian, Mexican or Colombian banks. In *R v. Boam*, where the defendant ran a video rental shop, evidence that cash is drug proceeds included involvement of the defendant with drug traffickers, significant increases in cash banking, the dropping of the level of cash banking after the arrest of traffickers, and the testimony of accountant that he had never known a small business to behave like this before.

In proving the proceeds of crime, both the predicate crime and the derivation of the proceeds from it must be proved. Therefore, circumstantial evidence should be directed towards these two aspects. It is suggested from the cases above that the circumstantial evidence in this respect may be divided into four main groups:  

1. Involvement of the defendant in the predicate crime or his relation with its perpetrator;
2. Financial background;
3. Irregularity or complexity of the transaction; and
4. Expert evidence on specific aspects of the transaction.

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60 69 F.3d 1417 (9th Cir. 1995).
62 This does not suggest that there may not be other evidence useful in proving the criminal origin of the proceeds. For example, admission of the defendant during interviews, proceeds packaging etc. may be of value as well. In this regard, see Bell, *supra* note 48.
The first group is evidence as to the existence of the predicate crime and the latter three types are evidence suggesting the derivation of the proceeds from such crime.

(1) Involvement of the Defendant in the Predicate Crime or his Relation with Its Perpetrator

Evidence of the predicate crime obviously is relevant to the source of the proceeds. Recall that money laundering may be divided into own proceeds laundering and laundering the proceeds of someone else. Whereas, in the former case, evidence need show the commission of the predicate crime by the defendant charged with the laundering offence, evidence in the latter is directed towards the relations between the defendant and those committing the predicate crime.

In the US, in proving the predicate crime from which the proceeds are derived, the prosecution need not tie the proceeds to a specific occasion of the predicate crime.\(^{63}\) This makes it possible to use involvement in the predicate crime generally, for instance, long-term business in distributing drugs, as one piece of evidence to prove that the proceeds are derived from drug trafficking. In all of the above cases, the existence of drug crime was proved by involvement of the defendant in the drug dealings generally without identifying a specific occasion of those dealings.

In these cases, although the defendants were convicted of the crimes listed as SUA, \textit{i.e.}, conspiracy with intent to distribute and/or distribution of controlled substances under 21 U.S.C. § 846, the money found to be the drug proceeds was not specifically linked to the drug crime in the occasions of which they were convicted. A conviction of the predicate crime in a given occasion may be used together with other evidence to support an inference that the money is the proceeds from other unidentified occasions of such crime. This is why it has been suggested that the laundering offence has a potential to be used as a surrogate against persons whose prosecution on the predicate crime could not succeed.\(^{64}\) Thus, in case of own proceeds laundering, evidence on a criminal standard of the predicate crime from which the laundered proceeds are derived

\(^{63}\) See, for instance, \textit{see US v. Blackman}, 904 F.2d 1250, 1257 (8th Cir. 1990), \textit{US v. Jackson}, 983 F.2d 757 (7th Cir. 1993), \textit{US v. Eastman}, 149 F.3d 802 (8th Cir. 1998), and \textit{US v. Mankarious}, 151 F.3d 694 (7th Cir. 1998).

\(^{64}\) Abrams, \textit{supra} note 1, at 34.
does not necessarily prove on the same standard that the person charged with money laundering committed the predicate crime. This, however, does not mean that proving the laundering offence is easier than proving the predicate crime, because, in money laundering, investigators must also examine financial documents and records to prove the derivation of the proceeds from the predicate crime. This examination is, no doubt, time-consuming. However, when proving the predicate crime against its perpetrator is probably not going to be successful for such reasons as specific occasions of the crime being unidentifiable or evidence being insufficient, the laundering offence may be a viable option against this perpetrator.

The advantage of the laundering offence in this regard is not available where own proceeds laundering is structured in a way that requires the prosecution to prove that the defendant is the perpetrator of the predicate crime to the criminal standard. This is because, in such a case, evidence of the defendant being involved in the predicate crime generally is probably not sufficient on that standard to prove the predicate crime against him.

(2) Financial Background of the Defendant

This type of evidence permits the government to prove the unlawful income indirectly. It is not necessary where the government can prove the unlawful income directly, such as when a witness can identify a specific transaction as a drug sale. To indirectly prove the criminal origin of the funds, the government must first estimate the total income of the defendant at a given period. In the US, four methods may be used in this respect: net worth analysis, source and application of funds, bank deposits and unit and volume.65 Once the total income is known, the government then subtracts from this figure the legitimate amount of funds. The net would be the amount of unknown sourced funds. Case law often talks of the existence of the unknown sourced funds as evidence of the defendant having limited or inadequate legitimate income. This type of evidence featured in Blackman, Heater, King, and Webster.

Many of documents and records whether of the defendant or of third parties, for instance, banks and financial institutions and other records kept by various governmental departments, for example, his earning reports on tax

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65 For detailed explanations on these methods, see MADINGER & ZALOPANY, supra note 50, at 144-151.
returns or social security earning reports, may be used to calculate those figures. For this purpose, experts may be employed where the examination is too complex for investigators in some cases.

It should be emphasised that the calculation only establishes that the unknown sourced funds exist but it does not prove that their sources are crimes. Thus, other evidence need be offered in corroboration with evidence of this type to establish that those sources are crimes. Involvement of the defendant in the predicate crime, for example, is such evidence.

(3) Irregularity or Complexity of the Transaction

Irregularity or complexity of the transaction is also used as one piece of evidence to show the criminal origin of the funds. Normally, people do not use cash, particularly when the amount is large, in view of the risk of theft and loss. Evidence of large-cash transactions is accordingly relevant in this respect. This evidence was used in almost all the above cases. In doing business, people maximise profits and minimise costs. Thus, without proper explanations, it is suspicious when transactions are of an unnecessary complexity, or are not commercially viable. In Golb, the court noted the unprofitable nature of the transactions as a piece of evidence for finding that the funds in the transaction were drug proceeds.

In the same vein, evidence of attempting to conceal the identity of those conducting the transaction is also useful in this regard. As in Heater and Wynn, the court noted using a nominee or a third party to hold property or using false name, false address, or false documentation to conceal the identity as evidence to prove that the money was drug proceeds. Evidence of structuring transactions to avoid the reporting requirement may also be used to prove the criminal origin of the funds in the transactions.66

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66 In US v. Brown, 944 F.2d 1377 (7th Cir. 1991), it was held that elaborate and time-consuming transactions under $10,000 imply knowledge of illegal source. While this case is concerned with the knowledge, it is submitted that this evidence also implies that the funds involved in the transaction are the proceeds of crime. It should be noted that where jurisdictions do not operate the threshold-based reporting system, attempts to avoid attention of banks by making small deposits may also be used to infer the criminal origin of the funds, particularly where those deposits are repeated and after the account is built up, the balance is transferred to others account. See R. E. Bell, An Introductory Who's Who for Money Laundering Investigators, 5 JOURNAL OF MONEY LAUNDERING CONTROL 287, 290 (2002). While this article has discussed this evidence to show that there is a smurfing-like activity, it is submitted that the comment applies to the proving of the criminal origin of the funds as well.
Besides establishing the criminal origin of the funds, this category of evidence also suggests the knowledge and the intent to conceal, where required, the funds. In *US v. Garcia-Emanuel*, evidence which proved the intent to conceal or disguise included unusual secrecy and highly irregular features of the transaction, using third parties to conceal the real owner, and a series of unusual financial moves culminating in the transaction.67

(4) Expert Evidence on Specific Aspects of the Transaction

As shown in *Saccoeccia* and *Blackmann*, expert evidence is also used in corroboration with other evidence to prove the criminal origin of the proceeds. The experts need not be governmental officials, for instance, agents from the Internal Revenue Service (IRS) or from the Drug Enforcement Administration (DEA), or police and custom officers with extensive experience in the investigation of money laundering. Any private individuals with expertise in pertinent matters, for instance, professional accountants, auditors, industry experts, and etc. could be used as expert witnesses.68

The matters which the experts can testify include the need of criminals in engaging in money laundering, the suspicious transactions reporting system, methods and techniques in money laundering, legitimate business practices, and cash flows and profits margins to be expected from particular types of businesses.69

Expert witnesses are not necessary in any case of money laundering. Certainly, there is no need for experts where the case is simple. However, the principal purpose of the control of money laundering is to fight against organised crime more effectively. Money laundering associated organised crime is most likely to be complex, given its financial resources to secure assistance of professionals. In these types of laundering schemes, it would be very difficult for investigators to be able to unravel the schemes without the help of the experts, such as forensic accountants and auditors. Furthermore, in countries where jury handles the issues of fact, expert witnesses may provide the jurors with understanding of unfamiliar terms and concepts, for instance, currency transaction reports, the significance of cashier’s cheque in laundering

67 14 F.3d 1469, 1475-1476 (10th Cir. 1994).
68 Bell, *supra* note 48, at 16.
69 Id.
transactions, the use of nominee owners, etc. It has therefore been correctly suggested that countries develop a database of experts in relevant aspects of money laundering so that they may be readily used in appropriate cases.

2) Substitute Property

(1) Problem

The use of circumstantial evidence to establish the criminal origin of the proceeds is used when property is derived directly from crime, i.e., the original property. Property which is the subject of the laundering offence, however, is not limited to the original property but includes property indirectly derived from crime or substitute property. For instance, while Article 3 of the Vienna Convention uses the word “property derived from an offence” in its definition of the laundering offence, the commentary suggests that property derived from an offence includes substitute property. Similarly, the explanatory report to the Money Laundering Convention noted that the “proceeds” in Article 6 include substitute property. However, both do not define “substitute property”. It is nonetheless very difficult to think of it as anything else, but property obtained in exchange for the original property. Thus, a house purchased with drug proceeds or a credit obtained from making the drug deposit is substitute property.

Where, however, the substitute property is exchanged with another property, it may be argued that the latter is not the proceeds of crime. Further in our example, if the house is sold, it may be argued that the payment obtained will not be the drug proceeds. Similarly, money withdrawn from the account into which the drug proceeds were deposited is not the drug proceeds. It is simply money from the bank. In this scenario, it may also be argued on the basis of the fungibility of money that banks generally return to the depositor the requested amount without returning the very money deposited and thus, the withdrawn money is not necessarily the drug proceeds. Of course, these arguments may be rejected easily. Clearly, the payment and the withdrawn money are substitutes for the drug proceeds. However, as will be shown in the case of mixing, it is

70 Id.
71 Id.
72 COMMENTARY, supra note 17, at 63.
virtually impossible to identify with certainty the substitute property. There should accordingly be legal rules on the identification of the substitute property.

(2) Response

In the common law world, tracing is a legal technique used to identify substitute property. The substitute property is often called traceable property. One of the principal tracing rules is the exchange product rule which holds that one property is a substitute for another if the former is obtained in exchange for the latter. Thus, if a criminal receives other property upon exchanging or otherwise disposing of the proceeds of crime, this property is a substitute property and, thus, is also traceable proceeds of crime. There are no limits as to number of exchanges or disposals. In our examples, the house and the payment from the sale of it are traceable proceeds. Similarly, the credit in the account and the money withdrawn from this account are traceable proceeds, notwithstanding the fungibility of money.\(^\text{74}\) As will be explained in the sub-section that follows, the consideration of substitute property as traceable property also has an advantage in that it provides solutions in cases where it is impossible to identify with certainty the substitute property. It is thus submitted that substitute property should be considered traceable property. As long as property is traceable to the proceeds of crime, it is the substitute property and therefore is of a criminal origin.

In the US, the MLCA 1986 does not specifically define the term "proceeds" for the purpose of 18 U.S.C. §§ 1956 and 1957 whether it includes traceable proceeds. Courts, however, permit the government to trace the proceeds into substitute property in order to prove that the latter has a criminal origin. For instance, in \textit{US v. Mankarious},\(^\text{75}\) it was held that where a cheque constituting the SUA proceeds was deposited in a bank account, the second cheque written on that account constituted the SUA proceeds. Clearly, this is the application of the exchange product tracing rule.

In the UK, the subject of the laundering offence under the PCA 2002 is criminal property which section 340(3) defines as property constituting a person's benefit from criminal conduct or representing such a benefit in whole or

\(^{74}\) \textit{See US v. Banco Cafetero} 797 F.2d 1154 (2d Cir. 1986). While this case is concerned with tracing for the forfeiture purpose, it is submitted that the holding equally applies to tracing in the laundering offence context.

\(^{75}\) 151 F.3d 694 (7th Cir. 1998).
in part, whether directly or indirectly. Section 340(5) further provides that a person benefits from conduct if he obtains property as a result of or in connection with it. Thus, criminal property need not be the very property a person has obtained from criminal conduct; it may be representative property. Nevertheless, it is not clear how one property represents another.

The concept of representation may be approached from the new UK civil recovery. Section 305 explicitly recognises tracing as a way to establish a representative property for the purpose of the civil recovery. This recognition, though in a different context, sheds lights on the meaning of the representative property in the laundering offence context. It is submitted that the representative property in the laundering offence context is traceable property. Only when property is traceable to property constituting benefit from crime can the former be considered as a representative property and thus criminal property for the purpose of the laundering offence in the UK.

3.2 The Proving of the Criminal Origin in case of Mixed Money

The previous sub-section has proposed that substitute property be considered traceable property. It has also been suggested in accordance with the exchange product tracing rule that the withdrawn money from the account into which the proceeds have been deposited is traceable proceeds, notwithstanding the fungibility of money. However, this rule works only when the account contains proceeds from only one crime, because the withdrawn money cannot be traceable to other than those proceeds. In many cases, proceeds of crime are mixed with other money, whether criminal or legitimate. As money has no specific identity, mixing makes it impossible to identify each in the mix. Each component loses its identity.

As will be shown below, where money is withdrawn from a mixed account, while the fungibility of money is no defence, it is in some cases impossible to link the withdrawn money to the part in the account which represents the proceeds of crime specified in the laundering charge. Without the rules addressing this, it would be impossible to prove money laundering. Thus, this sub-section explores four cases of mixing: a mix of proceeds of crime and legitimate money, a mix of proceeds from different crimes, a mix of proceeds from different occasions of crime, and a mix of proceeds from crime committed before and after the criminalisation of money laundering.
1) A Mix of Proceeds and Legitimate Money

(1) Problem

In the previous sub-section, we noted that the court in US v. Banco Cafetero held that the withdrawn money is traceable proceeds, despite the fungible nature of money. The rejection of the fungibility of money as a defence also applies to the case of mixed money. For example, where the account contains a mix of US $10,000 drug proceeds and US $15,000 legitimate money, if US $20,000 from this account is used to conduct a transaction, the transaction obviously involves the drug proceeds at least in the amount of US $5,000. It is no obstacle to trace by the exchange product rule in case of mixing. But this is not sufficient since there are circumstances of mixing where it would be impossible to know with certainty whether the withdrawn money is the proceeds of crime, as in the case where, for instance, a US $12,000 is used to conduct a transaction. Here, since the transacted amount is lower than the legitimate part in the mix, it is possible that the amount comes from this part. If this is the case, then, the transaction involves no drug proceeds and therefore is not laundering. In effect, this means that criminal liability for laundering grounded upon the withdrawal transaction can simply be avoided by simply mixing the proceeds with legitimate money.

(2) Response

In Banco, the court also considered the case of the mixed account. It approved two rules to determine whether the withdrawn money is traceable proceeds: the “drug-in (tainted money-in), first-out” or “drug-in (tainted money-in), last-out” rules. The former considers as traceable proceeds any one withdrawal, or any asset purchased with such withdrawal, to the extent of the deposit of the drug proceeds. The latter considers that the account contains

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76 See US v. Rutgard, 116 F.3d 1270 (9th Cir. 1997) which held that 18 U.S.C. § 1957 requires tracing even when criminal and legitimate funds are commingled; it must be shown that the balance in the mixed account dropped below the criminal deposit at least US $10,000 after the transaction. This is only true so far as concerns the laundering offence which requires only that the laundered property is partly tainted without having to identify the tainted part. The rule is different in property confiscation where the tainted part of the mixed property against which confiscation is to be enforced must be identifiable. It is in the confiscation context that mixing causes problems in property confiscation. See chapter III, infra, at 132.

77 The government also argued for an “averaging approach” where traceable proceeds are considered as a pro rata share of any withdrawal from the account or of any asset purchased with such withdrawal. The court did not, however, approve or reject this approach, since the government made no claim under it.
traceable proceeds up to the drug deposit as long as the balance never falls below this amount. This latter rule is often known as the “lowest intermediate balance” rule.

Applying the first rule to our example, the withdrawal of US $12,000 is traceable drug proceeds and it follows that the withdrawal constitutes money laundering, assuming that other elements of the offence are satisfied.

This rule was also applied in relation to 18 U.S.C. § 1957. In US v. Moore, the court presumed that any money withdrawn from a mixed account, at least up to the criminal deposit, was the SUA proceeds. In US v. Rutgard, however, this rule was explicitly rejected; it was held that in order to prove a violation of § 1957, the government must actually trace the SUA proceeds into the transaction by showing that the balance in the mixed account drops below the criminal deposit at least $10,000 after the transaction.

The Rutgard court justified its actual tracing requirement by comparing 18 U.S.C. §§ 1956 and 1957. It explained that because the fungibility of money destroys the specific identity of any particular funds, mixing criminal and legitimate funds is an obvious way to hide criminal funds. If § 1956 required tracing of specific funds, it could be wholly frustrated by commingling. Thus, § 1956, unlike § 1957, proscribes not only transaction to hide criminal funds but also reaches any funds “involved” in the transaction. In addition, as compared with § 1956, criminals cannot avoid liability in § 1957 by commingling, since § 1957 charge may be predicated on the deposit of $10,000 into the account. Moreover, criminal liability for laundering is not avoided by commingling, as the government can charge the deposits as laundering under § 1956.

It is submitted that Rutgard is wrong. Since the court made explicit reference to the position under § 1956, it is necessary first to consider the tracing issue under that section. Recall that § 1956 makes it a crime to conduct a financial transaction which in fact “involves” the SUA proceeds for specified purposes. In US v. Garcia, it was held that this section does not require tracing; it is sufficient to prove only that the funds come from a mixed account without

78 27 F.3d 969 (4th Cir. 1994).
79 116 F.3d 1270 (9th Cir. 1997).
80 Id. at 1292.
81 37 F.3d 1359 (9th Cir. 1994).
having to segregate in any manner the SUA proceeds in the account. The reason was to prevent the escape of liability by mixing.

It is submitted that the reasons explained in Rutgard for the imposition of actual tracing in § 1957 are not justified. First, it is not true that if actual tracing is required in § 1956, criminal liability could be avoided by simply commingling because making a criminal deposit into a legitimate account also constitutes laundering under § 1956. Second, it is not entirely clear what the court meant when it asserted that § 1956 proscribes not only transaction whose purpose is to hide criminal funds but also includes any funds involved. The word "involve" in § 1956 cannot certainly mean that § 1956 prohibits transactions whose purpose is to hide funds other than criminal funds. There cannot be a violation of § 1956 where there are no criminal funds. As long as there are criminal funds in the transaction, it matters not whether the transaction also involves legitimate funds. Similarly, in § 1957, as long as at least $10,000 in the transaction is the SUA proceeds, it matters not whether legitimate funds are also in the transaction. Thus, both do not require the whole funds in the transaction to be the SUA proceeds. Viewed in this light, the difference in the statutory language between both should be given less emphasis but more weight should be accorded to the purpose of not allowing criminals to escape liability by mixing. Of course, requiring actual tracing does not mean that criminals can escape liability in this regard, since the laundering charge may be grounded on the making of a criminal deposit. However, the option should not be closed because there is an alternative. It is submitted that the imposition of actual tracing in § 1957 is incorrect.

While the application of the tainted money-in, first-out provides a practical solution to the problem in proving the criminal origin of money in the case of mixed accounts, there is a limit. Recall the lowest intermediate balance rule. This rule holds that traceable proceeds remain in the account as long as the

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82 In some cases, there is not even an alternative. Those making withdrawals need not be those making deposits, for instance, low-level associates who are commonly known as "smurfs" may be used to make criminal deposits but the principals may conduct further transactions to obscure the criminal origin of the money in the system. It is possible that there may be cases where there is no evidence of the principals making the deposits but there is sufficient evidence to prove that the principals withdraw the money from the mixed account. Here, unless the withdrawn money is considered the proceeds of crime, there would be no case against the principals on money laundering.
balance never goes below the criminal deposit. Thus, where after the last criminal deposit, the balance goes to zero and thereafter becomes positive with a deposit of lawful money, there are no longer traceable proceeds in the account. In this situation, where a withdrawal is made from this account, it cannot be considered that the withdrawn money is of a criminal origin.

In *US v. Marbella*, the balance in the mixed account dropped to zero after the SUA proceeds were deposited and the issuing of cheques withdrawing money from this account. The issue was whether the withdrawals through those cheques constituted money laundering in violation of § 1956. It was held that because tracing is not required, the withdrawal transactions involved the SUA proceeds and therefore constituted money laundering.

Were this to be the case under § 1957, the defendant would have to be acquitted. The reason is that, under the *Banco* tracing rule, there were no traceable proceeds left in the account when the cheques were issued. This is the only gap under the *Banco* tracing rule. Clearly, dispensing with tracing in case of mixed money is the most practical solution. Whether US courts will take this as the position in § 1957 is not yet known. Given the similarity between §§ 1956 and 1957 identified above, mixing the proceeds and legitimate money, in and of itself, being suggestive of the design to hide the proceeds, and the prevention of the escape of criminal laundering liability by mixing, it is submitted that tracing should also be dispensed with in § 1957.

It is thus suggested as a response to the problem of mixing the proceeds and legitimate money that tracing should be completely eliminated. As long as money is withdrawn from the mixed account, notwithstanding the lowest intermediate balance rule, this withdrawal constitutes money laundering. Where tracing is required, the prosecution should be entitled to rely on the tainted money-in, first-out rule that the withdrawn money up to the amount of the criminal deposit is the proceeds of crime.

2) A Mix of Proceeds from Different Crimes

(1) Problem

Here, the problem is concerned with the impossibility of tying the withdrawn money to the predicate crime specified in the laundering charge. Of

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83 73 F.3d 1508 (9th Cir. 1996).
course, if the whole money or more than the proceeds from other crimes in the account (which may be evidenced by the dropping of the balance in the account below the deposit of the proceeds from the specified crime) is withdrawn, the transaction obviously involves the proceeds from the specified crime and therefore is money laundering. Apart from this case, proving that the money in the transaction is the proceeds of the specified crime is not possible and the laundering offence based upon the withdrawal fails as a result.

(2) Response

The suggestion made in the previous section may be adapted to this case. First, tracing should not be necessary. Thus, where the prosecution proves that the proceeds of the specified predicate crime were deposited into the account which also contained the proceeds from other crimes, the withdrawal constitutes money laundering without regard to the lowest intermediate balance rule.

Second, where tracing is necessary, the “tainted money-in, first-out” rule should be adapted with the effect that the withdrawal contains up to the amount of the proceeds from the specified predicate crime and it follows that the withdrawal constitutes money laundering. Of course, the lowest intermediate balance rule is a limitation to the traceability of the money in this case.

3) A Mix of Proceeds from Different Occasions of Crime

(1) Problem

There are a number of crimes which do not produce a lot of profits each time it is committed but which generate large amount of income when committed in a number of occasions, such as prostitution. Indeed, even drug trafficking in some cases produces large amount of returns when continuously committed for a period of time. It is no doubt that proceeds from crimes committed in a number of occasions may be mixed in a single account. Once mixed, it is impossible to distinguish proceeds from each occasion and it is similarly impossible to tie the laundered proceeds to the crime committed on a particular occasion.\(^4\)

(2) Response

Certainly, the suggestions earlier made may be adapted to this situation. Where tracing is abolished, the withdrawal would always be considered money laundering.

\(^4\) The Australian law enforcement bodies also considered the need to prove a specific predicate crime as a difficulty in the Australian Proceeds of Crime Act 1987. See AUSTRALIAN LAW REFORM COMMISSION, CONFISCATION THAT COUNTS: A REVIEW OF THE PROCEEDS OF CRIME ACT 1987 56-60 (1999).
laundering without regard to the lowest intermediate balance rule. Otherwise, the withdrawal from the account should be considered as containing up to the amount of the proceeds of crime on a specified occasion under the tainted money-in, first-out rule and thereby would be money laundering. This is subject to the lowest intermediate balance rule. However, these approaches work only when the prosecution first proves that the account contains the proceeds from a specific occasion of the crime. This proof is likely to be difficult.

There is, however, a better alternative, that is to allow the predicate crime from which the laundered proceeds are derived to be proved generally. The prosecution need not specifically link the proceeds to a particular occasion of the crime. Thus, the prosecution would seek to prove that the whole money in the account is the proceeds of crime without identifying occasions. Upon this proof, any withdrawal from this account would be money laundering.

The approach which allows the predicate crime to be proved generally—the "general link" approach—has an advantage over the approach which requires the proving of a particular occasion of the predicate crime—the "specific link" approach. This is concerned with the case of own proceeds laundering structured in a way which does not require the proving on a criminal standard of the perpetrator of the predicate crime. Here, where the defendant is charged with the predicate crime on a specific occasion and the laundering offence with regard to the proceeds of the predicate crime generally, he may be acquitted in the former, but convicted of the latter.

In *US v. Tencer,* it was held that acquittal on particular mail fraud counts did not require acquittal on the laundering offence where the jury could have found that property being laundered was proceeds of other parts of the fraud scheme. That the "defendant" was not charged with other parts of the mail frauds suggests that evidence against him on those frauds was not sufficient, even though the same evidence was sufficient for finding those mail frauds from which the laundered proceeds were derived. This supports the point made earlier that evidence sufficient on a criminal standard to prove the crime which

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85 In this connection, note that the FATF has suggested the countries introduce legislation permitting proof of any occasion of the predicate crime to overcome the problem. See *FATF Review,* supra note 6, at 9.

86 107 F.3d 1120 (5th Cir. 1997). See also *US v. Mankarious,* 151 F.3d 694 (7th Cir. 1998), *US v. Kennedy,* 64 F.3d 1465 (10th Cir. 1995), and *US v. Jackson,* 983 F.2d 757 (7th Cir. 1993).
produced the laundered proceeds need not be sufficient on the same standard that “a person” charged with laundering commits such crime. This enables the laundering offence to be used successfully where pursuing the perpetrator of the predicate crime on a particular occasion is likely to fail due to insufficiency of evidence.

The specific link approach, on the contrary, does not enable this advantage. If a specific occasion of the crime from which the laundered proceeds are derived is not proved, the defendant charged with own proceeds laundering must be acquitted even if evidence supports the existence of other occasions of the crime from which the proceeds are derived. In US v. Adkinson, it was held that where the laundering charge alleges the SUA by referencing specific counts in the indictment, and conviction of the defendant on those counts is reversed, a conviction for the laundering offence must also be vacated.

4) A Mix of Proceeds from Crime Committed before and after the Criminalisation of Money Laundering

(1) Problem

Proceeds from crime committed before and after the effective date of the laundering offence may be mixed. When mixed, they are indistinguishable. It is impossible to prove from crime committed in which periods the laundered proceeds come. This impossibility is particularly relevant in countries with recent legislation on money laundering, for example, emerging economies.

(2) Response

As with mixing in the preceding two cases, dispensing with tracing or adaptation of the tainted money-in, first-out provide a solution to the impossibility in this regard. The better alternative to both, however, is to make the laundering offence applicable to proceeds from crime, whenever committed. Making it applicable to proceeds from crime committed before the criminalisation of money laundering, however, raises the issue of whether this is

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87 This does not mean that, in the specific link approach, a person must be convicted of the predicate crime and the laundering offence at the same time. If the prosecution simply institutes the laundering charge against the defendant without also charging the predicate crime from which the proceeds come, obviously the only conviction to be obtained is the laundering offence, even when evidence establishes that the defendant has committed the predicate crime.

88 135 F.3d 1363 (11th Cir. 1998).
in violation of the universally recognised legal rule that criminal law cannot be retroactively applied: the *Ex Post Facto* prohibition.

It is submitted that the making the laundering offence applicable as such does not violate this prohibition. It is not a retroactive application of the laundering offence but the application of the offence to the proceeds of the predicate crime committed before its effective date. An act of laundering must be committed after the effective date of money laundering. It is therefore no *Ex Post Facto* violation when the laundering charge is based on a laundering act committed after the effective date of the laundering offence.

In the US, although the MLCA 1986 does not make this explicit, courts have taken this position. For instance, in *US v. Monaco,* the court held that “proceeds” includes proceeds of drug offences committed before the effective date of the money laundering statute in 1986. In the UK, it is made clear in the legislation that the predicate crime includes those committed before the effective date of the law.

**IV. Concluding Remarks**

This chapter has examined the laundering offence in the UK and the US in comparison with a view to making it capable of being used as an effective weapon against crime. The principal conclusion is that the monetary nature of the proceeds makes it difficult or even practically impossible to prove the criminal origin of the proceeds for the purpose of money laundering. It has therefore been suggested that the offence will be an effective tool to fight against crime if it is approached with a view to overcoming difficulties that will arise from the monetary nature of the proceeds of crime.

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89 194 F.3d 381 (2d Cir. 1999).
90 Section 340(4).
Chapter III: Comparative Examination of the UK and US Confiscation

This chapter focuses on another component of the repressive measures to control money laundering: confiscation of the proceeds of crime. The concept of confiscation, of course, is not new in criminal law. Every legal system has long recognised confiscation measures such as confiscation of property of which the possession is illegal such as drugs or prohibited materials, confiscation of property used in the commission of crime, and confiscation of the product of crime. However, these types of confiscation cannot confiscate the proceeds of crime. From 1988 onwards, confiscation, particularly with regard to the proceeds of crime, has taken on a dramatically increased role. At the international level, the Vienna Convention 1988 is the first international instrument to require its Parties to introduce measure to confiscate the proceeds of crime. This was followed in the Money Laundering Convention 1990 and subsequent international instruments, such as the UN Convention against Transnational Organised Crime 2000 and the UN Convention against Corruption. At the national level, laws on confiscation of the proceeds of crime have been introduced or been improved. The proliferation of this improved confiscation is indicative of its importance in the criminal policy nowadays.

This chapter conducts comparative examination between the UK and US proceeds confiscation with a view to making it effective. It will be shown that the monetary form of the proceeds makes it difficult or, in case of mixing, even impossible to identify the proceeds of crime for confiscation purposes. To be effective, countries should implement measures which would overcome the evidential difficulties in this regard. Specifically, legislation should provide for the reversal of the burden of proof and/or the use of the civil standard of proof in respect of proving the criminal origin of the proceeds for confiscation purpose. Further, so far as concerns the conviction-based regime, the UK value confiscation is preferable to the US property confiscation because it does not require property against which confiscation is to be enforced be the proceeds of crime. Finally, where the non-conviction-based confiscation regime exists, it should be supplemented with a provision which allows the confiscation of the portion of the mix to the extent of the proceeds.
I. General Concept of Confiscation

Black's Law Dictionary defines "to confiscate" as "to appropriate (property) as forfeited to the government..." It also defines "forfeiture" as "the divestiture of property without compensation..." Confiscation then could be described as "the governmental appropriation or divestiture of property without compensation". As such, confiscation comprises of two elements. Firstly, confiscation must be of governmental nature. Thus, only when the government or any authority acting on its behalf has appropriated or divested the property may there be confiscation. Secondly, the governmental action to appropriate or divest property is a confiscation only if no compensation is paid to the owner thereof.

In the criminal law context, property which would be subject to confiscation must involve in a crime as a subject of it, a tool used to commit it, or being derived from it. For example, in the Vienna Convention, under Article 5 paragraph 1 confiscated property must be drugs, psychotropic substances, materials, equipment, or other instrumentalities used or intended to be used in narcotic related offences, or proceeds of those offences. Similarly, Article 1 of the Money Laundering Convention defines "confiscation" as a penalty or a measure, ordered by a court following proceedings in relation to "a criminal offence or criminal offences" resulting in the final deprivation of property. The difference between these two conventions is that confiscation under the Vienna Convention need not be the order of a court but the Money Laundering Convention requires that it must be so. Thus, a U.S. administrative forfeiture where the investigating officers seize an object of less than US $ 500,000 is confiscation under the former, but is not so under the latter. However, where confiscation is the order of a court, both do not require that the court making the order be of a criminal jurisdiction. It follows that a proceeding leading to confiscation is not necessarily a criminal proceeding. Consequently, a confiscation order, even if made by a court exercising civil jurisdiction, like a

2 Id. at 661.
3 It should be noted that property is confiscated in the context of private international law if the compensation is uncertain or grossly disproportionate to the value of the property taken. See P. ADRIAANSE, CONFISCATION IN PRIVATE INTERNATIONAL LAW 5-9 (1956). In the context of criminal law, however, the question of uncertainty and disproportion of compensation does not exist, as the divestiture of property involved in an offence is always without compensation.
 civil in rem forfeiture order, as practiced in the U.S., is also "confiscation" under these conventions.4

II. Types of Confiscation

Three criteria may be used in differentiating confiscation: confiscable property, confiscation systems, and confiscation proceedings.

2.1 The First Criterion: Confiscable Property

Three types of confiscable property may be distinguished: contraband, instrumentality of crime, and product of crime.

1) Contraband Confiscation

Contrabands are items of which mere possession constitutes a crime. They may be articles of an inherently dangerous nature to the general public, such as narcotics and illegal weapons, or alternatively, may simply be articles the circulation of which would undermine the security of, or public confidence in, the government, for instance, counterfeit money, passports or other governmental documents.5 Thus, the purpose of the confiscation of contraband is to prevent the general public and the government from the dangers of their circulation.6 It is a “security” measure and generally is imposed without regard to the outcome of criminal proceedings.7

2) Instrumentality Confiscation

An instrumentality of crime is property which was used, or was intended to be used, in the commission of a crime. Some commentators have referred to it as “derivative contraband”.8 This type of property is not inherently dangerous to the public or does not undermine public confidence in the government. The

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8 Marc B. Stahl, Asset Forfeiture, Burdens of Proof and the War on Drugs, 83 J. OF CRIM. L. & CRIMINOLOGY 274, 307 (1992) and other sources cited therein. It is, however, more accurate to use the term “instrumentality” rather than “derivative contraband” for property used or intended to be used to commit a crime, since the property is not contraband and its illegal use, while subjecting it to confiscation, does not make it contraband either. The term “instrumentality of crime” will be used throughout this thesis.
government does not declare its possession contrary to public policy, prohibited or illegal. It is a normal property that is in fact capable of being used for a variety of perfectly legitimate purposes such as a motorbike, car, and the like. The reason for its confiscation is that this type of property, while not injurious in nature, may become dangerous when a person having it in possession uses or intends to use it in the commission of the crime. Instrumentality confiscation, therefore, removes from a would-be offender or an offender a means to commit or further commit the crime. Thus, its purpose is to prevent the commission or further commission of the crime. But, as will be seen in the next section, instrumentality confiscation is at the same time punitive. This is unlike contraband confiscation which is truly preventive.

3) Proceeds Confiscation

Traditional confiscation comparable to proceeds confiscation is confiscation of product of crime. This traditional confiscation applies only to goods literally created by the crime, for example, the counterfeit coin or forged banknotes. Recently, in many countries, the concept of "product of crime" has been extended to proceeds of crime which are not the product of crime in the traditional sense, but are financial benefits obtained through crime. The rationale is that crime should not pay or no one should profit from wrong. The focus of confiscation of this type is on the benefits an offender has obtained, not on losses to others, from crime. By confiscation of the proceeds from crime, the offender will have less incentive to commit the crime and, at the same time, will be deprived of the financial ability he could use to further commit it. Thus, confiscating the proceeds of crime works to deter and prevent crime. As will be seen in the next section, proceeds confiscation also punishes individuals concerned and should therefore be distinguished from contraband confiscation which is truly preventive.

2. The Second Criterion: Confiscation Systems

9 Verbruggen, supra note 7, at 315.
10 Of course, the products of crime also include stolen property and the like. In many countries, however, courts order restitution to its rightful owner, instead of confiscation.
This criterion separates confiscation into property confiscation and value confiscation on the basis of the mode in which property rights are affected.\textsuperscript{11}

1) Property Confiscation

This type of confiscation is also known as "forfeiture". Here, upon the making of a confiscation order, ownership in property is transferred to the government.\textsuperscript{12} Because a property right is affected immediately upon the making of the order, there must always be a target property on which the order bites. In the context of confiscation of property relating to a crime, this property has to be somehow connected with the crime and for this reason is frequently called tainted property. Untainted property is not confiscable in this system. Clearly, contraband confiscation and instrumentality confiscation are confiscation of this type.

2) Value Confiscation

A value confiscation order is an order requiring a convicted person to pay a sum of money based on an assessment of the value of the criminal proceeds. It does not confiscate any property. There is no target property of which the transfer of rights to the government occurs upon the making of the order. The government only has a financial claim in the specified sum against the person against whom the order is made. If the claim is not paid, the order is enforceable against any of his property, whether legitimately or criminally acquired. In the UK, a confiscation order is enforced as though it were a fine or through using civil court orders.\textsuperscript{13}

Most of the FATF members operate property confiscation as a principal method but allow the making of a value order if the property to be confiscated is not available for certain reasons, such as where the defendant has removed it from jurisdiction and it cannot be located.\textsuperscript{14}

3. The Third Criterion: Confiscation Proceedings

\textsuperscript{11} GUY STESSENS, MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL 31 (2000).

\textsuperscript{12} Explanatory Report, supra note 4, at 5.

\textsuperscript{13} ANDREW R. MITCHELL ET AL., CONFISCATION AND THE PROCEEDS OF CRIME 226 (2nd ed. 1997).

1) Non-judicial Proceeding

In the US, for example, summary forfeiture and administrative forfeiture fall into this category. Summary forfeiture is a process by which property is seized and forfeited without any notice or hearing. This type of forfeiture applies only to contrabands. Administrative forfeiture is a process by which property is forfeited through the investigative agency that seizes it without any judicial involvement. For example, 19 U.S.C. § 1607 permits administrative forfeiture of the property if it does not exceed $500,000 in value, its importation is illegal (regardless of its value), it is a conveyance that has been used to import, export, transport or store controlled substances (regardless of its value), or it is a monetary instrument within the meaning of 31 U.S.C. § 5312(a)(3) (regardless of its value).

2) Judicial Proceeding

(1) Conviction-based Proceeding

This is obviously a confiscation imposed in a criminal proceeding. It is an action in personam. Generally, the government must charge a person with a criminal offence which provides for confiscation and must secure his conviction before the court can make a confiscation order against him. For example, US courts cannot impose criminal forfeiture unless a criminal is convicted. So it is with respect to the UK criminal confiscation.

(2) Non-conviction-based Proceeding

This is the case where property is confiscated outside a criminal proceeding. Obviously, there cannot be the finding of guilt or conviction of the person concerned in confiscation of this type. Indeed, no criminal charge need be filed ever. In the US, confiscation of this type is known as civil forfeitures. In the UK, it is known as actions to recover the proceeds of unlawful conduct or civil recovery.

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17 Section 6(2).
18 Civil forfeitures are actions in rem, i.e. against things. The things are named as defendants in the actions.
III. The Nature of Confiscation

In this part, contraband confiscation, instrumentality confiscation, and proceeds confiscation would be examined. The purpose of this inquiry is to ascertain the nature of each type of confiscation whether it is "remedial" or "punitive". As earlier observed, confiscation is generally a transfer of property involved in a crime without compensation. Thus, a person must have legally recognised property or rights existing therein which, upon confiscation, is extinguished.\(^{20}\) That the property of a person or any rights therein is extinguished upon confiscation suggests that the person is punished. If this is the case with respect to any type of confiscation, we can certainly say that it is punitive. Each type of confiscation is now examined in light of this understanding.

3.1 Contraband Confiscation

As one cannot lawfully have property rights in contraband, it cannot be said that he is deprived of a legal property interest and thereby, punished when the contraband is confiscated. In the US, contraband confiscation is often said to be remedial, since it removes inherently dangerous items from the public.\(^{21}\) Most countries require that contraband be confiscated even where a person charged with its illegal possession is found not guilty or acquitted.\(^{22}\) While the guilt or criminal conviction of a person is not a condition for the confiscation of contraband, the property to be confiscated must be determined to be contraband. In most cases, this is apparent; further evidence is generally not required.\(^{23}\) As will be seen below, this is not a case with respect to instrumentalities and proceeds of crime. The distinction in this aspect would seem to warrant a

\(^{20}\) This is only for property confiscation. In value confiscation, property or any right therein is affected when the order is enforced.


\(^{22}\) In the US, contraband is confiscated through civil *in rem* proceedings. For example, see 21 U.S.C. § 881 which requires forfeiture of "controlled substances". Compare this with its counterpart—criminal *in personam* forfeiture—in 21 U.S.C. § 853 where property subject to forfeiture does not include "controlled substances".

\(^{23}\) This is like the concept of "personification fiction" according to which property itself furnishes all the material evidence of its own condemnation. This concept justifies US civil *in rem* forfeiture. For details, see James R. Maxeiner, *Bane of American Forfeiture Law: Banished at Last*, 62 Cornell L. Rev. 768, 784 (1977).
different legal procedure to effect confiscation of the instrumentalities and proceeds of crime.

3.2 Instrumentality Confiscation

As noted in the previous section, instrumentality confiscation prevents the commission or further commission of the crime. In the US, courts have often emphasised this preventive function and have asserted that confiscation of the instrumentality of crime is not punitive but remedial. For example, forfeiture of tools used in the drug trade under 21 U.S.C § 881 is remedial because it prevents future drug transactions and their attendant harms. It is not punitive even when the owners of forfeited property are innocent, since forfeiture induces greater care on their part to ensure that property will not be put into illegal uses. Finally, the courts have also argued that forfeiture in this category is not punitive because it also reimburses the government for enforcement efforts.

However, it is submitted that instrumentality confiscation is punitive. First, property which is an instrumentality of a crime is normal property that can be used for various lawful purposes. It is not a legally prohibited thing and, therefore, a person can have property rights in it. Certainly, those rights are extinguished upon confiscation. It follows that instrumentality confiscation cannot be of any other character but punitive in nature. Granted, instrumentality confiscation also prevents the crime in the above aspect and this preventive function may be considered similar to the case of contraband confiscation. However, this similarity does not necessarily mean that the nature of both is the same. The danger at which both are directed is different. For contraband, the danger comes from its inherent nature. For instrumentalities, it is a person who has used or intended to use it in a harmful manner. While contraband

24 Stahl, supra note 8 at 317.
25 Subsections (a)(4) and (a)(7) of this section provides for the forfeiture of all conveyances....and real property which is used or intended to be used to facilitate illegal drug distribution.
26 In Bennis v. Michigan, 516 U.S. 442 (1996), a case of an automobile used in violation of Michigan indecency law, the Supreme Court said forfeiture serves a deterrent purpose distinct from any punitive purpose. Forfeiture of property prevents illegal uses both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behaviour unprofitable.
28 Id. n.26, at 687.
confiscation addresses the harm from the things, instrumentality confiscation tackles the harm caused by a person in using the property. In this regard, the blameworthiness of a person should not matter in the former but it should in the latter. That explains why many countries do not require the proof of guilt in the former but insist on it in the latter.\(^{29}\)

Furthermore, instrumentality confiscation is generally not permitted where a convicted criminal does not own it unless its owner knew or should have known that it would be used or was intended to be used to commit the crime.\(^{30}\) This suggests that instrumentality confiscation focuses on the culpability of a person. Thus, for offenders, it is a punishment for engaging in the crime. For owners, it is a punishment for being an accomplice in the crime.\(^{31}\)

In the US, the concept of the instrumentality of crime is very broadly interpreted, particularly the concept of property used or intended for use in or to facilitate illegal narcotic activity which is forfeitable under 21 U.S.C. § 881. Often, forfeited property under this section is only slightly or tenuously connected to the crime. For example, a car driven to a place of narcotics sale is

\(^{29}\) Of course, the exception is the US which authorises civil forfeiture of the instrumentality of the crime. In England and Wales, conviction is required, see section 143 of the Powers of the Criminal Courts (Sentencing) Act (PCC(S)A) 2000. This is also the case in Thailand, see section 33 of the Penal Code.

\(^{30}\) For example, in England and Wales, while sections 143 of PCC(S)A) 2000 authorises the court to forfeit property used or intended to be used to commit a crime the instrumentality which belongs to another person but is in the possession of a convicted criminal at the time of his arrest, section 144(1) authorises that person to apply for a return of the property upon showing that he has not consented to the criminal having possession of the property or he does not know, and has no reason to suspect that the property is likely to be used to commit the crime. Similarly, section 33 of the Thai Penal Code authorises the forfeiture of property of another person but is used or intended to be used to commit the crime only if he turns a blind eye to or connive at the commission of the crime. Section 36 further allows the owner to the return of the property even when a forfeiture order for it has already been made where he can prove that he does not turn a blind eye to or connive at the commission of the crime. The exception is the situation in the US where civil forfeiture of property of completely innocent persons is authorised if it is used or intended to be used to commit the crime. See Bennis v. Michigan, 516 U.S. 442 (1996).

\(^{31}\) One commentator has described forfeiture of property of a third party that is used to facilitate the crime as a punishment for permitting others, or at least not preventing others, from engaging in criminal activity. See Mary M. Cheh, Can Something this Easy, Quick, and Profitable also Be Fair?: Runaway Civil Forfeiture Stumbles on the Constitution, 39 N.Y.L. SCH. L. REV. 1, 16-17 (1994). The US Supreme Court explicitly recognised the punitive aspect of forfeiture of instrumentality in 21 U.S.C. § 881 by the existence of innocent owner exception in 21 U.S.C. § 881 (a)(4) and (a)(7). See Austin v. US, 509 U.S. 602 (1993).
forfeited. Similarly, forfeiture is ordered against a car driven to a place where a plan for illegal drug distributions is discussed. A house where negotiations for drug sales take place is forfeited. In spite of this, US courts have always explained that these forfeitures prevent future drug transactions and thus, are not punitive but remedial. However, it is difficult to see how forfeiting a car or a house in this respect prevents future illegal drug activity. In these cases, the car or the house is not indispensable or integral to the sale of narcotics. Individuals can always find alternatives to get to the place for narcotics sales or plan to distribute drugs in any other places. It has thus been correctly observed that forfeiture of the property as the instrumentality of the crime can prevent future criminal activity only if it is indispensable to the commission of the crime. Indeed, even when the property is indispensable to the commission of the crime, its confiscation is still punitive. That instrumentality confiscation may have some preventive effect does not mean that it does not also punish a wrongdoer who used or intended to use it for a criminal purpose. If instrumentality confiscation is preventive in this sense, imprisonments may also be considered preventive because it prevents an offender from further committing the crime. Indeed, the Scottish Law Commission considered that the purpose of instrumentality confiscation is punitive, preventive or both.

33 US v. 1990 Toyota 4Runner, 9 F.3d 651, 652 (7th Cir. 1990).
34 US v. 42450 Highway, 441, 920 F.2d 900 (11th Cir. 1991).
36 Stahl, supra note Sat 318.
31 One court has remarked that “[T]he punitive aspects of any forfeiture are self-evident, although it observed that stripping the drug trade of its instrumentalities is remedial and non-punitive purpose of 21 U.S.C. section 881. See Santoro, 866 F.2d at 1543-1544. See also Robert E. Edwards, Comment, Forfeiture—Civil or Criminal?, 43 TEMP. L.Q. 191, 193 (1970) arguing that forfeiture of property which is not contraband, even if it prevents future violations of the laws, is punitive in respect of the person from whom it is confiscated.
38 In US v. Brown, 381 U.S. 437, 458 (1965), the Supreme Court said “Punishment serves several purposes: retributive, rehabilitative, deterrent and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”
The compensation rationale cannot likewise give instrumentality confiscation a remedial nature. For it to be compensatory, the confiscation amount must be determined by the costs of enforcing the law and other public losses from the crime. However, in instrumentality confiscation, it is the value of confiscated property that determines the compensation amount. It has thus been correctly argued that instrumentality confiscation frustrates the compensation goal in some cases and exceeds it in others. As such, instrumentality confiscation, it is submitted, is of a punitive nature.

3.3 Proceeds Confiscation

Historically, this type of confiscation is limited to a good literally created by the crime, for example, counterfeit coins or forged banknotes. While the product of crime includes a stolen chattel, the legal response is not confiscation but restitution, i.e. the return of the chattel to its owner. Obviously, both confiscation of the product of crime and restitution forces the offender to give up what he has obtained through crime, thereby furthering the idea that no one should profit from his wrong. In modern times where criminal activity which produces the proceeds becomes victimless, restitution cannot be made. The only option to further this idea is to force the offender to return to the state what he has criminally obtained. Thus, the concept of proceeds confiscation emerged.

One could be tempted to argue that proceeds confiscation furthers the civil goal of restitution since it forces the offender to return to the society what he has obtained through the crime. Thus, it is restitutionary. It is submitted that this equation is wrong. Restitution is the return to an identified victim what he has lost through a crime, but the confiscated proceeds go to the government. Thus, proceeds confiscation is no more restitutionary than fines and any other monetary penalties. Granted, there is a distinction between fines and proceeds confiscation. The former is not fixed on the basis of benefits obtained from the crime, but the latter is calculated only on this basis. However, no legal rules forbid the calculation of fines on the basis of profits obtained from the crime.

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40 Stahl, supra note 8, at 331.
41 Id. at 307 n.135.
42 One commentator has suggested criminal forfeiture under RICO and CCE should be reformulated as profit fines. See Note, A Proposal to Reform Criminal Forfeiture under RICO and CCE, 97 HARV. L. REV 1929-1946 (1984).
Even if fines are to be fixed in this way, they are still unarguably punitive. The concept of society as a victim, therefore, cannot justify fines as having a restitutionary nature and it necessarily follows that proceeds confiscation cannot be restitutionary either.

Closely related to the restitutionary argument is the assertion that proceeds confiscation is compensatory. Even though the crime does not specifically injure particular individuals, this does not mean that there are no victims. It is society that sustains the loss and is thus the victim. Requiring the offender to redress or repair this harm through proceeds confiscation is compensatory. But, the concept of compensation, as generally agreed, requires that there be identifiable victims and compensation be fixed according to the loss of the victims. Thus, the compensable loss must be individual-specific. The general loss that has to be borne by the society as a whole, for example, costs of enforcing the laws and expenditures for addressing societal problems, is not compensable. In other words, the concept of society as a victim does not fit with the compensation rationale. Proceeds confiscation, therefore, is not compensatory. This is not to deny that confiscated proceeds cannot be used to pay for those costs. But, that the confiscated proceeds may be used for this purpose does not mean that proceeds confiscation is compensatory in the sense defined above. Any other financial penalties or fines may be similarly used to compensate the government in this respect. Yet, it is unarguably punitive, not compensatory. If the rationale that these monetary penalties or fines may be used to pay for the costs of enforcing the laws cannot make them compensatory, it is submitted that the same rationale cannot do so with regard to proceeds confiscation. Finally, in proceeds confiscation, it is the value of criminal benefits, not the losses of the victim that determines the recoverable amount. Compensation, however, is fixed by referring to the loss of the victim. The benefit from the crime scarcely bears any relation to the societal costs of the crime. It is unrealistic to assume that both are equal or even approximately equal.

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45 This does not mean that the victims have to be private individuals. A governmental department the property of which was stolen, for instance, can also sue for compensation.
46 STESSENS, supra note 11, at 46.
For example, in crime committed by saving costs in breach of environmental laws and regulation, unlawful benefit may be small in comparison to great damage which may be caused by it.

The US Supreme Court sometimes has advanced that because proceeds of crime are property which a criminal has no right to retain, it is not punitive. In this sense, proceeds confiscation is similar to contraband confiscation. However, there is a difference. No person has the right to retain contraband without regard to whether crime associated with it has even been committed. It is not a response to the commission of the crime. Proceeds confiscation, however, is unarguably a response to the crime. This distinction, it is submitted, makes proceeds confiscation more similar to any other prescribed penalty for the crime. That the confiscated amount is limited to what the offender has obtained from the crime does not signify the difference in the nature of proceeds confiscation from those penalties. It only effectuates the principle that a criminal should not profit from his crime. This goal is precisely retributive.

Frequently, it is argued that proceeds confiscation is not punitive because it simply forces a criminal to return what he has obtained through crime; it restores the status quo ante, i.e., putting him back into a position he would have been had he not offended. The principal basis for this argument is the doctrine of unjust enrichment. This doctrine has also led the Australian Law Commission to conclude that confiscation in civil proceedings has a basis in law. However, the prevention of unjust enrichment in fact is punitive. Since appropriate punishment must exceed the benefit obtained from the wrong, the disgorgement of wrongful benefit is merely a minimum punishment.

From a philosophical point of view, proceeds confiscation is also punishment. Prof. H. L. A. Hart has defined punishment as follows:

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47 Id. at 51.
50 Id. at 359.
51 MITCHELL, supra note 43, at 3.
(1) It must involve pain or other consequences normally considered unpleasant,

(2) It must be for an offence against legal rule.

(3) It must be of an actual or supposed offender for his offence.

(4) It must be intentionally administered by human beings other than the offender.

(5) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.\textsuperscript{54}

Prof. Packer has added that punishment must be imposed for the dominant purpose of preventing an offence against legal rule or of exacting retribution from the offender.\textsuperscript{55}

No doubts proceeds confiscation is an unpleasant or painful consequence. It is also exacted from the offender or supposed offender. This is obvious in the case where confiscation is conviction-based. Even in proceeds confiscation that is effected entirely outside criminal proceedings, for example, civil forfeiture as practiced in the US, the exemption from forfeiture for innocent owners of property considered proceeds indicates that forfeiture is only for persons somehow involved in the offence. The innocent owner defence also may be viewed as creating a new offence which may be stated as the crime of owning tainted property with knowledge of, or wilful blindness to, its tainted nature. It is for this offence that forfeiture occurs.\textsuperscript{56} Further, it is the authority against whose legal rule is violated that administers confiscation. Finally, it cannot be denied that proceeds confiscation also aims at preventing the recurrence of the offence and exacting retribution from the offender. It is quite difficult to argue that proceeds confiscation is not punitive in nature.

Finally, the actual application of proceeds confiscation in many countries also reveals its punitive aspect. Firstly, most countries do not permit the offenders to deduct their expenses from the amount that is to be confiscated. It is


\textsuperscript{55}Herbert L. Packer, The Limits of the Criminal Sanction 31 (1969).

not net profits, but gross proceeds which are to be confiscated.\textsuperscript{57} Second, unlike civil sanctions, the default of a confiscation order can subject a person to imprisonment,\textsuperscript{58} for example, section 38 of the PCA 2002. These characteristics suggest that proceeds confiscation is of a punitive nature. In \textit{Welch v. UK},\textsuperscript{59} the European Court of Human Rights (ECtHR) also confirmed the punitive character of proceeds confiscation. Of course, the ECtHR, on the contrary, decided in the case of \textit{Raimondo v. Italy},\textsuperscript{60} that proceeds confiscation under Italian Anti-Mafia law was a preventive measure in that it prevented the use of fruits of crimes to the detriment of the community. The ECtHR in \textit{Raimondo} considered the proceeds of crime as an instrument to commit a crime in reaching the conclusion that it was preventive. As with the case of instrumentality confiscation, the fact that proceeds confiscation may serve some preventive goals does not mean that it does not also punish. If this reasoning can justify the preventive nature of proceeds confiscation, the same can also be said with respect to imprisonment. Yet, imprisonment is unarguably punitive. It is then submitted that proceeds confiscation is punitive and the ECtHR approach in the \textit{Raimondo} case is wrong.

\textbf{IV. Non-conviction-based Confiscation and Human Rights}

In the previous section, it has been argued that contraband confiscation only is not punitive and that instrumentality and proceeds confiscations are punitive. This part examines whether confiscation imposed without the finding of guilt or a conviction is in violation of human rights, in view of the suggestion made by some international body, such as the FATF in the Recommendation No.

\textsuperscript{57} In the US, for example, see \textit{US v. Lizza Industries, Inc.} 775 F.2d 492 (2d Cir. 1985), \textit{US v. Hurley} 63 F.3d 1 (1st Cir. 1995), and \textit{US v. McHan} 101 F.3d 1027 (4th Cir. 1996), \textit{cert. denied}, 520 U.S. 1281 (1997). Prior to the Civil Asset Forfeiture Reform Act 2000, the position in regard to civil forfeitures is the gross proceeds rule. \textit{See McHan}, at 1041-1042. Currently, in cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the gross proceeds rule applies, but in cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the costs incurred in providing the goods or services are deductible. In the UK, see \textit{R. v. Ian Smith}, 89 Crim. App. R. 235 (1989). While this case was decided under the DTOA 1986, it appears that this is the current position even if the DTOA 1986 was repealed and replaced by the DTA 1994 which was also repealed and replaced by the PCA 2002. For civil proceeds recovery under the PCA 2002, gross proceeds, rather than net profits, rule also determines whether property is obtained through unlawful conduct. \textit{See section 242 2)(a). See also HOME OFFICE, EXPLANATORY NOTES TO THE PROCEEDS OF CRIME ACT 2002 (C.29) 58 (2002).}

\textsuperscript{58} \textit{STESSENS, supra} note 11, at 56.


that the non-conviction-based regime be considered or introduced. The examination focuses on the European Convention on the Protection of Human Rights and Fundamental Freedom (ECHR) and its case law. Before examining, the relevant Articles of the ECHR are set out below.

Article 1 of Protocol No. 1 reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of tax or other contributions or penalties.

Article 6 reads:

1. In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

2. Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

4.1 Case Law

1) Contraband Confiscation

In *Handyside v. UK*,\(^{61}\) the applicant was found guilty of the crime of having obscene books for publication for gain and the court made a forfeiture order for the destruction of the books. The applicant complained that the forfeiture order breached his right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1. The ECtHR held that the forfeiture constituted the control of the use of property in the second paragraph of this Article because the books were items whose use has been lawfully adjudged illicit and dangerous to the general interest. Thus, there was no violation of Article 1 of Protocol No. 1.

In *AGOSI v. UK,*62 X and Y were arrested in attempting to smuggle into the UK in violation of the Customs and Excise Act 1952 gold coins fraudulently purchased from AGOSI. In accordance with this Act, the coins were seized and later forfeited. After discovering the fraud, AGOSI voided the sale and became the owner of the coins. It was not in dispute that AGOSI was innocent without knowing any wrongdoing of X and Y. AGOSI contended that forfeiture of the coins was an unjustified interference of its property right in breach of Article 1 of Protocol No. 1. It also claimed that it was criminally charged in the forfeiture proceeding without its right to be presumed innocent being respected in violation of Article 6.

For the alleged violation of Article 1 of Protocol No. 1, the court explained that this Article was comprised of three related rules. The first is the principle of peaceful enjoyment of property. The second and third principles in the second sentence of the first paragraph and the second paragraph address specific instances of interference of property right: deprivation of possession and the control of the use of property. As a result, the second and third principles must be construed in the light of the first principle.

The court considered that the prohibition on the importation of the gold coins into the UK constituted the control of the use of property. While the forfeiture of the coins involved the deprivation of property, it was only the element of the procedure to control the use in the UK of the coins. Thus, the third principle applied in this case. Since this principle was to be construed in the light of the first principle, the forfeiture of the coins, and the aim sought to be realised had to be proportional; the state must strike a fair balance between the demands of the general interest in this respect and the interest of the individual or individuals concerned. The ECtHR found that a fair balance was struck in this case and it followed that there was no violation of Article 1 of Protocol No. 1.

As a response to the complaint in respect of Article 6, the ECtHR stated that the fact that measures consequential upon an act for which third parties were prosecuted affected in an adverse manner the property rights of AGOSI cannot of itself lead to the conclusion that, during the course of the proceedings

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complained of, any criminal charge for the purpose of Article 6, could be considered as having been brought against it. Thus, there was no breach of Article 6.

2) Instrumentality Confiscation

In *Air Canada v. UK*, upon the finding of cannabis, the aircraft was seized but was later returned after a payment of 50,000 pounds. Air Canada alleged that the seizure of the aircraft and the requirement to pay 50,000 pounds for its return were unjustified interference of property rights in violation of Article 1 of Protocol No. 1 and also amounted to a determination, without court proceedings, of a criminal charge in breach of Article 6.

The ECtHR considered that the seizure and the requirement to pay for the return were part of the system to control the use of property and this was a justified interference with property rights. Thus, there was no violation of Article 1 of Protocol No. 1. It also accepted the rationale of the English Court of Appeal that the seizure and forfeiture in this case was a process *in rem* against any vehicle used in smuggling and followed its decision in *AGOSI* in reaching the conclusion that Air Canada was not charged with any criminal offence. Thus, no violation of Article 6 was engaged.

3) Proceeds Confiscation

In *Raimondo v. Italy*, the applicant suspected of belonging to a mafia-type organisation was charged in criminal proceedings and during those proceedings several preventive measures were taken against him. Among those preventive measures were seizures of his assets which represented the proceeds of unlawful activities and subsequent confiscation of some of those assets, in particular buildings and vehicles. On appeal, the Court of Appeal terminated the confiscation and ordered restitution of the confiscated property. The applicant alleged that the seizure and confiscation of his assets violated Article 1 of Protocol No. 1 of the ECHR.

The ECtHR considered the confiscation to fall within a system to control the use of property. It cited its decision in *Handyside* and *AGOSI* to support this

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position. Considering that confiscation was a measure to control the use of property, it then considered whether this was proportionate. To this, it observed that: “confiscation pursued an aim that was in the general interest, namely it sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisations to which he was suspected of belonging, advantage to the detriment of the community”.\(^{65}\) Noting that confiscation is an effective and necessary weapon in the combat against enormous wealth from unlawful activities of the Mafia, especially drug trafficking, it considered that the confiscation was proportionate to the aim pursued and it followed that there was no violation of Article 1 Protocol No. 1.\(^{66}\)

The ECtHR, however, did not decide whether the confiscation of his asset violated his right to be presumed innocent under Article 6(2). Mr. Raimondo in fact also complained that this right was violated, but the Commission declared his complaint in this respect inadmissible. The reason why it was rejected was not published, however. It appears likely that the Commission followed its earlier decision in *M v. Italy*.\(^{67}\) There, M was tried and convicted for being a member of mafia-type organisation. During the trial period, a number of preventive measures were taken against him, including the seizure and subsequent confiscation of his assets. He complained that the confiscation of his assets acquired [before he was suspected of being a member of a criminal organisation] amounted to a retroactive punishment in violation of Article 7.

The Commission, however, considered his complaint whether there was a breach of the right to be presumed innocent under Article 6(2), in addition to a violation of Article 7. It found that the confiscation in this case was of a preventive nature; it did not involve a finding of guilt. It was designed to prevent the unlawful use of the property which was the subject of the order to the detriment of the community. The imposition of confiscation against M did not imply the finding of guilt of a specific offence on his part and, thus, it held that there was no violation of the right to be presumed innocent in Article 6(2).

\(^{65}\) *Id.* at 17.
\(^{66}\) *Id.*
In *Butler v. UK*, an admissibility decision, the applicant contended that the provisions in the Drug Trafficking Act (DTA) 1994 which authorised the forfeiture of cash which, on a balance of probabilities, represented the proceeds of drug trafficking of any person, or which was intended by any person for use in drug trafficking involved the determination of a criminal charge and was criminal in nature for the purpose of Article 6 of the ECHR.

The ECtHR held that forfeiture is a preventive measure and cannot be compared to a criminal sanction. Thus, the proceeding did not involve the determination of a criminal charge and it followed that the making of a forfeiture order against the seized money was not in violation of the right to be presumed innocent in Article 6(2).

4.2 Examination

1) Contraband Confiscation

As argued in the previous section, contraband confiscation is not punitive. Thus, Article 6 is not engaged. It is concerned with Article 1 Protocol No. 1. Contraband confiscation, of course, involves the deprivation of property. However, since contraband confiscation is designed to prevent the danger of contraband to the general public or the government, it is a measure to control the use of property in the second paragraph of Article 1 Protocol No. 1. As a result, as long as the state strikes a fair balance between the general interests and those of the individuals concerned, contraband confiscation is not in violation of the right to peaceful enjoyment of property as guaranteed in this Article.

2) Instrumentality Confiscation

Often, a criminal uses property of another person to commit the crime, either with or without knowledge on the part of the latter. While instrumentality

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69 Sections 42 and 43. Under the PCA 2002, this type of forfeiture proceedings now extends to cash which is the proceeds of "any" unlawful conduct or is intended by any person for use in unlawful conduct, not limited only to drug trafficking. See sections 289-303.
70 This case may provide support for arguing that the UK civil recovery in the PCA 2002 would not be likely to be considered as being criminal in nature. This is because the UK civil recovery scheme is substantially similar to the proceeding for forfeiting cash in the DTA 1994: the civil recovery proceedings do not require conviction of a person who is a party to the proceedings and proof required for a recovery order is on balance of probabilities that property sought to be recovered is proceeds of unlawful conduct.
confiscation is punitive, this does not necessarily mean that the owner of the property confiscated is charged with a crime. It is obvious that the owner of the property cannot indeed even be charged with the crime in case he did not know that his property would be criminally used. Of course, in some countries, where the owner knew that his property would be so used, its confiscation is permitted.71 But, even in this case, the owner is not charged with a crime; its confiscation would be made in the criminal proceeding against the person who used it to commit the crime. This reasoning explains why the ECtHR concluded in AGOSI and Air Canada that they were not charged with a crime.72 Of course, Air Canada only is the case of instrumentality confiscation but AGOSI is not. However, the confiscation of the gold coins in AGOSI and the instrumentality confiscation in Air Canada are similar in that they were cases where third parties were the owners of the confiscated property.

While the conclusion of the ECtHR that both AGOSI and Air Canada were not charged with a crime is certainly correct, it is submitted that the holding that the gold coins in AGOSI and the aircraft in Air Canada could be forfeited, despite their innocence of the crime giving rise to forfeiture was compatible with Article 1 of Protocol No. 1 is wrong.

The conclusion of the ECtHR in this regard followed from its treatment of confiscation as a measure to control the use of the property, irrespective of whether the confiscated property is contraband, instrumentality, or proceeds. It is submitted that the across-the-board approach to confiscation is not justified. First, the treatment of confiscation as a measure to control the use of the property would always result in the application of the second paragraph of Article 1 of Protocol No. 1; the first paragraph of this Article would never govern confiscation despite the fact that confiscation always deprives the owner or possessor of his property. Thus, as long as the state strikes a fair balance between the demand of the general interests and the interests of the individuals concerned, property of an innocent person can be confiscated without violation of Article 1 of Protocol No. 1. Given the different nature of property subject to confiscation, this cannot be right.

71 See, for example, section 33 of the Thai Penal Code.
72 AGOSI, supra note 62, at 22 and Air Canada, supra note 63, at 20.
Second, as earlier argued, the fact that confiscation may have some preventive functions does not necessarily mean that it cannot be at the same time punitive. It is submitted that when confiscation is punitive, it cannot take place without giving the person concerned the protections under Article 6. For the application of Article 6 to punitive confiscation, a distinction should be drawn between where a person whose property is to be confiscated is charged with a crime and where he is not so charged. In the former case, he has the rights associated with a criminal charge the most important of which is the right to be presumed innocent in Article 6(2). Where he is not charged with a crime, although the presumption of innocence does not apply to him, this should not, it is submitted, mean that punitive confiscation may be imposed upon his property. If punitive confiscation cannot be imposed upon a person who has been charged with a crime without his right to be presumed innocent being respected, the case for the similar protection is even stronger in the case of a person who has not even been charged with a crime. This, of course, does not mean that the presumption of innocence in Article 6(2) actually applies to him. But, it does imply that where his innocence is established, it is not right to confiscate his property. A contrary position is untenable, since the person who has not been or cannot be charged with a crime is worse treated than the person who has been so charged. Viewed in this light, one can see a close relation between Article 6 and Article 1 of Protocol No. 1 to the effect that punitive confiscation cannot be imposed upon innocent persons under the guise of it being a measure to control the use of property. This is the only way to make sense out of them. From this, it indicates that contraband confiscation alone falls within the measure to control the use of property, since it is not punitive. This provides further support to the above examination of contraband confiscation.

3) Proceeds Confiscation

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73 The same conclusion was reached by the dissenting judges in AGOSI and Air Canada. See AGOSI, supra note 62, at 27 and Air Canada, supra note 63, at 27. It should be noted that the return of the property may be made in the criminal proceeding, for example, by way of allowing a third party to intervene to prove his innocence or in a separate subsequent civil proceeding. See Steessen, supra note 11, at 78-79.
It is necessary to examine the concept of criminal charge under the case law of the ECtHR. In *Engel and Others v. Netherlands*, the ECtHR set out three criteria in deciding whether a proceeding involves the determination of a criminal charge for the purpose of Article 6: its domestic classification, its essential nature, and the severity of the penalty which the person concerned risks incurring. The jurisprudence of the ECtHR in this regard has further developed in later cases.

As has been excellently summarised:

"[I]f a proceeding is locally classified as criminal, this will be decisive, even if the penalty imposed is relatively slight. But if domestic law labels it as civil, disciplinary or administrative, this will not end the inquiry. The ECtHR will further examine the law and proceeding pursuant to the other two criteria. It will consider the nature of the proceeding, in particular whether it is of a generally binding character, whether it is instituted by a public body with statutory power of enforcement, whether it furthers a punitive or a deterrent purpose, whether the penalty attached is dependent upon a finding of culpability, whether the proceeding gives rise to a criminal record, and finally, whether comparable procedure exists and how it is classified in other Council of Europe Member States. The ECtHR will also give considerable weight to the severity of the penalty, particularly where possible penalties include imprisonment, or significant financial penalties enforceable by imprisonment, or a minor financial penalty where it has a clearly deterrent and punitive purpose."

It should also be noted that the ECtHR has emphasised that the second and third criteria are alternative. In other words, the proceeding is criminal where either its nature is criminal or the penalty attached to it belongs generally to the criminal sphere but this does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to ascertain the existence of a criminal charge.

76 *Id.* at 152.
Obviously, because the non-conviction-based regime is locally classified as civil, the latter two criteria: the nature of the proceeding and the severity of the penalty are of considerable weight. On the one hand, three of the above factors point towards the "criminal" nature of the proceeding. First, the proceeding to confiscate property without a conviction is of general application. Second, the public authority institutes the proceedings, for example, the US Attorney or the UK Director of Criminal Asset Recovery. Third, proceeds confiscation also pursues a deterrent and punitive purpose.

On the other hand, the proceeding to confiscate property in this type does not require the finding of culpability of the person concerned. Generally, as long as it is shown that property is the proceeds of crime, it is confiscable. In addition, the proceeding does not give rise to a criminal record. Except the loss of property, he is not subject to any other penalties, particularly imprisonment. Moreover, the non-conviction-based confiscation regime also exists in some EU Member countries, for instance, Italy, Ireland, and now the UK.

While there are arguments pointing both ways, it is submitted that a criminal charge should be considered as having been brought against a person whose property is to be confiscated as the proceeds of crime in a non-conviction-based proceeding. In the case where he has obtained the property by his own crime, the court must determine not only whether the property is the proceeds of crime but also whether he has engaged in the crime. The latter is indistinguishable from the determination in criminal law whether the person has committed the crime. Of course, a person whose property is to be confiscated in the non-conviction-based scheme is not necessarily the perpetrator of the crime from which the property is obtained; he may merely happen to hold it. For example, the UK civil recovery is instituted against a person who holds recoverable property. Where this is the case, it may be argued that he is not charged with a crime. It is, however, submitted that there is a material

78 Section 243.
79 BENJAMIN GUMPERT ET AL., PROCEEDS OF CRIME ACT 2002: A PRACTICAL GUIDE 116 (2003). It should be noted that these commentators have even further suggested that this aspect makes it
distinction. Proceeds of crime, unlike instrumentalities of crime, are the subject of the laundering offence. Where the person who holds the proceeds knows of their criminal origin, he would in all probability be considered as having committed the laundering offence.

Given the protections afforded to those innocent third parties who have obtained the proceeds in good faith and for value, it is clear that proceeds confiscation somehow depends in reality on the finding of culpability whether of the crime which generated the proceeds or the laundering offence. In this regard, it should be noted that the civil liberties organisation “LIBERTY” in the UK commented that the pursuit of criminal property through civil recovery necessarily involves direct or indirect findings of guilt on the part of the property holder or persons connected to the property and that it undermines the presumption of innocence. The civil recovery, while civil in form, is criminal for the purpose of Article 6, as it entails the imposition of a potentially substantial financial penalty following a determination that the person concerned has either engaged in criminal activity or has received the proceeds of crime.

It has been suggested that the proceeding to confiscate the proceeds without conviction is not criminal because it lacks many distinct characters of criminal proceedings: the detention of the person concerned, the bringing of him in custody to a police station, the charging of him with a specific criminal offence, the searching of him, the bringing of him before a court, the detention of him if bail is not granted, the finding of guilt or a conviction on his part.

It should, however, be noted that in most countries, the purpose of the introduction of a non-conviction-based regime is to make it easier to deprive criminals of the proceeds of crime. For example, one of the reasons for the UK to introduce the civil recovery of the proceeds of unlawful conduct is the

likely that the UK civil recovery scheme is not likely to be found criminal in nature, even if it applies to the perpetrator of the crime which has produced the property. See id.

81 Id. at 69.
recognition that it may be difficult and not cost-effective to pursue criminal investigation as regards some individuals in order to confiscate the proceeds of crime. The non-conviction-based regime will enable the recovery of unlawful gains held by individuals who protect themselves from prosecution through complex money laundering schemes, bribery and intimidation. It was also noted that the civil forfeiture regime targeted the activities of organised crime heads who are remote from crimes committed to their order, yet who enjoy the benefits. No doubts, the non-conviction-based confiscation proceeding is a shortcut. Its purpose is certainly to enable the confiscation of property without providing a person whose property is sought to be confiscated applicable procedural safeguards available in criminal proceedings. It cannot be a surprise that many distinct characters of the criminal proceeding are absent from the non-conviction-based proceeding because the objective could not be achieved if the otherwise is the case. Hence, the real issue is whether the state is legally entitled to impose punitive confiscation by this means. Given the fact that confiscation which will follow in the non-conviction-based proceeding is the same as that following a conviction in the criminal proceeding, the answer should be no. As one commentator has observed:

"[C]alling the process "civil" does not alter the fact that it is in reality penal and, being effectively a penal process, it should not in principle be permitted without the safeguards associated with a criminal trial."86

It is thus submitted that the argument that the non-conviction-based confiscation proceeding is not criminal because of the absence of many indicia of the criminal proceeding is untenable. Likewise, the absence of a criminal record should not be considered as having much significance, since this is simply a result of local classification. Of course, there is no imprisonment. While the ECtHR appears to regard the proceeding as criminal in nature where imprisonment is a possible penalty, it is submitted that this should not preclude

84 Id. para. 1.18 at 7.
85 Id. para. 5.2 at 35.
the possibility that the proceeding could be considered criminal in nature even in the absence of imprisonment. One commentator has noted that:

"Confiscation is a complete divestiture of ownership. Ownership of property, although subject to wide-ranging restriction and even severe regulation, is a basic and fundamental liberty interest. The analogy of forfeiture to fine in *Austin v. US*, while apt, does not indeed capture the severity of forfeiture. Forfeiture is to fine what capital punishment is to incarceration."87 In this light, confiscation is definitely a severe sanction.

In its third report on criminal assets, the Home Office provided a reason for the civil recovery process that it is already possible to recover property from alleged criminals in civil proceedings. For instance, where the assets are alleged to have been obtained from the plaintiff by theft or fraud, or where the plaintiff is seeking damages for an offence of violence.88 A similar argument is made that there is no constitutional bar in the determination in civil or other proceedings of matters which may constitute elements of criminal offences. An example is given that rape victims prove the rape to the civil standard in civil proceedings in order to gain damages.89 It is, however, submitted that this analogy is wrong. The marked difference between the non-conviction-based confiscation proceedings and the civil suits instituted to recover unlawfully obtained property or damages is the identity of the plaintiff. In the former, the public authority acts as the plaintiff but in the latter the private victim institutes the suits. This distinction is significant in view of the judgment of the ECtHR in *Benham v. UK*90 which considered public authority with statutory power of enforcement instituting the proceeding as one of the factors in giving the criminal nature to the proceeding. Actions of private victims against criminals to recover damages or property lost through a crime are of a private compensatory nature. The determination of the matters in those actions must be the civil rules. It is a necessary consequence of the nature of the actions. By contrast, actions to confiscate proceeds of crime are of a public and punitive nature. It is submitted that the reference to what is

89 Bell, *supra* note 82, at 383.
permitted in civil compensatory actions cannot be used to support that the proposition that the same should also be allowed in punitive actions. In addition, this reasoning cannot be applied with regard to instrumentality confiscation. In the US, this type of property is also subject to civil forfeiture. Similarly, the UK civil recovery process applies to cash which is intended to be used in unlawful conduct. It is therefore submitted that the proceeding to confiscate property as proceeds of crime in the non-conviction-based regime is criminal in substance and a person against whom it is brought should be considered as having been charged with a criminal offence, either the crime which produced the property or the laundering offence. It follows that proceeds confiscation cannot take place without giving the person concerned the protections under Article 6. It is therefore submitted that the cases of Raimondo, M, and Butler were wrongly decided.

V. Comparative Examination of Proceeds Confiscation in the UK and the US

The purpose of this part is to provide a necessary setting for the next section which will examine obstacles arising from the monetary nature of the proceeds in respect of confiscation. While the non-conviction-based confiscation regime is not justified from the human rights point of view, it is still necessary to set it out in this part. There are two reasons for this. First, many reports have suggested the introduction of the non-conviction-based confiscation regime. Since the obstacles associated with the monetary form of the proceeds are not exclusively concerned with the conviction-based regime, appropriate measures in response to those obstacles would also have to be developed in the non-conviction-based regime, where it exists or will be introduced. The latter case is particularly relevant to many other commonwealth countries, especially small ones, which are likely to follow the UK lead in respect of the civil recovery of proceeds of crime. The second reason relates specifically to Thailand which has adopted a non-conviction-based confiscation regime since 1999.

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91 Section 240(1).
Before setting out the UK and the US stance in respect of confiscation measures, two observations should be noted. First, while the UK uses the term “forfeiture” in respect of contraband and instrumentalities of crime and uses the term “confiscation” in relation to the proceeds of crime, the US uses only the term “forfeiture” for all. In the UK, the power to forfeit contraband is governed under specific statutes and the power to forfeit instrumentalities of crime is governed under the Powers of Criminal Courts (Sentencing) Act 2000. Second, as will be seen below, while the UK currently has the non-conviction-based regime, this regime applies principally to the proceeds of crime. It does not apply to an instrumentality of crime except in case of cash intended to be used in the crime. Apart from this case, the UK forfeiture of instrumentalities of crime, unlike the US counterpart, is conditional on a conviction for the particular crime charged. For this reason, the following examination is concerned only with proceeds confiscation.

5.1 Conviction-based Confiscation

1) UK Criminal Confiscation

Under the PCA 2002, a criminal confiscation order is an order to a convicted defendant to pay a sum of money equal to the benefit he has obtained from a crime. It is a value type of order. The making of the confiscation order does not transfer any property to the government. The order only enables the state to assert a financial claim against the defendant and if the claim is not satisfied, the state can take action to realise it from any property whether it is criminally or legitimately derived.

A defendant must be convicted before the confiscation proceeding begins. Generally, there are three steps involved in the confiscation proceeding. First, the court is to determine how much the defendant has benefited from the crime. It should be noted that the burden of the prosecution as to the extent of his criminal activities.

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93 See, for instance, section 27 of the Misuse of Drug Act 1971, section 52 of the Firearms Act 1968, and section 1(4) of the Obscene Publication Act 1964. It should be noted that forfeiture in this case could occur with or without conviction. For example, while forfeiture under the Misuse of Drug Act 1971 requires conviction, the latter two Acts do not condition forfeiture upon conviction.

94 Section 143.

95 MITCHELL, supra note 13, at 226.
benefit is on a civil standard, i.e., the balance of probabilities. Second, it calculates the recoverable amount. Third, it orders the defendant to pay the recoverable amount. According to section 7, the recoverable amount is equal to the benefit from the crime or the available amount in case the available amount is less than the benefit. Section 9 further defines the available amount as the values of all the property of the defendant, minus the amount of certain priority obligations, plus the values of all tainted gifts.

It should be noted that the court is not limited to considering the benefit from only the crime of which he is convicted. In assessing the value of the benefit from the crime, the court first has to determine whether he has a criminal lifestyle. Where he has a criminal lifestyle, the benefit is to be calculated on the basis of his general criminal conduct which under section 76 includes all criminal conduct whenever committed or whenever property was obtained. For the purpose of calculating the benefit, the court must make certain assumptions as to the benefit from crime going back six years unless the assumptions are shown to be incorrect or to do so would give rise to a serious risk of injustice. It is important to note that the power of the court to determine the benefit from crime in this case is not limited to the previous six years; the court can go back earlier but the extent of the benefit must be proved without reliance on the assumption.

Where he does not have a criminal lifestyle, the court must calculate the benefit from his particular criminal conduct. In section 76, particular criminal conduct includes offences of which he is convicted in the current proceedings, together with those that the court takes into consideration in passing sentence.

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96 Section 6(7).
97 Section 77 as to the definition of “tainted gifts”.
98 Section 75 as to the definition of “criminal lifestyle”.
99 In section 10, four assumptions are provided:
   1. Property the defendant has received in the previous six years is assumed to be the proceeds of crime;
   2. Property he has retained after the date of his conviction is assumed to be the proceeds of crime;
   3. Property he has used to pay for expenditure in the previous six year is assumed to be the proceeds of crime; and
   4. The above property is assumed to have been obtained free of any other interests.
100 EDWARD REES & ANDREW HALL, BLACKSTONE’S GUIDE TO THE PROCEEDS OF CRIME ACT 2002 29 (2003).
The court cannot go further than these offences and cannot make the assumptions.

With a view to ensuring the availability of property to satisfy a confiscation order which will be made, section 41 empowers the court to make a restraint order prohibiting any specified person from dealing with any realisable property held by him in case where any of the conditions specified in section 40 is met. Section 83 defines “realisable property” as any free property held by the defendant as well as any free property held by the recipient of a tainted gift. Thus, the court can make a restraint order against any property of the defendant or the recipient of the tainted gift, not just the proceeds of crime.

5.2 US Criminal Forfeiture

Recall that a forfeiture order, whether criminal or civil, is property-specific. It is an order against property of which the effect is the transfer of ownership in it to the government. Further, the basis of the forfeiture, whether criminal or civil, is the association with a crime of particular property, which is often referred to as the taint. To forfeit property, therefore, the government must in principle prove that the property is tainted because it is involved in the crime, constitutes, or is derived from the crime, or it is traceable thereto.¹⁰¹

Criminal forfeiture is imposed in proceeding in personam: against a person. The defendant must be convicted of a crime which provides for a penalty of forfeiture. As such, it applies to property of the defendant only. Furthermore, criminal forfeiture generally applies to property which is tainted in respect of the crime of conviction only. This is so even if there is a rebuttable presumption in narcotics-related crimes as to property being the proceeds thereof, if the US establishes by a preponderance of evidence that such property was acquired by the convicted person during the period of the crime or within a reasonable time after such period and there was no likely source for such property other than the convicted crime.¹⁰²

While forfeiture is generally against tainted property only, US courts have held that because criminal forfeiture is in personam, they can impose on the

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defendant a money judgment in the forfeitable amount without tracing the taint into specific property of the defendant at the time of forfeiture. This money judgment is presumably enforceable against any property of the defendant howsoever acquired; lawfully or illegally. In some situations, specific property of “the defendant” lawfully acquired may be used to satisfy a criminal forfeiture order. This is called the forfeiture of substitute property. This is available in five circumstances: forfeitable property or tainted property cannot be located upon the exercise of due diligence, has been transferred or sold to, or deposited with, a third party, has been placed beyond the jurisdiction of the court, has been substantially diminished in value, or has been commingled with other property which cannot be divided without difficulty.

When property is forfeited, the title to it is vested in the government at the time of the commission of the crime giving rise to forfeiture. Any subsequent transfers of forfeitable property are generally void against the US except bona fide purchasers for value. Thus, tainted property in the hands of third parties which was owned by the defendant at the time of the commission of the crime giving rise to forfeiture is forfeitable if they are not bona fide purchasers for value.

The law also provides for measures to preserve the availability of property for forfeiture. This is known as a restraint order. The defendant, of course, can be restrained. However, whether third parties who receive forfeitable property from the defendant may be made subject to the restraint order is still unsettled. Some courts hold that the restraint order may be made applicable to third parties to preserve the government interest. Others do not permit the restraint order against third parties. The issue of the restraint order in respect of substitute property is also unsettled. For some courts, the restraint order may be

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107 See, for instance, US v. Kirchenbaum, 156 F.3d 784 (7th Cir. 1998) where it was held that defendant may be enjoined from taking action with respect to property subject to forfeiture but such an order applies only to defendant and his agents.
made applicable to substitute property.\textsuperscript{108} Others do not permit the restraint of substitute property.\textsuperscript{109}

Finally, the burden of proof in a criminal forfeiture trial is the civil standard, \textit{i.e.}, balance of probabilities, because criminal forfeiture is part of the sentencing process.\textsuperscript{110}

\textbf{5.2 Non-conviction-based Confiscation}

\textbf{1) UK Civil Recovery}

The focus of civil recovery is on property obtained through unlawful conduct. This property is called "recoverable property". No person is accused of having committed any crime. Thus, section 240(2) provides that the enforcement authority can initiate the proceeding even in the absence of proceedings being brought for an offence in connection with the property. Section 242(1) also specifies that the unlawful conduct which is the source of the property need not be of the person against whom the proceeding is brought; it may be of someone else. Hence, it is whosever unlawful conduct that makes the property subjected to civil recovery. Section 241 defines "unlawful conduct" as a crime in the UK or, if committed abroad, is a crime where it is committed and would constitute a crime, if it were committed in the UK. It should also be noted that section 242(2)(b) explicitly relieves the enforcement authority of the burden in establishing the particular kind of unlawful conduct from which the property is obtained; it is sufficient to prove only that property is obtained through unlawful conduct of any kind.

A civil recovery proceeding is instituted against a person who holds recoverable property which may be "original property" or "representative property".\textsuperscript{111} Section 304 further provides for the following and recovery of the original property from a person who obtains it upon disposal except where he


\textsuperscript{110} See, for example, \textit{US v. Dicter}, 198 F.3d 1284 (11th Cir. 1999), \textit{US v. DeFrei}, 129 F.3d 1293 (D.C. Cir. 1997), and \textit{US v. Bellomo}, 176 F.3d 580 (2d Cir. 1999). This follows the decision of the Supreme Court in \textit{Libretti v. US}, 516 U.S. 29 (1995), which held that the preponderance standard applies in determining issues at the sentencing stage.

\textsuperscript{111} See Home Office, \textit{supra} note 57, at 59 and section 304.
obtains it in good faith, for value and without notice that it is recoverable property as provided in section 308. To recover representative property, the government must trace according to section 305. Where a person obtains property in place of the recoverable property, whether the original property or representative property, which has been disposed of, this section considers the property so obtained as representative property. The representative property is recoverable. It should also be noted that where the representative property is further disposed of, it may also be followed into the hands of the person who obtains it. It, however, continues to be representative property and thus, recoverable.

Section 306 addresses the case where recoverable property is mixed with other property, whether of his or of others. It is provided that the portion of the mixed property attributable to the recoverable property represents the property obtained through unlawful conduct and therefore, is recoverable.

The PCA 2002 prescribes the balance of probabilities standard to be applicable in deciding whether the unlawful conduct has occurred. However, it does not clearly provide on what standard property must be proved to have been obtained through unlawful conduct. Nevertheless, because this is a suit in a civil court, it follows that this has to be established on this standard.

2) US Civil Forfeiture

Civil forfeiture is an action in rem against property tainted by being involved in or derived from crime. It is the property that is considered the defendant in the suit. While the owner of the property will certainly be affected if the property is forfeited in the civil forfeiture proceeding, he is not on trial. Even if he contests the forfeiture, he still is not the defendant; he is only a claimant. As such, the guilt of the person concerned is immaterial. Property of an innocent person tainted by the crime of another may be civilly forfeited. In the US, the Supreme Court held that an innocent owner defence for civil forfeiture is not constitutionally required. Fortunately, an innocent owner defence is now provided for in 18 U.S.C. § 983(d).

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Like criminal forfeiture, property subject to civil forfeiture includes property which is involved in the offence, which constitutes, or is derived from or is proceeds from the underlying offence as well as property traceable thereto.\textsuperscript{114} However, the concepts of money judgment and substitute property in criminal forfeiture are not available in civil forfeiture. Thus, legitimate property or property that cannot be traced to tainted property cannot be civilly forfeited. Tracing, therefore, is more important in civil forfeiture than in criminal forfeiture.

The government is to prove on the preponderance standard which is the same as the balance of probabilities standard that the property is subject to forfeiture.\textsuperscript{115}

VI. Proving the Criminal Origin of the Proceeds: Evidentiary Problems in Confiscation

This section examines the proving of the proceeds of crime for the purpose of confiscation. It is divided into two sections. First, it explores the proving of the criminal origin of money in general and, second, it considers this issue in case of mixed money.

6.1 The Proving of the Criminal Origin of Money Generally

1) Original Property

(1) Problem

As with the laundering offence, proving the criminal origin of the proceeds requires the prosecution to prove a link between the proceeds and the crime. However, proving this link is likely to be difficult.\textsuperscript{116} The sources of the difficulties in this respect include the fungibility and lack of specific identity of money and the likely lack of direct evidence due to the victimless nature of many proceeds-generating crimes, and laundering schemes.\textsuperscript{117} To these may be added

\textsuperscript{114} 18 U.S.C. § 981(a).
\textsuperscript{115} 18 U.S.C. § 983(c). Before this, the burden was only to establish probable cause to believe that the property is subject to forfeiture and then the burden shifts to the claimant to disprove or prove exceptions.
\textsuperscript{116} As an attestation to this, the Australian Law Reform Commission has pointed out the need to prove this link in case of non-serious crimes as one of the defects in the Australian Proceeds of Crime Act 1987. See Australian Law Reform Commission, supra note 52, at 56-60 (1999).
\textsuperscript{117} See supra chapter II at 69-70.
the criminal standard of proof which prevails in most countries with respect to proving the criminal origin of the proceeds for confiscation purposes.\textsuperscript{118}

(2) Response

The first response is extensive use of circumstantial evidence. The examination of circumstantial evidence, although in the laundering offence context, is also applicable in the confiscation context.\textsuperscript{119} Therefore, it will not be repeated here. However, the extensive use of circumstantial evidence is unlikely to be sufficient to prove the criminal origin of money in the confiscation context, especially in the conviction-based regime where the prosecution generally has to tie the proceeds to the convicted crime. It is very difficult to prove this specific link in case criminals have engaged in crime in a number of occasions or in many crimes, as is mostly the case with career criminals and organised crime.

In the context of the laundering offence, so far as concern crimes committed on a number of occasions, it has been shown in chapter II that the prosecution need not tie the proceeds to a particular criminal act and this position generally solves the difficulty in this respect. However, this is generally not the case with conviction-based confiscation. Thus, additional measures may be suggested. It is proposed to first examine the case of the conviction-based regime and then the non-conviction-based regime.

A. Conviction-based Regime

The FATF has suggested two measures: reversing the burden of proof and providing for civil or non-conviction-based confiscation.\textsuperscript{120} The provision reversing the burden of proof is also urged by the Vienna Convention.\textsuperscript{121} The non-conviction-based regime will be examined in the next section. It is further suggested that the burden of proof in this regard should be lowered, perhaps


\textsuperscript{119} See supra chapter II at 69-76.

\textsuperscript{120} FATF Review, supra note 118, at 11.

\textsuperscript{121} Article 5(7).
using the civil standard of proof to determine this issue in the conviction-based confiscation.

It is useful at the outset to distinguish between the reversal of the burden of proof and lowering this burden. The former is where the burden of proof on specified standards is shifted to the defendant, i.e., the defendant bears the burden of proving that property is not the proceeds. The latter is where some other evidentiary standards, apart from the criminal standard, are used to determine whether the property is the proceeds of crime for confiscation purposes and generally the prosecution shoulders the burden of proof. Countries may use both or either of them. As has been seen, for example, the UK and the US apply the civil standard of proof in relation to the criminal origin of the proceeds in the conviction-based regime. Further, both provide for the reversal of burden of proof. We now analyse first the case of reversing the burden of proof and second the use of the civil standard of proof.

(A) Reversal of the Burden of Proof

In criminal law, it is part of a fair trial right that the defendant is to be presumed innocent and the prosecution is to prove his guilt beyond a reasonable doubt. In the European context, this is guaranteed in Article 6 of the ECHR. This Article, in relevant part, reads:

"In the determination of.......any criminal charge against him, everyone is entitled to a fair and public hearing....

Everyone charged with a criminal offence shall have the right to be presumed innocence until proved guilty according to law."

While the second paragraph speaks clearly of the presumption of innocence, it does not specifically prescribe that proof must be beyond a reasonable doubt in a criminal proceeding. The case law of the ECtHR has, however, emphasised that any doubts should be to the benefit of the accused. Therefore, the prosecution is to prove the guilt beyond a reasonable doubt.

The provision reversing the burden of proof or placing the burden on the defendant to prove the lawful origin of his property appears to be in conflict with

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122 The court observed that [paragraph 2 embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the pre-conceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused..." See Barbera, Messegue and Jarbado v. Spain, 146 Eur. Ct. H.R. (Ser. A) (1988).
the presumption of innocence and the right to have the prosecution prove its case beyond a reasonable doubt. However, it is submitted that they are not indeed in violation of those principles.

While the wordings of Article 6(2) appear to limit its application to the determination of the merits of the charge, the ECtHR has made clear that it applies to the criminal proceeding in its entirety. However, once the defendant is proved guilty, it cannot apply to allegations at sentencing stage unless those allegations constitute a new charge. Since the defendant must have been convicted of the crime charged in a conviction-based regime, before the confiscation proceeding begins, the decisive issue is whether the confiscation proceeding in which the criminal origin of the property is to be determined constitutes the bringing of a new criminal charge.

The provision reversing the burden of proof in this respect, in effect, presumes that the property is of a criminal origin. For the purpose of examination, a distinction should be drawn between cases where it is only presumed that the property is derived from the crime of conviction and where it is presumed that property is derived from both the crime of conviction and other crimes. For example, 21 U.S.C. § 853(d) only presumes that property is derived from the narcotics crime of which the defendant stands convicted. On the other hand, as noted earlier, the PCA 2002 provides for the assumptions of property being the proceeds subject to confiscation of not only the convicted crime but also other crimes. Thus, in the former, the defendant can avoid confiscation by establishing that the property is derived legitimately or derived from other than the crime of which he stands convicted. But, in the latter case, the defendant must prove that the property is of a legitimate origin in order to avoid confiscation. So considered, the provision reversing the burden of proof in the former case eases the burden of the prosecution in linking the proceeds to a particular criminal act while, in the latter case, the provision reversing the burden of proof relieves the prosecution of proving the link between the proceeds and a specific criminal act or a specific type of criminal activity.

a. The UK Style Presumption

125 The concept of "criminal charge" has autonomous meaning according to the criteria developed in Engel v. Netherlands, 22 Eur. Ct. H.R. (Ser. A) at 35 (1976).
The first case in the UK that addressed whether the assumption of property being the proceeds of crime is compatible with Article 6 of the ECHR is *McIntosh v. Lord Advocate*. This case concerned the assumption under the Proceed of Crime (Scotland) Act 1995 (similar to the assumption provided under the DTA 1994 and the PCA 2002). The Privy Council first held that Article 6(2) had no application to the confiscation proceeding where the court was to apply the assumption as to property being proceeds of drug trafficking, since it could not be considered that the defendant was not charged with a crime in the confiscation proceeding. This made it unnecessary for them to decide whether the assumption violated the presumption of innocence. Assuming, nevertheless, that Article 6(2) governed the confiscation proceeding, they considered this issue. In this respect, they adopted the test propounded in the case of *R v. Director of Public Prosecutions, ex p. Kebilene*, where Lord Hope stated that for the provision reversing the burden of proof to be acceptable, a fair balance must be struck between the demand of general interest of the community and the protection of the fundamental rights of the individual. For this purpose, three questions must be asked: first, what public threat the provision reversing the burden of proof is directed to address; second, what the prosecutor must prove to transfer the onus to the defendant; and, third, what difficulty the defendant may have in discharging the onus laid upon him.

The Privy Council concluded that the assumption was compatible with the presumption of innocence in Article 6(2), given the destructive nature of drug trafficking, the burden of the prosecution to show the discrepancy between the property of the defendant and his known sources of income, the rebuttable nature of the assumption, and the relative ease for the defendant to disprove the assumption. This conclusion was followed in *R. v. Rezvi* in respect of the

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127 1 Crim. App. R. 275 (2000). It should be noted that the case was indeed concerned with the application for judicial review of the decision of the Director of Public Prosecution (DPP) to prosecute offences under section 16 of the Prevention of Terrorism (Temporary Provisions) Act 1989. The DPP considered that the provisions in this Act were not in violation of Article 6(2) of the ECHR. The applicants disagreed and asked for judicial review. The Divisional Court held that the DPP was wrong in his conclusion but the House of Lords overturned this ruling, thus making it unnecessary to consider the issue of the compatibility of the offence under section 16 with Article 6(2). However, Lord Hope, while agreeing with the judgement of other Lords, also considered the issue and, in so doing, set out the above principles.
128 *McIntosh, supra* note 126, at 507.
assumption under the CJA 1988 and R v. Benjafield in case of the assumption under the DTA 1994.

The European Court of Human Rights (ECtHR) reached the same conclusion in this aspect. In Phillips v. UK, the ECtHR, by majority, decided that Article 6(2) did not apply to the confiscation proceeding in which the UK court made the assumption of property being the proceeds of drug trafficking under section 4 of the DTA 1994.

The principal reason was that the confiscation proceeding was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to impose upon a properly convicted offender. It was part of sentencing. Further, the right to be presumed innocent, while governing criminal proceedings in their entirety, and not solely the examination of the merits of the charge, arose only in connection with the particular offence “charged”. Once an accused was properly proved guilty of that offence, Article 6(2) had no application to allegations made about his character and conduct as part of the sentencing process, unless they were of such a nature and degree as to amount to the bringing of a new “charge”. It considered that the assumption did not constitute a new charge and therefore Article 6(2) was not engaged.

However, because it also held that the right to be presumed innocent was part of the right to a fair trial in Article 6(1), the assumption had to be assessed whether it was in violation of this right. To this issue, the court referred to its previous decision in Salabiaku v. France. There, the ECtHR held that the presumption, whether in fact or in law, is not per se contrary to the right to be presumed innocent or the right to a fair trial. However, it must be confined within

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132 Two judges held that Article 6(2) is applicable to the confiscation proceeding at issue relying on its case law that the right to be presumed innocent applies to a criminal proceeding in its entirety. It should be noted that the Court of Appeal in R. v. Benjafield, 2 Crim. App. R. 87, at 116 (2001) also held that Article 6(2) applies to the confiscation proceeding. Further, some academics appeared to consider that Article 6(2) should apply to the confiscation proceeding in this case, since the effect of the assumptions is that the court must determine the proceeds of drug trafficking in the previous six years beyond the offence of which the defendant stands convicted. See Peter Allridge, Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime 148 (2003) and A. J. A., Commentary to the Case of Phillips v. UK, Crim. L. Rev. 818 (2001).
reasonable limits taking into account the importance of what is at stake and the
maintaining of the rights of the defence.

In light of this principle, the ECtHR noted with respect to the importance
of what is at stake that the statutory assumption was not applied in order to
facilitate the finding that the applicant was guilty of an offence, but instead to
enable the national court to assess the amount at which the confiscation order
should properly be fixed. Thus, while the confiscation amount was considerable
—GBP 91,400— and he risked a further two year imprisonment upon default, his
conviction for additional drug trafficking was not at stake.134 The ECtHR also
considered that the proceeding for determining the proceeds from drug
trafficking contained sufficient safeguards as to the maintaining of the right of
the defence. It noted a number of aspects in this regard:

- The proceeding is a public hearing with advance disclosure of the
  prosecution case and the opportunity for the applicant to adduce evidence.

- The court could also tailor the confiscation order to the established
  resources of the applicant.

- The applicant can rebut the assumption and the judge has discretion not
to apply the assumptions if there would be a serious risk of injustice.

- On the particular facts of the case, every item or property taken into
  account by the judge was satisfied on the basis of admission by the applicant or
evidence provided by the prosecution.

- Even if the assumptions had not been applied, there could have been no
  objections to the finding as to the confiscable amount;

- Had the account of his financial dealings been true, it would not have
  been difficult for him to rebut the statutory assumption.135

Thus, the assumption of property being the proceeds of drug trafficking in
the DTA 1994 was confined within reasonable limits taking into account the
importance of what is at stake and the rights of the defence. As a result, there was
no violation of the rights to a fair trial in Article 6(1) of the ECHR.

While both the ECtHR and the UK court agreed that the assumption
under the UK laws as to property being the proceeds of crime was compatible
with Article 6 of the ECHR, the test adopted by them were slightly different.

134 Phillips, supra note 131, at 46.
135 Id. at 46-47.
Recall that one of the factors in the test is the consideration of the importance of what is at stake. Prior to the Phillips case, one commentator had suggested from this consideration that the ECtHR would permit the presumption only in case of minor crimes for which no grave sanctions can be imposed. This suggestion appears to have been made on the facts in the Salabiaku case. There, the presumption which was held to be compatible with Article 6(2) applied solely to the offence of smuggling prohibited drugs which carried a much lighter sentence than the offence of knowingly importing drugs which the applicant was charged with, but was acquitted of. In view of the result in the Phillips case, this suggestion is certainly incorrect. While the assumption did not operate to make the applicant guilty of additional drug trafficking, the applicant faced a considerable amount of confiscation and risked a further two years of imprisonment where he defaulted. These were certainly no minor sanctions. Further, the ECtHR has always maintained even before the Phillips case that the protections in Article 6: the presumption of innocence and the rights to a fair trial apply equally to all types of crimes. There are no reasons why it should be different in this aspect. In addition, it appears unreasonable to permit the presumption only in minor crimes, rather than serious crimes, in view of the fact that the public interest in suppressing the latter is far more important than the former. Thus, it is a misunderstanding to suggest that the importance of the stake in the ECtHR test is considered by referring to the severity of the offence concerned.

In the UK, the first of the set of three questions for determining the compatibility of the presumption with Article 6 asks about the nature of the threat to society. This might imply that the presumption would be more acceptable when the crime concerned is serious, not minor. This surely cannot be a position, since, according to the case law of the ECtHR, the protections in Article 6 of the ECHR apply equally to any crimes, irrespective of their gravity.

136 STESSSENS, supra note 11, at 70.
139 EMMERSON & ASHWORTH, supra note 75, at 270.
While the nature of the offence (serious or minor) should not matter in this respect, the compatibility of the presumption with Article 6 should not be judged exclusively on the basis of the maintaining of the rights of the defence, as one commentator has suggested. Should this be so, the protective function of the presumption of innocence would be reduced to a minimum; a state can provide for the presumption in any case as long as the defence is allowed to disprove it. Thus, some other consideration should be introduced. It is suggested that this consideration is whether there is a need or necessity for the presumption in order to make law enforcement successful or effective. Unless there is a need in the sense that effective law enforcement could not be achieved without the presumption, a state should not be able to sidestep the presumption of innocence by providing the presumption in this regard. This ensures that the presumption of innocence would be interfered with to the least extent. As has been cogently stated:

"The prosecution would be required to demonstrate that the reversal of the burden of proof (presumption) was rationally connected to a clear policy justification, and that it was proportionate, in the sense that the objective in question could not be met by the imposition of a purely evidential burden.".....

This suggestion could be used in the ECtHR test. In a criminal trial, there are always two opposing interests: the public interest in effective law enforcement against an offence and the protections of individual rights. These two may be considered as stakes in the ECtHR test. Hence, the consideration of the importance of the stake can be considered by balancing one interest against the other. Where effective law enforcement in the offence concerned could not be achieved without the presumption, for example, it is extremely difficult for the prosecution to prove the presumed facts, the presumption should be considered as being confined within the reasonable limits and therefore be compatible with

140 According to the ECtHR, this means that the presumption does not automatically apply and it must be rebuttable. Under the test adopted in the UK, these two requirements are counterparts of the second and third questions in the set of three questions: what proof the prosecution has to offer to trigger the presumption and the difficulty the defence faces in disproving the presumption.
141 STESSENS, supra note 11, at 70-71.
142 EMMERSON & ASHWORTH, supra note 75, at 271. The purely evidential burden means the burden to raise a reasonable doubt. See id at 270.
Article 6 of the ECHR. It should be emphasised that the nature of the offence (serious or minor) is irrelevant in this consideration.

b. The US Style Presumption

As noted, Article 6(2) does not apply once the defendant is proved guilty unless the allegations made at the sentencing stage constitute a new charge. Here, it is clear that no allegations of other crimes, even by implication, are being made against the defendant since property is presumed to be the proceeds from convicted crime only. Confiscation is simply a punishment for the convicted crime. Thus, the presumption of innocence in Article 6(2) has no application. Further, considering that the US style presumption is less extensive than the UK counterpart, it is rebuttable, and it even requires certain facts to be proved before it operates,\(^{143}\) the US type presumption would surely meet the right to a fair trial in Article 6(1) of the ECHR.

(B) The Use of the Civil Standard of Proof

The decisive issue is whether the defendant is charged with a crime. Unless he is charged with a crime, the presumption of innocence under Article 6(2) does not apply. In case where the proceeds from the convicted crime only are subject to confiscation, it is obvious that in this case there are no other allegations against the defendant. Confiscation is a punishment for the crime of conviction. Since the defendant is not charged with a crime, the presumption of innocence in Article 6(2) has no application. That, in itself, is not sufficient to render the use of the civil standard of proof compatible with Article 6 unless it meets the right to a fair trial in Article 6(1).

There is no case law in this respect. Nevertheless, it is submitted that the use of civil standard of proof is compatible with the right to a fair trial under Article 6(1). Remember that, in case of the presumption, the burden to disprove it is on the defendant and the standard of disproving it generally is on the civil standard. Thus, where the defendant disproves the presumption on the civil standard, the presumed fact is not established. Similarly, where the civil standard of proof is used, the government has to meet this standard in order to establish the fact which would be presumed in case of the presumption. Viewed in this light, the presumption interferes with the right to have the prosecution prove its

\(^{143}\) 21 U.S.C. § 853(d).
case even more than the use of the civil standard of proof since, in the former case, the government need not prove the presumed fact and instead the defendant has to disprove it but, in the latter case, the government has to prove the presumed fact. As the case law of the ECtHR holds that the use of the presumption in the confiscation context is compatible with the right to a fair trial in Article 6(1), the use of the civil standard for the same purpose, it is submitted, must be similarly compatible with Article 6(1).

There are cases where property subject to confiscation includes property obtained from other crimes, not simply the convicted crime. For example, under the PCA 2002, when the defendant is convicted of crime qualifying him as having a criminal lifestyle, there are no limits as to how far the court could go to confiscate his proceeds of crime, although the court could not make use of the assumption going back more than six years before the proceeding was instituted.\textsuperscript{144} The prosecution has to prove on a civil standard the extent of his proceeds of crime during this period. It is submitted that the above reasoning equally applies to this case. Thus, in light of the \textit{Phillips} decision, it cannot be considered that the defendant is charged with a new crime, even if the proceeds from other than the convicted crimes are also subject to confiscation. Article 6(2) is not engaged. Further, the use of civil standard of proof in this case is similarly compatible with the right to a fair trial in Article 6(1).

\textbf{B. Non-conviction-based Regime}

The non-conviction-based regime has been suggested as a way to alleviate difficulty in proving the proceeds of crime.\textsuperscript{145} The advantage of this regime is no doubt the civil standard of proof. In the conviction-based regime, with a view to alleviating the difficulty in proving the proceeds of crime, it has been suggested that the defendant is to prove that the property concerned is not the proceeds of crime. While the same difficulty exists in the non-conviction-based regime, it is submitted that the presumption should not be provided for in this regime.

In the conviction-based regime, the defendant has already been proved to have committed a crime. It is not unreasonable to place a burden upon him to disprove the presumption. However, in the non-conviction-based regime, the

\textsuperscript{144} \textit{REES \\& HALL, supra note 100, at 29.}

\textsuperscript{145} \textit{FATF Review, supra note 118, at 11.}
person concerned is not proved to have committed a crime. It would not appear proper to provide for the presumption as in the conviction-based regime. Nevertheless, the difficulty should be addressed in order to make confiscation more effective. Rather than placing the burden upon the person to prove the legitimate origin of his property, the government should bear the burden of proving that the property concerned is the proceeds of crime. However, this burden should be lessened by measures which produce similar effect to that of the presumption.

In the US, the presumption helps proving the link between the property and the convicted crime. In the non-conviction-based confiscation, a measure with similar effect is used in civil forfeiture. This is that the government need not link the property to a particular criminal act, even if it has to particularise the crime which subjects the property to forfeiture. In *US v. Parcels of Land*, the court explicitly rejected the requirement that the government must link properties seized with particular drug transactions. While this may be a distinctive aspect of civil forfeiture, as opposed to criminal forfeiture, it is suggested that this is also a way to alleviate the difficulty in linking the proceeds to a specific criminal act. This would help address the problem in proving a specific link between the property and the crime. It provides a similar effect to the US style presumption, although, of course, the government shoulders the burden in this respect.

In the UK conviction-based regime, any property falling into the assumption is assumed to be the proceeds of any crime, not just a convicted crime. A measure in civil recovery which produces a similar effect to the assumption in this regard is provided in the UK. But, of course, the government bears the burden of proof. Thus, the PCA 2002 provides that it is not necessary to show that the unlawful conduct which generates recoverable property was of a particular kind. It is sufficient that property is obtained through one of a number of kinds each of which would have been unlawful conduct.

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146 903 F.2d 36 (1st Cir. 1990). *See also US v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996), and *US v. One lot of U.S. Currency*, 103 F.3d 1048 (1st Cir. 1997).

147 Section 242(2)(b). In practice, this provision is likely to be of limited value because the government may still need to particularise all the possible unlawful sources of the property. *See STUART BIGGS ET AL., THE PROCEEDS OF CRIME ACT 2002 111 (2002)* which noted the response of Mr. Ainsworth: *[T]he claim form would be likely to include details of the unlawful conduct that is alleged to have generated the recoverable property. Nevertheless, there may be cases where this provision is useful. For instance, where the whole of property are not proved to have*
2) Substitute Property

Proceeds of crime, if not wholly consumed or used up, would have to be laundered in order to be safely enjoyed. Once laundered, they typically change into other property in the hands of the criminal. This property may be called substitute property. The substitute property must certainly be confiscable if we are to realise full deprivation of the proceeds of crime. The relevant international instruments provide for this need clearly. The Money Laundering Convention adopts the wide definition of the term “proceeds” which includes substitute property. While the Vienna Convention does not speak of the word “substitute property”, it explicitly provides for confiscation of property into which proceeds have been transformed or converted.

(1) Problem

Since the problem has already been noted at some length in the laundering offence context in Chapter II, it will not be repeated here. Suffice it to say that it is in some cases practically impossible to identify substitute property with certainty.

(2) Response

As with the laundering offence context, in order to address the impossibility in identifying the substitute property in some circumstances, the substitute property should be considered traceable property. Thus, the substitute property is of a criminal origin and thus subject to confiscation only if it is traceable to the proceeds of crime, whether original or substitute, in accordance with tracing rules, in particular the exchange-product rule, the “tainted money-in, first-out” or “tainted money-in, last-out” rules.

It is to be noted that the need to locate substitute property is only necessary in property confiscation. As earlier noted, this type of confiscation is only enforceable against property which is the proceeds of crime or the tainted

been derived from unlawful conducts which are specified as sources in the claim form but evidence adduced suggests that it could not have been legitimately derived, the whole of the property may be recoverable.

Those proceeds, of course, still exist but they belong to someone else. That, however, is not relevant to the purpose of confiscation in ensuring that crime does not pay in so far as the criminal is concerned. There can be no doubts that if this purpose is to be achieved, property obtained from laundering must be subject to confiscation.

Explanatory Report, supra note 4, at 14.

Article 5(6)(a).

See supra chapter II, at 76-77 and 79-80.
property. Thus, where the proceeds have been exchanged or otherwise disposed of, there would be a need to identify the property which is traceable to them or to substitute property. Tracing, however, is not necessary in case of value confiscation, since, in this system, any property of the defendant, howsoever derived, may be used to satisfy a confiscation order. Further, as will be immediately shown below, the above tracing rules are no complete solutions to the identification problem caused by mixing in the property confiscation system. A number of adjustments have to be made in the property confiscation system to cope with the identification impossibility in this regard. Nevertheless, we will see in the following section that value confiscation is similarly better at solving the identification impossibility caused by mixing as well. Thus, so far as concerns the conviction-based confiscation regime, it will be suggested that value confiscation is better than property confiscation.

6.2 Identifying the Confiscable Part of the Property of a Criminal Origin

In the laundering offence, it is sufficient if the laundered property or even a part of it is the proceeds of crime. However, for confiscation purpose, in so far as property confiscation is concerned, it is not sufficient to prove that a part of property is the proceeds of crime without identifying this part, because this type of confiscation only bites the proceeds or the tainted property. Untainted property in theory is not confiscable. This aspect makes proceeds confiscation difficult in case of mixing since the proceeds of crime are often money and, when mixed with money from other sources, each loses its identity and is indistinguishable. Obviously, confiscation, if it is to be effective, must be able to cope with this identification impossibility. The analysis below addresses the case of mixing in four situations: first, where the proceeds are mixed with legitimate money; second, where they are mixed with proceeds from other crimes; third, where they are mixed with proceeds from other occasions of the crime; and, finally, where the proceeds of crime committed before effective date of confiscation are mixed with those of crime committed thereafter.

1) A Mix of Proceeds and Legitimate Money

(1) Problem
Where proceeds and legitimate money are mixed as, for instance, in the case of making a criminal deposit into an account having legitimate money, each loses its identity and both are represented by a credit obtained as a result. While the credit in the extent of the criminal deposit is clearly traceable proceeds under the exchange-product tracing rule, there is still a problem in the confiscation context, since which part of the credit is the traceable proceeds subject to confiscation cannot be identified.

There is also similar identification impossibility even with the application of the "tainted money-in, first-out" or "tainted money-in, last-out" rules. For instance, suppose that US $8,000 drug proceeds are deposited into a US $10,000 legitimate account. Of course, if a withdrawal of US $8,000 from this account is made to buy a car, the "tainted money-in", first-out rule would render the whole car traceable proceeds and confiscable. There is no identification problem. It is problematic, however, in case where the government pursues confiscation of US $8,000 drug proceeds from the account which has now US $10,000 under the "tainted money-in, last-out" rule. Here, which part of the US $10,000 account is the US $8,000 drug proceeds is unidentifiable. In addition, suppose that the car costs US $15,000. Under the tainted money-in, first-out" rule, the car is traceable drug proceeds to the extent of US $8,000. However, it is impossible to identify the part of the car which is a substitute for the US $8,000 drug proceeds.

(2) Response

A. Conviction-based Regime

Within the conviction-based system, a distinction should be made between property confiscation and value confiscation systems. We examine these in order.

(A) Property Confiscation

Although a property confiscation order, as a general rule, is only enforceable against tainted property, exceptions have been created both by judicial and legislative actions which authorise the enforcement of the order against legitimately derived property.

a. Judicial Actions

On a judicial front, US courts have adopted some approaches to solve the identification impossibility. First, relying on the nature of criminal forfeiture which is imposed in proceedings against a person, they have held that they can
impose on the defendant a money judgment in the forfeitable amount. This judgment is presumably enforceable against any property of the defendant, howsoever derived.

Second, in some cases, the whole balance in the account would be forfeited. In this case, the basis of forfeiture must be based on the laundering offence in 18 U.S.C. § 1956(a)(1)(B)(i) for which the property involved in the offence would be forfeited. According to the US case law, when the proceeds of crime are deposited into a legitimate account, the legitimate money facilitates the concealment or disguise of the proceeds. It is involved in money laundering and therefore forfeitable. For instance, in US v. Tencer, the entire balance in the bank account is forfeitable even if less than half of it is the proceeds of crime if the purpose of the deposit is to conceal or disguise those proceeds among legitimate funds. This eliminates the need to make any identification.

Third, US courts do not strictly apply the notion that forfeiture is enforceable against tainted property only. Where the amount of the proceeds of crime in the mixed account is known, while it becomes virtually impossible to distinguish or separate one from another, this is not a problem. US courts do not require the government to specifically prove which part of the mix are the proceeds; they simply forfeit money in the mixed account to the extent of the proceeds. Although forfeiture statutes concerned in these cases are civil, it is

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153 ASSET FORFEITURE AND MONEY LAUNDERING SECTION, supra note 103, at (5-5)-(5-6).


155 Stephan D. Cassella, Establishing Probable Cause for Forfeiture in Federal Money Laundering Cases, 39 N.Y.L. SCH. L. REV. 163, 178 (1994). See also US v. Rutgard, 108 F.3d 1041, 1063 (9th Cir. 1997) which indicates that when the proceeds of crime are mixed with legitimate money, this presumably constitutes money laundering.

156 107 F.3d 1120 (5th Cir. 1997).

157 See, for instance, US v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986)(noting in dicta that "if US $100 from the sale of drugs is deposited in an account funded with untainted money, US $100 in the account... [is] vulnerable to forfeiture. See also US v. Pole, No. 3172 Hopkinton,
submitted that this is also the position in respect of criminal forfeiture. In *US v. Stewart*, 158 which concerned criminal forfeiture for the laundering offence in 18 U.S.C. § 982, it was held that because the US $3,000,000 fraud proceeds deposited in a bank are traceable to the laundering offence, they are directly forfeitable even if this account also has legitimate money when they have been deposited. The court acknowledged that the proceeds and legitimate money, when mixed, cannot be distinguished but it did not consider this as obstacle for making forfeiture. It said:

"There would be a difficulty only if one were to attach significance to which actual bills were left in a defendant's account after the direct forfeiture; certainly the defendant has no legitimate interest in preferring one dollar bill to another as long as he is left with the same amount of legitimate funds." 159

It should be noted that this approach may also be used in case where the amount of the proceeds are known by way of the application of the *Banco" tainted money-in, first-out" or "tainted money-in, last-out" rules. 160 While these rules have been developed in the civil forfeiture context, it is submitted that they are also applicable in the criminal forfeiture setting because both similarly mandate that there be a traceable connection between the crime and forfeitible property.

b. Legislative Action

On a legislative front, for example, the US enacted a provision which authorises the enforcement of a criminal forfeiture order which is a property-based type of confiscation against any other property of the defendant up to the value of tainted property where the latter has been commingled with other property which cannot be divided without difficulty. 161 In *US v. Voigt*, 162 the court stated in *dicta* that this provision applies in the case of commingling of cash which makes it impossible to distinguish between tainted and untainted dollars,

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852 F.2d 636 (1st Cir. 1988) and *US v. One 1890 Roll Royce*, 905 F.2d 89 (5th Cir. 1990). While these two cases dealt with forfeiture of property partly bought with the proceeds of crime, it is similar to the case of mixed money in that the criminal part of the property is unidentifiable. The courts applied the same rule, i.e., the property would be sold and the proceeds from the sale to the extent of the proceeds of crime would be forfeited.

158 185 F.3d 112 (3d Cir. 1999).
159 Id. at 130.
160 *US v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986).
162 89 F.3d 1050 (3d Cir. 1996).
although one could readily divide the amount subject to forfeiture. The *Voigt* position stands different from that in *Stewart* which permitted forfeiture of the known amount of the proceeds directly.

(B) Value Confiscation

In this system, there is no requirement that property against which the order is enforceable be tainted. Any property of the defendant, whether criminal or legitimate, may be used to satisfy the confiscation order. As such, there is no need to separate proceeds of crime from legitimate money when both are mixed in any manner. The fact that it is impossible to identify the tainted part in the mixed money is no obstacle in the value confiscation system. It is flexible. It is clearly more effective than property confiscation in solving the identification impossibility caused by mixing.

B. Non-conviction-based Regime

As earlier examined, the proceeding leading to this type of confiscation whether the UK civil recovery or the US civil forfeiture, has its focus on the taint of property in that it is derived from crime. Of course, this property may be directly derived from crime or be property traceable thereto. It follows that unless the property is the proceeds of crime, whether original or traceable, a civil recovery or a civil forfeiture order cannot generally be made. Therefore, the identification impossibility caused by mixing in this confiscation regime is more acute. Clearly, appropriate response is necessary.

(A) Judicial Actions

We note at the outset that measures developed by courts are exclusively those of the US. There are no comparable UK judicial developments, since it was only in 2002 that the UK provided for civil recovery. Moreover, the PCA 2002 has an explicit provision dealing the case of mixing which would make it unnecessary for any judicial developments.

As examined in the conviction-based regime, the first measure is to avoid making identification by attempting to forfeit the entire balance in the mixed

\[163\] *Id.* n.24 at 1088.

\[164\] Of course, in the UK, any property of the recipient of a tainted gift may also be used to meet the order but this is only to the extent of the tainted gift and it is necessary only when the defendant does not have sufficient property to satisfy the order.

\[165\] In the US, for instance, see 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981. In the UK, see section 305.
account. The fact that the government cannot identify the “proceeds” part of the mixed money in the account is no obstacle to forfeiture. This approach is also applicable in the civil forfeiture, since property involved in laundering is subject to both civil and criminal forfeitures.

Another approach is to forfeit the amount of the proceeds in the mixed account without any identification. This amount may be proved whether by direct evidence or by the application of the tracing rules.

(B) Legislative Action

Both the UK and the US have an explicit provision specifically designed to alleviate the identification impossibility caused by mixing.

a. The UK

Under the PCA 2002, property is recoverable if it is obtained through unlawful conduct. Section 306 provides for the recovery of property obtained through unlawful conduct when it is mixed with other property, whether his property or property of another. Examples of mixing are given, such as when recoverable property and other property are used to increase funds held in a bank account or to pay for the acquisition of an asset. It considers that the portion of the mixed property which is attributable to the recoverable property represents the property obtained through unlawful conduct. That portion, therefore, is recoverable. Thus, where US $10,000 proceeds of crime are deposited into the US $15,000 legitimate account, although the balance in the account is increased to US $25,000 and it is impossible to distinguish the proceeds from the legitimate money, the US $10,000 in the account is nevertheless recoverable. Similarly, where US $25,000 is used to purchase property, the property is recoverable to the extent of the US $10,000 proceeds of crime. The court would simply make a recovery order vesting the mixed property—the balance in the account or the property—to the extent of the proceeds in a trustee for civil recovery.

It is to be emphasised that this section is concerned with mixing, not tracing. The PCA 2002 has an explicit provision on tracing. This provision considers property obtained upon disposal of recoverable property to be similarly recoverable. Thus, where the proceeds of crime are deposited into a legitimate

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166 Section 306(3).
167 Section 306(2).
168 Section 305.
account, the increased balance in the account is traceable property and recoverable. However, because it is practically impossible to identify the "proceeds" part of the whole balance in the account, making a recovery order against this part is impossible. Section 306, therefore, authorises the making of a recovery order in the amount of the proceeds. The fact that the UK makes an explicit provision in case of mixing suggests that it recognises that forfeiture of the proceeds amount in the mixed account without specifically proving it as tainted as allowed in the US is not truly consistent with the notion of forfeiture that it is against tainted property only.

Section 306 also governs where it is not possible to determine the extent of the proceeds in the mixed property. For instance, where US $10,000 is withdrawn from a bank account which contains US $8,000 drug proceeds and US $15,000 legitimate money, it is not possible to determine the extent of the drug proceeds in the withdrawal or left in the account. Nevertheless, the case falls within the ambit of section 306. Thus, the US $8,000 either contained in the withdrawal or left in the account would be recoverable. It is not necessary to determine the amount of the drug proceeds under either the "tainted money-in, first-out" or "tainted money-in, last-out" tracing rules as in the US. The lowest intermediate balance rule according to which the account contains no traceable proceeds if the balance has ever dropped to zero after the criminal deposit is also no defence against civil recovery.

b. The US

As shown earlier, as long as the proceeds amount is known, whether it is proved or it is fixed according to the tracing rules, the impossibility in identifying the proceeds part in the mixed property is no obstacle to courts in making forfeiture. The courts simply forfeit the proceeds amount without requiring any identification. The only problem is where the case falls within the limit of these tracing rules: the lowest intermediate balance rule. In 1992, Congress responded to this loophole by enacting a special provision dealing with civil forfeiture of

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169 In the UK, property must retain its identity in order to be capable of being followed or traced. See Dr. Evan Bell, *UK Part IV: Confiscating the proceeds of crime*, in BUTTERWORTHS INTERNATIONAL GUIDE TO MONEY LAUNDERING LAW AND PRACTICE 100 (Toby Graham ed. 2nd ed. 2003).
fungible property: cash, bearer monetary instruments, funds deposited in an account, or precious metal.\textsuperscript{170}

This provision applies only when the basis for forfeiture is money laundering-related offences: 18 U.S.C. §§ 1956 and 1957 and 31 U.S.C. §§ 5322 and 5324. It specifically relieves the government of the burden of identifying specific property involved in any of those offences. It is not a defence that the property has been removed or replaced by identical property and forfeiture is to be made against identical property found in the same place or account as property involved in the offence. Thus, the remaining balance in the account is forfeitable, irrespective of the number of intervening deposits into and withdrawals from the account, the amount of the deposits and withdrawals.\textsuperscript{171} Even if the account has ever been dropped to zero, this is no defence if the balance is positive at the time of forfeiture.\textsuperscript{172}

While this provision was specifically designed to fix the problem caused by the lowest intermediate balance rule, it also provides a solution to the identification impossibility caused by mixing. This is because, once mixed with legitimate money, the proceeds would be considered as property involved in money laundering which need not be specifically identified. Thus, in case the balance in the account is positive, forfeiture would be made in the amount of the proceeds and what is forfeited is not necessarily tainted.

It should be noted that both the UK and the US approaches in this regard do not authorise civil recovery or civil forfeiture of “any” property of equivalent value. Section 306 only allows the portion of the “mixed property” attributable to the recoverable property to be recoverable. Similarly, 18 U.S.C. § 984 only permits the forfeiture of the identical property which must be “found in the same place or account”. These approaches somewhat preserve the principle that the non-conviction-based confiscation is enforceable against tainted property only, although, of course, it is relaxed a bit. Thus, the principal distinction between the conviction-based and the non-conviction-based confiscation is largely preserved.

The above analysis has shown that, in property confiscation whether or not conviction is a pre-requisite, the US has taken several approaches to tackle
the impossibility in identifying the proceeds of crime when mixed with legitimate money. These include forfeiture of the proceeds amount, whether proved or fixed using tracing rules without requiring any identification, and forfeiture of the entire balance in the account on the facilitating theory, money judgment and forfeiture of substitute property.

The first three approaches have some limits. The forfeiture of the proceeds amount is not truly consistent with the notion that forfeiture is enforceable against tainted property only. It is like bending the principle. This, of course, does not deny that there is a need for forfeiture of the proceeds amount and the government should not be required to do what is not practicable for it to do. It is, however, submitted that a judicial task in this context is not warranted but legislative action is preferable. Further, the lowest intermediate balance rule limits the traceability of the proceeds in the mixed account. This rule makes it that no traceable proceeds are left in the account if the balance has ever dropped to zero after the criminal deposit. Even if thereafter the balance becomes positive again, the balance is not traceable to the criminal deposit and thus not forfeitable.

In relation to the forfeiture of legitimate money as facilitating property, this may only be possible if two conditions are met. First, the basis of forfeiture must be money laundering-related offences, in particular the conduct of a financial transaction to conceal or disguise the SUA proceeds under 18 U.S.C. § 1956(a)(1)(B)(i). Second, forfeiture must be based on involvement of property in the laundering offence which according to the US case law includes facilitation. This approach, however, should be rejected as a way to solve the identification impossibility in case of mixed money. There are two reasons for this. First, this approach creates additional burden of proving money laundering, in addition to the predicate crime. Second, the forfeiture of property on the basis of its involvement in money laundering brings a problem of disproportion, as the forfeiture is not limited to the proceeds of crime. Further, the concept of facilitation which subjects property to forfeiture is dangerously limitless.

173 Casella, supra note 155, at 174-175.
Just as the forfeiture of the proceeds amount, money judgment is not truly consistent with the nature of forfeiture which is enforceable against tainted property only. It is even contrary to some forfeiture statutes. For instance, in money laundering forfeiture statutes, 18 U.S.C. §§ 981 and 982 explicitly require a traceable connection between property and money laundering. It seems at odds with the statutes for courts to forfeit legitimate property with no connection whatsoever to money laundering. As in US v. Voigt, where a forfeiture statute at issue was 18 U.S.C. § 982 which required a traceable connection, the court explicitly said:

"The authorisation of the money judgments in cases the government cited to support its position was held for a policy reason."\(^{177}\)

It is submitted that this is a correct view. Where forfeiture statutes expressly require a traceable connection between the property and the crime, the courts should not be legally able to make a forfeiture order against legitimate property in the form of a money judgment.

By contrast, the concept of substitute property is valid; it is statutorily authorised. So far as property confiscation is concerned, it represents an effective way to solve the identification impossibility caused by mixing. Nevertheless, the provision allowing forfeiture of substitute property is not as effective as value confiscation, since it only operates when property confiscation fails. In other words, it is subsidiary. For instance, US courts can forfeit substitute property only in five circumstances: forfeitable property or tainted property cannot be located upon the exercise of due diligence, has been transferred or sold to, or deposited with, a third party, has been placed beyond the jurisdiction of the court, has been substantially diminished in value, or has been commingled with other property which cannot be divided without difficulty.\(^{178}\)

It is submitted that there are no good reasons why the government should be required to prove any of these conditions before legitimate property may be forfeited. In value confiscation, this is not necessary. Any property of the defendant may be used to satisfy the value order; the impossibility in identifying the proceeds part in the mixed money is no obstacle. It is therefore submitted

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\(^{176}\) [US v. Voigt, 89 F.3d 1050 (1996).]
\(^{177}\) Id. at 1084-1085.\(^{176}\)
that, so far as concerns the conviction-based regime, value confiscation is better than property confiscation in depriving criminals of the proceeds of crime.

In the non-conviction-based regime, the making of forfeiture in the proceeds amount whether proved or fixed in accord with the tracing rules, and the forfeiture of the entire balance including legitimate money as facilitating property may be used to solve the identification impossibility caused by mixing. They should be rejected for the reasons advanced above. The best solution is to legislatively authorise forfeiture of the value of the property but in a much more limited fashion to retain the distinction between conviction-based and non-conviction-based confiscation systems.

It has been shown that 18 U.S.C. § 984 is unduly restrictive with respect to the offences which would enable forfeiture of identical property. These are money laundering-related offences. There are no reasons why the forfeiture in the suggested manner should be limited only to mixing which constitutes money laundering. Further, this also unnecessarily burdens the government in that it must prove both the predicate crime and money laundering to obviate tracing and to overcome the lowest intermediate balance rule. Section 306 of the PCA 2002, on the contrary, applies to the case of mixing, irrespective whether it constitutes money laundering. It is therefore better in solving the identification impossibility caused by mixing in the non-conviction-based regime.

2) A Mix of Proceeds from Different Crimes

(1) Problem

Here, when proceeds from different crimes are mixed, it is practically impossible to distinguish the proceeds of one crime from those of another. Therefore, which part of the mix is the proceeds of the crime at issue is not identifiable.

(2) Response

It should be noted at the outset that there is no case law as to what response may be used to address the identification impossibility in this respect. Nevertheless, it is submitted that the measures outlined in case of a mix of the proceeds and legitimate money may be adapted to cope with this case.

A. Conviction-based Regime

(A) Property Confiscation
In the US, forfeiture of the proceeds amount whether proved by evidence or fixed according to the tracing rules may be used. Similarly, facilitation forfeiture is also possible, since proceeds from other crimes in the account may facilitate the concealment or disguise of the proceeds of crime specified in the laundering charge which is grounded on the making of a deposit of the proceeds of the specified crime.

Since this type of confiscation is against a person, two more measures are available: forfeiture of substitute property and money judgment. These two may be satisfied from any property including property not tainted in respect of the convicted offence. However, they all should be rejected for the same reasons as earlier advanced.

(B) Value Confiscation

The impossibility in distinguishing proceeds of one crime from those of another is no obstacle in value confiscation because value confiscation does not require any identification. Once the proceeds amount is known, the court makes an order which is enforceable against any property of the defendant even when it is legitimate or not tainted with the convicted offence. It is therefore submitted that, so far as concerns conviction-based regimes, value confiscation is also better than property confiscation in solving the identification impossibility in case where proceeds from different crimes are mixed.

Recall that the PCA 2002 authorises the confiscation of proceeds beyond the convicted crime.\textsuperscript{179} Since proceeds of any crime are subject to confiscation under the PCA 2002,\textsuperscript{180} property will be confiscable if the government proves that it could not have been come by legitimately. Granted, the UK system of confiscation is value-based. There is no need for the identification in any event. Nevertheless, this approach may be of use in property confiscation where there has to be identification of property tainted with the convicted crime. Where there is a provision allowing forfeiture of the proceeds from other crimes, in addition to the convicted crime, the government need not identify the part in the mixed property which is tainted with the convicted crime. As long as it proves that the mixed property could not have been legitimately derived, the whole of it is forfeitable.

\textsuperscript{179} Sections 6(4)(b), 6(4)(5), 7(1) and 76(2).
\textsuperscript{180} Section 76.
It should be noted that, for this to occur, there are two conditions. First, proceeds of “any” crime must be subject to forfeiture. Otherwise, the government must prove that the whole of the mixed property comes from crimes which provide for forfeiture. Second, forfeiture of proceeds of any crime must be provided for in the same legislation. In the UK, before the PCA 2002, there were two distinct confiscation laws: the DTA 1994 on drug proceeds and the CJA 1988 on proceeds from other crimes. The government has to prove that the property comes from drug or other crimes depending on the concerned legislation. Were the UK confiscation system at that time property-based, the making of confiscation beyond the convicted crime under the DTA 1994 would not solve the identification impossibility in this case, since it is impossible to identify which part of the property are the drug proceeds. 181 Of course, this is unless there is assumption as to the property being the drug proceeds.

The confiscation of the proceeds beyond the crime of conviction is the most effective way to deal with career criminals and organised crime which engages in various criminal activities. Confiscation which is limited only to the proceeds of the convicted crime has only limited effects. There are two reasons for this. First, confiscation of the proceeds from the convicted crime only does not deprive the criminals of the proceeds of their prior crimes. Second, in some cases there would be no or little proceeds liable to confiscation because the criminals get caught before they complete the transaction, for instance, a narcotics sale, and thereby obtain no proceeds from it. 182 It is therefore submitted that, in order to be effective against those career criminals or organised crime, confiscation beyond the crime of conviction should be permitted. This should also be available in value confiscation, although the identification impossibility in this context is not a problem.

The confiscation of the proceeds beyond the crime of conviction, however, should not apply to any types of criminals, because in some cases the defendant is clearly a first-time offender and there is no evidence whatsoever that

181 One commentator has similarly noted the difficulty in linking the proceeds to a particular type of crime where countries draw a distinction between drug proceeds and proceeds from other crimes. See Alastair N. Brown, The Proceeds of Crime: An Evidential Perspective, in PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TREND IN CRIMINAL INVESTIGATION AND EVIDENCE 264 (J. F. Nijboer & J. M. Reijntjes, eds. 1997).
182 AUSTRALIAN LAW REFORM COMMISSION, supra note 52, at 58-59 for examples in this regard.
he has engaged in previous criminal activities. It should be authorised where the crime of which the defendant stands convicted is of an ongoing nature or is part of a course of conduct. These types of crimes may be defined by legislation, as in the UK. Nevertheless, because the specification of qualifying crimes for this purpose is necessarily category-based, it may not be true in every case that there are prior crimes from which the defendant has committed and obtained certain property as proceeds. To avoid rigidity in this respect, where this confiscation is facilitated by the assumption as to property being the proceeds of crime, just as in the UK, the defendant should be allowed to disprove the assumption and the court should have discretion not to apply them where there would be a serious risk of injustice.

B. Non-conviction-based Regime

In the case of US civil forfeiture, only forfeiture of the proceeds amount and facilitation forfeiture are available. However, for the same reasons advanced above, they should be rejected. Explicit legislation is preferable and it should be similar to section 306 of the PCA 2002 rather than 18 U.S.C. § 984.

3) A Mix of Proceeds from Different Occasions of Crime

(1) Problem

In this case, there is only one type of crime, for example, drugs but it is committed in a number of occasions and the proceeds derived therefrom are mixed. Thus, which part in the mix are the proceeds of crime committed on a particular occasion is unidentifiable.

(2) Response

A. Conviction-based Regime

(A) Property Confiscation

Here, facilitation forfeiture would not appear possible, since it is difficult to consider that the proceeds from crime on other occasions in the account facilitate the concealment or disguise of the proceeds of crime on a particular occasion, given the fact that they are proceeds from the same type of crime. Thus, the available measures are forfeiture of the proceeds amount, money judgment, and forfeiture of substitute property. They may be adapted to use in this regard. However, they all should be rejected for reasons earlier explained.

The confiscation of the proceeds beyond the crime of conviction, especially when coupled with the assumption as to property being the proceeds
of crime, may also provide a solution to the identification impossibility in this regard, since the whole of the mixed property is confiscable.

(B) Value Confiscation

As value confiscation does not require any identification, it is the best response to the identification impossibility in this aspect. Further, the confiscation of the proceeds beyond the convicted crime should also be allowed in order to make value confiscation more effective in depriving careered criminals of the proceeds of their prior crimes, although it is not necessary to solve the identification impossibility in this regard.

B. Non-conviction-based Regime

As earlier suggested, the government need not link the property with a particular criminal act. As long as the complaint alleges that the property is the proceeds of crime without making reference to a particular occasion, identification is not necessary. The whole property is confiscable. This practically solves the identification impossibility in this regard. Where, however, the complaint makes a specific reference to the crime committed on a particular occasion, it would still be practically impossible to identify which part of the property comes from the crime on that occasion.

As in the conviction-based regime, facilitation forfeiture is not possible in this situation. Thus, only forfeiture of the proceeds amount is available but it should be rejected for the earlier explained reason. A statutory provision authorising the confiscation of the proceeds amount in the mix should be enacted. This should preferably be in a form similar to section 306, instead of 18 U.S.C. § 984.

4) A Mix of Proceeds from Crime Committed before Confiscation and Those from Crime Committed thereafter

(1) Problem

In this case, it is practically impossible to separate which part in the mix are the proceeds from crime committed in which periods.

(2) Response

A. Conviction-based Regime

(A) Property Confiscation

For the reason that they are proceeds from the same type of crime, facilitation forfeiture would not appear possible. Thus, the available measures are
forfeiture of the proceeds amount, money judgment, and forfeiture of substitute property. They may be adapted to cope with this identification impossibility. Because of the drawbacks earlier expounded, they should be rejected.

(B) Value Confiscation

Here, there is no need for any identification. A value confiscation order is enforceable against any property.

B. Non-conviction-based Regime

As with the conviction-based regime, facilitation forfeiture would not seem possible. Thus, forfeiture of the proceeds amount is available but it should be rejected for the earlier explained reason. Explicit provision addressing mixing similar to section 306, rather than 18 U.S.C. § 984, should be enacted.

C. Application of Confiscation to Proceeds from Crime, whenever committed.

At the outset, it must be noted that this measure applies to both conviction-based and non-conviction-based regimes. Here, instead of attempting to segregate the mix into parts representing proceeds from crime committed in particular periods, the proceeds of crime, whenever committed, would be made subject to confiscation. It practically solves the identification impossibility in this respect.

This measure, when implemented in the conviction-based regime, raises the issue whether it is a violation of the prohibition against retrospective penalty, one of the fundamental human rights as guaranteed in Article 7 of the ECHR. It is submitted that making confiscation applicable to proceeds from crime committed before the effective date of confiscation does not necessarily offend this prohibition. This is shown below.

Article 7 of the ECHR reads:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."
In *Welch v. UK*, the ECtHR considered whether the confiscation of the proceeds under the Drug Trafficking Offences Act (DTOA) 1986 violated this Article. There, the defendant was convicted in 1988 of drug trafficking committed in 1986. The judge, apart from imprisonment, also imposed upon him a confiscation order made under the DTOA 1986 which came into force in 1987. The ECtHR considered that there was a violation of Article 7. The *Welch* decision was distinguished in the decisions of the European Commission of Human Rights in *RC v. UK*,*IM* and *Taylor v. UK*, where the commission held that where the confiscation legislation which provided for confiscation of proceeds from earlier crimes, as in the case of the DTOA 1986 was effective at the time of the commission of the triggering crime, there would be no violation of Article 7 even if the proceeds from crimes committed before the effective date of the legislation were also subject to confiscation. In these two cases, the drug trafficking crime which triggered confiscation was committed after the DTOA 1986 came into force. The applicants were aware at the time of engaging in drug trafficking that they would be liable to confiscation of proceeds from earlier crimes. Therefore, there was no retrospective punishment. The ECtHR confirmed this position in *Danison v. UK*, which was concerned with a confiscation order under the CJA 1988.

In light of these decisions, the position appears to be that making confiscation applicable to the proceeds from crime committed before its effective date is not *per se* contrary to the prohibition against retrospective punishment. As long as the crime which triggers this confiscation is committed after the confiscation becomes effective, the fact that the proceeds from earlier crimes are confiscable is not a violation of the prohibition against retrospective penalty.

In the case of the non-conviction-based regime, there would not likely to be the issue of retrospective penalty, with respect to the confiscation of the proceeds from crime committed before confiscation becomes effective, since

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185 Application No. 31209 96, September 10, 1997. See Id. at 790.
186 Application No. 45042 98, September 7, 1999. Id.
confiscation of this type is considered civil. The PCA 2002 explicitly provides that the civil recovery applies retroactively. Similarly, US courts have held that civil forfeiture may be applied retroactively without violation of the ex post facto clause because it is not penal in nature.

We have addressed in this part the issues in relation to proving the proceeds of crime for confiscation purposes. It has been shown that the monetary form of the proceeds, the likely lack of direct evidence, laundering schemers, and the criminal standard of proof make this very difficult. As a response, it has been suggested that, in the conviction-based regimes, the burden of proof be reversed and/or the civil standard of proof be used which have been shown to be compatible with the presumption of innocence and the fair trial right under Article 6 of the ECHR. In the non-conviction-based regime, while the most important benefit of this regime is the civil standard of proof, further measures have also been suggested to increase the effectiveness of confiscation. Specifically, the government should not be required to link the proceeds to a particular criminal act or to a particular type of crime.

It has also been shown that mixing the proceeds with other money, whether criminal or legitimate, causes the identification of the proceeds to be practically impossible in some cases. Property confiscation which is in principle enforceable against the proceeds or tainted property only would be problematic. While adjustments to property confiscation may solve the identification impossibility in this respect, they should be rejected. In particular, forfeiture of the proceeds amount, without legislative authorisation, is inconsistent with the nature of property confiscation. Facilitation forfeiture unnecessarily burdens the government with proving the laundering offence, is dangerously limitless, and

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188 Some, however, questioned the compatibility with the prohibition against retrospective penalty in Article 7 of the ECHR of the civil recovery of proceeds from crime committed before its effective date. See ALLRIDGE, supra note 132, at 241-242.

189 Section 316.

190 See, for instance, US v. Certain Funds (Hoang Kong and Shanghai Banking Corporation), 96 F.3d 20 (2d Cir. 1996).

191 Similar difficulties exist in the context of the laundering offence as well. However, there are no similar suggestions in this context. The reason may be because it is more acceptable to lower or reverse the burden of proof in the confiscation context which only occurs after the defendant has been charged, presumed innocent, and been convicted of the crime. Support for this may be found in Article 5(7) of the Vienna Convention which advocates the reversal of burden of proof in the confiscation context but not in the laundering offence context.
does not appear possible in all mixing cases. Making a money judgement is, without explicit legislation, not compatible with the nature of property confiscation and may be in some cases contrary to the forfeiture statutes. Forfeiture of substitute property also unnecessarily burdens the government with tracing. Therefore, it has been suggested that, so far as concerns the conviction-based regimes, the confiscation system should be value-based, because there would not be any need for identification in this regard. Any property of the defendant, howsoever derived, may be used to satisfy a value confiscation order.

It has also been suggested that the confiscation should be permitted in respect of the proceeds beyond the crime of conviction. While this is not necessary to solve the identification impossibility in the value confiscation system, it is the most effective way to deal with career criminals, those who have been living off from crime and, in particular, organised crime. Further, confiscation should be permitted for the proceeds from crime committed before its effective date. This, however, should be properly structured so as not to contravene the prohibition against retrospective penalties under Article 7 of the ECHR.

In the non-conviction-based regime, it has been suggested that explicit provision addressing the case of mixing similar to the UK approach in section 306, instead of 18 U.S.C. § 984 is a preferred solution to address the identification impossibility caused by mixing. In addition, countries may also dispense with the need to tie the proceeds to a particular criminal act and may subject the proceeds from crime committed before the effective date of the regime to address the identification impossibility caused by mixing the proceeds from different occasions of crime and mixing the proceeds from crime committed before the regime is effective and those from crime committed thereafter.

VII. Concluding Remarks

This chapter has examined confiscation measure in the UK and the US in comparison with a view to making effective deprivation of the proceeds of crime. The principal conclusion is that the monetary form of the proceeds makes it very difficult to prove that the property is the proceeds of crime and also makes it practically impossible to identify the proceeds where they are mixed with other money, whether criminal or legitimate. Thus, measures should be introduced to
address these difficulties. Specifically, with respect to proving that the criminal origin of the property for confiscation purpose, legislation should provide for the reversal of the burden of proof and/or the application of the civil standard of proof to this issue. To respond to the identification impossibility, value confiscation is preferable to property confiscation in respect of the conviction-based regime, and, if the non-conviction-based regime is implemented, the legislation should explicitly deal with mixing by allowing the enforcement of confiscation against the mix without requiring any identification.
Chapter IV: Comparative Examination of International Confiscation in International Law, the UK, and the US

Modern crimes are no longer limited to borders. Sophisticated criminals and organised crime know that law enforcement generally stops at borders and, thus, if they can spread their criminal activities across several jurisdictions, they will make the investigation and prosecution of their crimes much more difficult. So far as concerns money laundering, the movement of the proceeds of crime abroad is one of the marked characteristics of the operation of sophisticated laundering operations and organised crime.¹ As noted in chapter I, the transfer of the proceeds abroad does not only enable criminals to effectively foil the pursuit of law enforcement officers of the state in whose territory the predicate crimes was committed, but also allows them to make further use of those proceeds effectively, particularly where the destination of those proceeds is a state whose anti-money laundering system is lax. That is why money laundering is typically transnational. The transnational nature of money laundering also explains why the implementation of measures to control money laundering around the globe is largely a product of international and regional initiatives as examined in Chapter I.

Since money laundering is a problem of international dimension, measures to address it must also be international in scope. This chapter explores the legal mechanisms which deal with the problem of confiscating the proceeds of crime located abroad. The examination will be divided into two sections: unilateral actions and mutual legal assistance. It will be shown that in most cases unilateral actions to confiscate the proceeds of crime located abroad are not likely to be effective as to the defendant. While these measures may be used in respect of a third party with some success, they violate international law and punish him despite his innocence. Thus, mutual legal assistance should be a preferred method of dealing with the problem in this regard. So far as concerns mutual legal assistance for this purpose, it will be shown that although legal measures to control money laundering in many states are similar, there are differences as to the definition of the laundering offence as well as the ranges,

¹ WILLIAM C. GILMORE, DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTERMEASURES 28 (Council of Europe Publishing 2nd ed. 1999).
approaches and limitations on investigative and provisional measures as well as confiscation. These differences may render in some cases the requested state legally unable to provide assistance although the relevant conventions treat those differences as optional refusal grounds only. Some approaches will be suggested to enable mutual legal assistance to be legally given despite the said differences.

I. General Observations

There are three steps involved in any attempt to confiscate the proceeds of crime, whether at the domestic or international levels: investigation, preservation, and confiscation. At the investigation stage, the purpose is to locate the proceeds in case of property confiscation or the property of the defendant in case of value confiscation. Once the proceeds or property of the defendant are identified, there is a need to preserve them for the purpose of eventual confiscation. This is in most cases necessary, as the defendant would have every incentive to move them in order to avoid confiscation. Legal measures which further this purpose are often commonly known as “provisional measures”. They include, for example, seizure, freezing or restraining order. Once a confiscation order has been made, the order will have to be enforced against the proceeds or the property.

Under international law, a state has full jurisdiction in its own territory. Thus, where the case is purely domestic, i.e., the crime which gives rise to confiscation occurs, and the proceeds derived therefrom are located, in its territory, the investigation, preservation and confiscation of the proceeds are exclusively matters for the state of the territory without the sovereignty of other states being implicated. However, where the case is not purely domestic, such as where evidence of the crime is, or the proceeds of it are, located in the territory of another state, international law places limits upon the power of the state to exercise its jurisdiction over matters not exclusively of a domestic character. Before going on to examine the confiscation of proceeds located abroad, it is therefore necessary to explore the concept of state jurisdiction under international law.

II. State Jurisdiction under International Law

Jurisdiction in this sense has been defined as the right of a state under international law to regulate conduct in matters not exclusively of domestic
concern. In considering the issue of jurisdiction in this regard, it is useful to distinguish three types of jurisdiction—prescriptive, adjudicative, and enforcement—which correspond to the three branches of government: legislative, judicial and executive. Under the Restatement (Third) on the Foreign Relation Law of the US, prescriptive jurisdiction means the authority of a state to make its law applicable to the activities or persons whether by the legislative, executive or judicial branch; adjudicative jurisdiction is the authority of a state to subject persons or things to the process of its courts whether in civil or in criminal proceedings, whether or not the state is party to the proceedings; and enforcement jurisdiction is the authority of a state to induce or compel compliance or punish non-compliance with its law.

In general, prescriptive jurisdiction dictates adjudicative jurisdiction. When a state has the prescriptive jurisdiction over a certain matter, the court of the state has the adjudicative jurisdiction over such matter, i.e., has a right to apply its own law to the matter. Thus, whether the court of a state has jurisdiction to try the crime and order confiscation of its proceeds depends on whether the state has the prescriptive jurisdiction over the crime. The distinction between these two types of jurisdictions is only a matter of the perspective from which the question of jurisdiction is approached: prescriptive jurisdiction starts from the legislative viewpoint in determining the scope of the rule they are going to make but the adjudicative jurisdiction is looked at from the viewpoint of the courts which apply the rule.

The power of the state to prescribe rules is not territorially limited. There are other valid bases for the state to prescribe the rules, such as the nationality, the protective, and the universal principles. Thus, as long as the state has the

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4 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES Vol. 1 Section 401 (1986) [hereinafter “RESTATEMENT”]
6 Id.
7 For detailed exposition of these principles, see Council of Europe: European Committee on Crime Problem, Extraterritorial Criminal Jurisdiction 3 CRIM. L. F. 441- 454 (1992). See also ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 151-156 (2nd ed. 2003).
prescriptive jurisdiction over the crime consistent with these principles, it is able to try the crime and confiscate the proceeds therefrom, even if the crime is committed abroad.

The power of the state to enforce the rules it has prescribed, however, is not as extensive as the prescriptive jurisdiction. While the prescriptive jurisdiction is not territorially limited, the jurisdiction to enforce is strictly territorial. A state may not enforce its rules in the territory of another state without the consent of the latter. The attempt of one state to enforce its rule in the territory of another without consent constitutes a violation of sovereignty of the latter state. Thus, where the state exercises its prescriptive jurisdiction on the basis of other than its territory, it does not have jurisdiction to enforce the rules it has prescribed. The fact that the state has prescriptive jurisdiction over the matter does not necessarily mean that it has also jurisdiction to enforce. However, the state cannot have enforcement jurisdiction unless it has prescriptive jurisdiction. In other words, prescriptive jurisdiction is a necessary but not sufficient condition for enforcement jurisdiction.

III. Unilateral Actions to International Confiscation and International Law

This section examines unilateral measures some common law countries, particularly the US, have employed to pursue the confiscation of the proceeds of crime located abroad. It is proposed to examine first the investigation stage which would be followed by the preservation and confiscation stages.

3.1 Investigation

Often, banking and financial information is protected by banking secrecy. The protection may be backed by civil or criminal laws or both. Investigation as to the proceeds is unlikely to be successful unless law enforcement can access the information protected by this banking secrecy rule. While banking secrecy in a domestic context does not generally stand in the way of criminal investigations, a foreign criminal investigation is not an exception to the principle. Therefore, piercing foreign banking secrecy is generally more difficult.

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8 SS Lotus, (SS Lotus, France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 9, at 18-19 (7 September).
9 STESSENS, supra note 5, at 212.
1 The duty of confidentiality a bank owes to its customer was recognised in Tournier v. National Provincial and Union Bank of England, 1 KB, CA 461 (1924). One of the exceptions of this duty is where the disclosure is under compulsion by law. There are a few statutes mandating disclosure in this regard. The statute which is of general application is the Police and Criminal
In common law states, particularly the US, unilateral measures have been relied upon as a way to pierce foreign banking secrecy. These are extraterritorial disclosure order and consent directive.

1) Extraterritorial Disclosure Order

Before examining the issues in this respect, a few observations should be noted. First, while the examinations in this part are concerned with the use of a disclosure order to pierce foreign banking secrecy in criminal matters, i.e., for confiscation purposes, it is important to recognize that the order is also employed in civil litigation for the same purpose. The issues relating to the use of the disclosure order to pierce foreign banking secrecy are the same, irrespective of the nature of the actions, whether civil or criminal, in which the order is made. Thus, while some of the cases examined below are of civil matters, they are useful for the present purpose. Second, although the disclosure order may be issued compelling a party to litigation or a non-party witness to disclose information, the examination which follows focuses exclusively on the case where a bank which is not a party to litigation is compelled to disclose information protected by foreign banking secrecy. Third, although we use the term “disclosure order”, different words have been used in the US context and, therefore, it is important to note them to avoid confusion. In civil litigation, US courts often issue a production order, also known as subpoena duces tecum, which demands a non-party witness who possesses or controls documents, such as a bank, to produce before the courts banking information of particular individuals. In criminal proceedings, a federal Grand Jury, acting under the authority of the court, can also issue this type of subpoena. When the documents required to be produced are relating to information protected by banking secrecy, the effect of the production order is the disclosure of the protected information.

Evidence Act 1984. Where there are reasonable grounds for believing that a serious arrestable offence has been committed, section 9(1) permits a constable to make an application under Schedule 1 of this Act to obtain access to excluded material and special procedure material for the purposes of a criminal investigation. In section 11(1), excluded material means materials held in confidence. For further information on bank secrecy in the UK, see Wendy Fowler & Richards Butler, Great Britain, in INTERNATIONAL BANK SECRECY 260 (Dennis Campbell ed. 1992). In other countries, see INTERNATIONAL BANK SECRECY (Dennis Campbell ed. 1992).

11 In the US, see FED. R. CIV. P. Rule 45(1)(c) for a non-party witness in a civil action and FED. R. CRIM. P. Rule 17 for a non-party witness in a criminal action. In the UK, for instance, see section 34 of the Supreme Court Act 1981 and Part 31 of the Civil Procedure Rules 1998 (para. 31.17)
As such, it is not to be confused when the examination of the US case law below uses the words: production order or subpoena, rather than disclosure order.

An extraterritorial disclosure order is an order which requires the disclosure of information located in the state other than the state of the court making the order. The US case law has established that the court can require the production of documents held abroad as long as it has a personal jurisdiction over the person who possesses or controls the documents. This has been interpreted to cover situations where a bank has some presence in the US, although the documents required to be produced are kept by its Head Office or in a branch located in a foreign state. There are many cases where the bank located in the US was served with a subpoena duces tecum with the requirement that it produced the documents which concerned activities of its Head Office or branch in a foreign state and were protected by the banking secrecy in that state. It is submitted that the compelled production of the protected documents in this regard constitutes the exercise of US enforcement jurisdiction in the territory of another state. It is a violation of international law.

It should be emphasised that the making of the extraterritorial disclosure order in this case is against a third party, a bank, over which the US has no prescriptive jurisdiction. The issue is purely concerned with enforcement jurisdiction. As noted earlier, the enforcement jurisdiction is strictly territorial. A state cannot exercise, whether directly or indirectly, its jurisdiction in the territory of another state absent the consent of the latter. Since the service of the subpoena demanding compliance is an aspect of the exercise of the state jurisdiction, it cannot be served abroad. Of course, in the above cases, the subpoena was served upon the bank located in the US. However, compliance which was the production of the documents was to take place in the foreign state because the documents were kept in such state. In effect, the service of the subpoena upon the bank in the US in this situation was equivalent to the service of it in the foreign state. Since the US cannot under international law effect the service of the subpoena in the foreign state demanding the production of the

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12 See In the Matter of Marc Rich, 707 F.2d 663, 667 (2d Cir. 1983).
13 See, for example, US v. First National Bank of Chicago, 699 F.2d 341 (7th Cir. 1983), US v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), and In re Sealed Case, 832 F. 2d 1268 (D.C. Cir. 1987).
14 MANN, supra note 2, at 116.
documents located there, the US cannot achieve the same end by serving the subpoena within its own territory with the effect to take place abroad.\textsuperscript{15} It should not matter whether the bank in the US served with the subpoena is the Head Office or simply the branch. Each branch should be considered independent of the Head Office and of other branches.\textsuperscript{16} The treatment of branches as independent entities is apparently in accordance with the view of Lord Denning when he stated in \textit{Power Curber v. Bank of Kuwait}:

"Many banks now have branches in many foreign countries. Each branch has to be licensed by the country in which it operates. Each branch is treated in that country as independent of its parent body. The branch is subject to the orders of the courts of the country in which it operates: but not to the orders of the courts where its Head Office is situate."\textsuperscript{17}

The fact that the Head Office of the bank is located in the state should not mean that the state has the enforcement jurisdiction over its branches located abroad. Some, however, have considered that the Head Office and its branches are parts of a single entity, and because the Head Office exercises controls over its branches, the Head Office cannot deny the production of the documents on the ground that they are held abroad.\textsuperscript{18} The service of the subpoena upon the Head Office located in the jurisdiction requiring the production of the documents held abroad does not constitute the exercise by the state of the location of the Head Office of the enforcement jurisdiction beyond its territory.

It is nevertheless submitted that although the Head Office has control over the branches, the material issue is whether or not the enforcement of the subpoena is to take place outside the state where the Head Office is located. Clearly, in reality, this is to take place in the state of the location of the documents which is not the state of the location of the Head Office. It is submitted that the service of the subpoena upon the Head Office located in the jurisdiction demanding the production of the documents kept abroad constitutes

\textsuperscript{15} \textit{id.} at 118-119.
\textsuperscript{16} \textit{id.} at 119.
\textsuperscript{17} 3 All E.R. 607 (1981).
\textsuperscript{18} F. A. MANN, \textit{The Doctrine of International Jurisdiction Revisited After 20 Years, in Further Studies in International Law} 35 (1990). This is the opinion of Dr. Mann in 1984. Previously, he considered branches as being independent of the Head Office. \textit{See n.15}. 164
the exercise by the state of the location of the Head Office of the enforcement jurisdiction beyond its territory,

Even if this is not so, there is another objection to the practice in this respect. In most states, banking secrecy is protected civilly, criminally, or both. While banking secrecy may be lifted, this can only be through the order of the local authorities. Foreign compulsion is no exception to banking secrecy. The disclosure of protected information pursuant to the extraterritorial disclosure order would in all probability render the bank guilty of a crime and/or civilly liable for breach of contract in the foreign state. It is submitted that, as a matter of international law, no state is allowed to require the commission of an illegality whether under criminal or civil law in the territory of another.19 Further, demanding the commission of illegality in another state constitutes a violation of the non-interference principle which is part of the state sovereignty.20 The use of disclosure order demanding the information protected by foreign banking secrecy is therefore contrary to international law in this respect even if it is served upon the Head Office located within the jurisdiction.

Where the subpoena is locally served upon the branch demanding the production of the documents located abroad and protected by banking secrecy, it is clear that this constitutes the exercise of enforcement jurisdiction beyond the territory, since the branch so served has no ability to control other branches. It also renders the branch guilty of a crime or civilly liable for a breach of contract in the state of the location of the branch. It is surely contrary to international law.

Historically, US courts did not have the power to order acts to be performed abroad where such acts constituted a violation of the law of the place where the acts would be performed.21 Later, after the decision of the Supreme Court in Societe Internationale v. Rogers,22 the position was that the court would apply a two-step test: first, the court held that it has the power to make the order in this case; it only considers whether or not to exercise the power and second, if it makes the order, it would consider what sanctions are appropriate for non-

19 id. at 36.
20 STESSENS, supra note 5, at 324.
21 RESTATEMENT (FIRST) CONFLICT OF LAW § 94 (1934).
compliance. In *Societe*, the Supreme Court, while acknowledging that it had power to compel disclosure, excused non-compliance with the production order in respect of banking records of a private bank kept in Basel, Switzerland. One of the reasons for this excuse was that compliance would constitute the violation of Swiss laws. Many lower courts subsequently followed this ruling. Later, US courts were much less tolerant of the fact that the disclosure would be illegal according to the law of the state where the information was kept.

In *US v. Bank of Nova Scotia* (Bank of Nova Scotia I), a subpoena was served upon the branch of the bank in Miami demanding the production of banking records of a customer of the bank at its branch or branches in the Bahamas. The court upheld the subpoena despite the fact that the production of the records would make the bank liable for criminal sanctions under section 10 of the Bank and Trust Companies Regulation Act. Again, in *US v. Bank of Nova Scotia* (Bank of Nova Scotia II), a subpoena served upon the Miami branch of the bank was again upheld which required the production of banking records located at its branch or branches in the Cayman Islands and the Bahamas despite the existence of the order of the Cayman Grand Court prohibiting the bank from complying with the subpoena.

The contemporary US approach is provided in the Restatement (Third) on Foreign Relation Law of the US. Section 442 recognises the power of the court to order a person subject to its jurisdiction to disclose information even if the information or person in possession of the information is outside the US. It

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25 See, for example, *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960), *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), and *US v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968).
26 Also note the *RESTATEMENT (SECOND) ON FOREIGN RELATION LAW* (1965) which asserted that: State having jurisdiction to prescribe or enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct.
27 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983).
28 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985).
adopted the interest-balancing approach\(^\text{29}\) in which a number of factors would be considered in deciding whether to order the disclosure of the information abroad: the importance of the information to US investigations or litigations, the specificity of the request, the information being originated in the US, alternative means of securing the information, adverse effects on important US interest from non-compliance, and negative effects from compliance on important interests of the state where the information is kept. The fact that the disclosure of the information is prohibited by the foreign law is not a bar for compelling the disclosure. Failure to comply with the order can have adverse consequences, such as sanctions of contempt, although they are not normally imposed except where there is a deliberate concealment or failure to make a good faith effort to secure permission from foreign authorities to disclose information.

As with the US, the UK also made use of the extraterritorial disclosure order. For example, in \textit{R v. Grossman},\(^\text{30}\) the court held that it had a power under section 7 of the Bankers' Books Evidence Act 1879 to make a disclosure order which required the production of documents located abroad. In this case, the order was served upon the Head Office of the Barclays bank in London which pertained to the account maintained at the branch of Barclays in the Isle of Man. In the confiscation context, furthermore, UK courts can also make a disclosure order. Although the Drug Trafficking Act (DTA) 1994 and the Criminal Justice Act (CJA) 1988 did not explicitly provide for this power, it was held that the court had inherent power to make the disclosure order in support of a restraint

\(^{29}\) This approach was also adopted in the Restatement (Second) on Foreign Relation Law of the US, although the Restatement (Third) added to the list of factors the good faith to secure permission from foreign authorities to disclose the information. Under the Restatement (Second), the result of balancing interests in most cases was usually that the US interest in having the information disclosed outweighed the foreign interest in keeping it confidential even if the disclosure is prohibited under the foreign laws. Many have thus correctly noted that the interest-balancing approach is nothing but a way of justifying the application of the law of the forum. See Harold G. Maier, \textit{Extraterritorial Jurisdiction at a Crossroad: An Intersection between Public and private International Law}, 76 AM. J. INT'L L 280,317 (1982). See also Stesmens, supra note 5, at 324. See \textit{In Re Bank America Trust and Banking Corporation (Cayman) Ltd.}, for a reversed situation. The Grand Court of the Cayman Island held that the preservation of confidentiality under the law in the Cayman Island outweighed the interests of the IRS in enforcing its summons which required the production of document by the Bank of America in respect of transactions to and from its offices the Cayman Island. This case is cited in \textit{Shazida Ali, Money Laundering Control in the Caribbean} 245-246 (2003).

order.\textsuperscript{31} The PCA 2002 has now given an explicit recognition of this power.\textsuperscript{32} It is important to note that the court can make a restraint order not only against the convicted defendant but also against any person who holds any realisable property.\textsuperscript{33} It follows that the court can make the disclosure order against a third party.\textsuperscript{34} Thus, it is possible that a UK bank or a UK branch of a foreign bank may be served with the disclosure order demanding the production of documents located abroad.

It is fortunate that the UK courts are more reserved as compared with their US counterparts in exercising this power. For instance, in Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corp.,\textsuperscript{35} the court set aside the order and the subpoena served upon the London branch of Citibank which required the production of the documents relating to accounts held in its New York offices. The court considered the order to be exorbitant and in violation of the US sovereignty.

It is clear that the use of extraterritorial disclosure order to pierce foreign banking secrecy by serving it locally upon a third party, particularly in this context, the bank, whether the Head Office or the branch, is contrary to international law. Granted, this approach is successful to some extent. In Bank of Nova Scotia I and II, after a fine of $25,000 per day was imposed upon the bank, the bank finally produced all the documents. Nevertheless, this is not without costs. The relation between the US and other states was greatly strained by this practice. Many states sent diplomatic notes objecting to the US approach in this respect maintaining that it was a violation of their sovereignty.\textsuperscript{36} In addition, it is important to recognise that those who are caught in the middle of two sovereigns are not parties to the proceeding but only witnesses. They are not wrongdoers. If they do not disclose, they will be penalised according to the law of one sovereign. Yet, if they comply with the disclosure order, they will also be

\textsuperscript{32} Section 41(7).
\textsuperscript{33} Section 41, the PCA 2002.
\textsuperscript{34} See Re D, The Time, 26 January 1995.
\textsuperscript{35} 1 All E.R. 653, 658 (1986). In this case, the order under section 7 of the Bankers' Books Evidence Act 1879 was served upon the London branch of Citibank demanding the production of the documents relating to the account of Bahamian Company held at its New York Head Office.
penalised by another sovereign. They are put into a dilemma. This is clearly shown in the case of Bank of Nova Scotia I and II. While it may be argued that this dilemma is a result of the bank voluntarily choosing to do business in numerous states, it is submitted that this does not justify the taking of unilateral actions without respecting the sovereignty of other states in violation of international law.

Of course, there is no dispute that the information from the bank is absolutely necessary in order not to allow the criminal to keep the proceeds of crime. But, paying due respect to the sovereignty of other states does not necessarily mean that the required information will not be forthcoming. It would be preferable for the US to seek cooperation from the state where the required information is kept by way of, for example, concluding a bilateral treaty on mutual legal assistance. The judicial approval of the unilateral approach provided the US government with less incentive to secure assistance from other countries through cooperation mechanisms.

So far the discussion has been concerned with the case where the disclosure order is made against the bank which is not a party but simply a witness to the proceeding. A disclosure order may also be made against a party to the proceeding. It is submitted that where the disclosure order is made against the party to the proceeding, the party cannot object to it on ground that the required documents are kept abroad or the foreign law prohibits the disclosure. The reason is that the state only exercises its enforcement jurisdiction to the extent necessary to implement its prescriptive jurisdiction. Put another way, the

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37 In Bank of Nova Scotia II, the court observed: The Bank has voluntarily elected to do business in numerous foreign host countries and has accepted the incidental risk of occasional inconsistent governmental actions. It cannot expect to avail itself of the benefits of doing business here without accepting the concomitant obligations. See Bank of Nova Scotia II, 740 F.2d at 828.

38 See the Treaty Between the US and the UK Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters 1986. This Treaty was signed between the US and the UK on behalf of the Cayman Islands after the case of Bank of Nova Scotia II.

39 In this connection, it should be noted that the US entered into MLATs because of the tensions and objections foreign governments had with the US in respect of the use of unilateral measures. See ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALISATION OF US CRIMINAL LAW ENFORCEMENT 315, 341-384 (1993).

40 In the US, see FED. R. CIV. P. Rule 34. In the UK, there is no explicit provision on the power of a court to order the disclosure of information from a party to the proceeding. However, this is a general rule of the law of discovery in the UK according to which the court could order a party to disclose document relating to any matter “in question” which were in his possession, custody or power.

41 MANN, supra note 2, at 138.
existence of prescriptive jurisdiction must carry with it any implied power to make this jurisdiction effective. This, it is submitted, includes the power to compel discovery of the documents in order to try the case properly. Accordingly, there is no objection under international law for the court to make the extraterritorial disclosure order against the defendant.

In the confiscation context, although the information sought by the extraterritorial disclosure order is not necessary for the trying of the case in respect of the crime because the defendant has already been convicted, the court need this information to determine the extent of the proceeds of crime properly. It is submitted that the confiscation hearing, although being a sequel to the trial of the crime charged, should be treated as a separate proceeding for this purpose, since it involves the determination of additional factual issues for which further information is required. So considered, it follows from the above reasoning that as long as the court has a proper criminal jurisdiction over the crime concerned and thus can confiscate the proceeds thereof, it can require the defendant to disclose the whereabouts of his proceeds of crime worldwide, irrespective of their location or the prohibition against disclosure under the foreign law. Further, it is submitted that no objection under international law could be made against the extraterritorial effect of the disclosure order against the defendant. The making of the disclosure order against the defendant is obviously useful where the defendant cooperates.

It is important to note that this is not concerned with the privilege against self-incrimination. Quite likely, the information the defendant is to supply may be incriminating of him. It is universally recognised that this right is part of the

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42 Dr. Michael Akehurst, *Jurisdiction in International Law* 46 BRIT. YEAR BOOK OF INT’L LAW 145, 178 (1972-1973). He has rightly stated:

“If this were not so, a foreign corporation could transact business within a state and defeat all attempts by the authorities of that state to investigate whether the business was being carried on in accordance with local law by keeping its business records in another state whose law prohibited discovery.”

Of course, where the foreign law prohibits the disclosure, the court would be likely to excuse non-compliance. See id.
right to a fair trial. Thus, in order to protect this right, the information disclosed must not be permitted to use in any criminal proceedings against the defendant.

2) Consent Directive

Consent directive is another way which US authorities sometimes employ to pierce foreign banking secrecy. It is a written form which releases foreign banking records of an individual by asserting his consent to do so. Thus, the person who signs the form waives his right to banking secrecy. Typically, in criminal investigations, a prosecutor will ask the Grand Jury to compel the person to sign the form. Refusal may result in the individual being held in contempt. The use of the consent directive has been held not to be in violation of the privilege against self-incrimination. Although failure to sign the consent directive may cause the person to engage liability for contempt of court, the consent directive is unlikely to be effective, since the foreign state would probably not consider it as consent which enables the bank to disclose information or produce documents. For example, in Re ABC Ltd., the Grand Court of the Cayman Island held that the consent directive is not a valid consent for the purpose of exception to secrecy law.

In light of the violation of international law of the US practice in locally serving the subpoena which requires the production of the documents abroad and the ineffectiveness of the consent directive as a way to pierce foreign banking secrecy, it is submitted that the best approach to secure information protected by foreign banking secrecy is through cooperative mechanisms which will be subsequently examined.

3.2 Preservation


In the UK, the protection of the privilege against self-incrimination is made by the imposition in the disclosure order of a condition which prevents any use of the information disclosed in any criminal proceeding except the proceedings for perjury to which the disclosure made relates. For further information in this regard, see IAN SMITH & TIM OWEN, ASSET RECOVERY: CRIMINAL CONFISCATION AND CIVIL RECOVERY 129-130 (2003). See also TREVOR MILLINGTON & MARK SUTHERLAND WILLIAMS, THE PROCEEDS OF CRIME: LAW AND PRACTICE OF RESTRAINT, CONFISCATION AND FORFEITURE 52-55 (2003).


This case is cited in Bergin, supra note 45, at 337 n.80.
Once the proceeds of crime have been located, there is a need to preserve them for the purpose of future confiscation. Regardless of many names of the measures for this purpose, such as seizure, freezing order, restraining order, or interim receiving order, their essence is to prevent the defendant from dissipating the proceeds to avoid confiscation. These measures are collectively known as provisional measures.

It should be noted that seizure in this aspect means seizure of property to ensure its availability for eventual confiscation. As such, it is different from the investigatory type of seizures which aims only at the use of seized property as evidence.48

Unilateral actions to preserve property abroad for the purpose of eventual confiscation are made by way of the issue by the court of extraterritorial provisional measures. As with extraterritorial disclosure orders which are also made in civil proceedings, in addition to criminal proceedings, these extraterritorial provisional measures are also made in a civil and commercial context, apart from criminal settings. Nevertheless, the issues under international law raised by these extraterritorial provisional measures are the same, irrespective of the nature of the proceeding in which they are made. Thus, while some cases examined below are civil cases, they are also relevant for the present purpose.

In a civil and commercial context, common law courts have the power to issue an injunction, known as a Mareva injunction, which restrains the defendant from dealing with his property.49 This injunction may be issued in respect of property outside the UK. This is often known as worldwide Mareva injunction.50 Similarly, US courts can issue an injunction preventing the person from disposing of his property abroad.51 The basis for the extraterritorial effect of the injunction is the jurisdiction of the court over the person or in personam

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48 STESENS, supra note 5, at 352.
49 Mareva Compania Naviera SA v. International Bulkcarriers SA, 1 All E.R. 213 (1975). The power to grant the injunction was given statutory authority in section 37(3) of the Supreme Court Act 1981.
51 Republic of Philippines v. Marcos, 862 F.2d 1355, 1363-1364 (9th Cir. 1988), cert. denied, 490 US 1035.
jurisdiction. Once the person is personally subject to the jurisdiction of the court, the court can make the order to control his conduct abroad. Failure to comply with the injunction constitutes a breach of the injunction and is punishable as contempt of court.

It is submitted that there is generally no objection under international law as to the extraterritorial effect of the injunction with respect to the defendant. In private litigation, UK courts would issue the injunction only when the case has a close connection with the UK as, for example, where a breach of contract or a tort is committed therein. Thus, from the international law point of view, the court has a proper prescriptive jurisdiction. This proper prescriptive jurisdiction carries with it any implied power to enforce whatever measure necessary to make it effective.

In the context of confiscation, the making of the extraterritorial injunction in the form of a restraint order or freezing order is also not in violation of international law. Two reasons may explain this. First, since the defendant must be on a criminal trial in the jurisdiction in which the court makes the restraint or freezing order, he is physically present in the jurisdiction. Thus, he is within the enforcement jurisdiction of the court. It is submitted that the making of the restraint or freezing order against the defendant who is within the enforcement jurisdiction of the court cannot be considered the exercise of the enforcement jurisdiction beyond the territory. This is so even if the defendant is also to comply with the order abroad as in this case. Further, even if this constitutes the exercise of the enforcement jurisdiction beyond the territory, it is still not a violation of international law for the restraint or freezing order to be extraterritorially effective against the defendant, since the court has a prescriptive jurisdiction over the defendant.

In so far as a third party is concerned, it should be noted at the outset that although, as a general rule, the injunction is available only against the party to

52 Lawrence Collins, Extraterritorial Provisional Measures, in Essay in International Litigation and the Conflict of Laws 88 (1996) See also US v. First National City Bank, 379 U.S. 378 (1965). Once personal jurisdiction of a party is obtained, the District Court has authority to order it to freeze property under its control, whether the property be within or without the US.

53 Campbell McLachlan, Extraterritorial Orders Affecting Bank Deposit, in Extraterritorial Jurisdiction in Theory and Practice 45 (Dr. Karl M. Meessen ed. 1996). See also Collins, supra note 50, at 207.
the proceeding, this does not mean that the third party cannot in any way be
affected by the injunction. A third party who has received the notice of the
injunction is bound not to aid and abet the party against whom the injunction is
made to breach the injunction. If he does so, he will be liable for it but his
liability is not of a breach of the injunction, but of contempt of court. As such,
the extraterritorial injunction also poses problems of jurisdiction under
international law with respect to the third party. In the UK, however, the courts
mitigate the effect of the extraterritorial injunction by subjecting it to what has
become known as the Babanafi proviso which reads:

"Effect of the order outside England and Wales:

The terms of this order do not affect or concern anyone outside the
jurisdiction of this court until it is declared enforceable or is enforced by a court
in the relevant country and then they are to affect him only to the extent that they
have been declared enforceable or have been enforced unless such person is

(a) a person to whom this order is addressed or an officer or an agent
appointed by power of attorney of such a person or

(b) a person who is subject to the jurisdiction of this court and (i) has
been given written notice of this order at his residence or place of business within
the jurisdiction of this court and (ii) is able to prevent acts or omissions outside
the jurisdiction of this court which constitute or assist in a breach of the terms of
this order."

In (a), the injunction is clearly extraterritorial with respect to the
defendant because he is the person to whom the injunction is addressed. As noted
above, no objection under international law can be made against the
extraterritorial effects of the injunction in respect of the defendant.

In case of a third party who is completely out of the jurisdiction and acts
completely abroad, the worldwide injunction has no effect on him unless the
injunction is recognised and enforced by a foreign court.

Clause (b), however, causes difficulties to the position of a third party
who has some presence within the UK, particularly a UK bank or a foreign bank
with a branch in the UK. As noted in the case of extraterritorial disclosure

54 COLLINS, supra note 50, at 193.
56 COLLINS, supra note 52, at 91.
orders, both the US and the UK consider that the bank in this case is subject to the jurisdiction of the court. As notice of the injunction may be served upon the bank within the UK, the material issue is whether it is able to prevent acts or omissions outside the jurisdiction which constitute or assist in a breach of the injunction, such as when the defendant attempts to withdraw the frozen funds from his account at the branch of the bank abroad.

As argued earlier, the Head Office of the bank and its branches are to be treated independently of each other; they are different entities. It is submitted that this should also be applied in respect of the extraterritorial injunction. As a result, the branch abroad of the bank should not be treated as being subject to the jurisdiction of the UK court and it follows that the branch is not bound to comply with the order. Serving the notice of the injunction on the bank which requires compliance abroad should therefore be considered as being in violation of international law.

However, as with the extraterritorial disclosure order, some courts, particularly those of the UK and the US, have considered the Head Office and its branches a single entity in this context. Thus, the bank is considered being subject to the jurisdiction of the court. The material issue, then, is whether the bank served with the notice of the injunction is able to prevent the breach of the injunction abroad.

In a case where the bank informed of the injunction is a branch located in the jurisdiction, the injunction is not likely to be extraterritorially effective. The reason is that the branch clearly does not exercise controls over other branches abroad and thus cannot prevent the breach of the injunction at those other branches.

Where, however, the Head Office is served with notice of the injunction, the injunction is likely to be extraterritorially effective. The Head Office exercises control over its branches. It may have the ability to prevent the defendant from attempting to withdraw the funds at the branch abroad. In Securities and Investment Board (SIB) v. Pantell SA,\(^{37}\) the Head Office of Barclays bank in England was served with the injunction prohibiting its branch in Guernsey, a separate jurisdiction, from parting with the money in the account of

the defendant. It was held that the service on the Head Office was sufficient to obliges it to ensure compliance with the injunction in Guernsey. The position appears to be the same in the US. In *US v First National City Bank*, the Supreme Court held that because the bank and its branch were parts of a single entity, the District Court had a jurisdiction to issue an injunction which was served upon the New York Head Office of the bank prohibiting its branch in Montevideo, Uruguay, to freeze an account of a customer kept at that branch.

While it makes sense in reality to condition the extraterritorial effect of the injunction on the ability to prevent the breach abroad, this raises the issue of a conflict of jurisdiction under international law. The bank is a third party; the court clearly does not have a prescriptive jurisdiction with respect to it. The issue is purely concerned with enforcement jurisdiction which, as noted earlier, is strictly territorial. Notwithstanding the controls the Head Office has over its branches and the concept of the Head Office and its branches being a single entity, it is obvious that the injunction, while locally served upon the Head Office, is intended to have effect abroad. It is clearly an exercise of enforcement jurisdiction abroad. As the court lacks the prescriptive jurisdiction with regard to the bank, the making of the extraterritorial injunction would be in violation of international law.

In addition, like the extraterritorial disclosure order, the extraterritorial injunction puts the bank into a dilemma, *i.e.*, being caught in the middle of two sovereigns with the effect that following the order of one sovereign renders it liable to another sovereign. This is explained below.

A contract of deposit is generally governed by the law of the state where the account is kept. In the case of the extraterritorial injunction, this would be the law of the state of the location of the bank from which the defendant attempts to withdraw the funds. According to the generally agreed rule of private international law, performance of the contract is excused only if it becomes illegal according to the governing law of the contract. It is then material to determine whether the bank is prohibited from making payment to the defendant if it is demanded. Clearly, there is no prohibition under the governing law of the

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59 *Stessens, supra* note 5, at 361.
contract. The issue, then, is whether a foreign injunction is a valid ground for the bank to refuse to make the payment.

In *Libyan Arab Foreign Bank v, Banker Trust Co.*, the US President issued an order freezing the assets of Libyan Arab Foreign Bank under US control as well as the assets held by foreign branches of US banks. Despite the freezing order, Libyan Arab Foreign Bank demanded payment from an account at the London branch of the Banker Trust Co., a US bank. The court determined the English law to be the governing law in respect of this account and thus held that the bank had to pay the debt it owed to Libyan Arab Foreign Bank. In case it failed to do so, it would be civilly liable for a breach of the contract.

In this connection, it should be remembered that we have argued earlier that, under international law, no state has jurisdiction to compel the commission of illegality, whether civil or criminal, in another state. To allow the injunction to have extraterritorial effect would mean that the state whose court has issued the injunction demands the commission of the illegality, *i.e.*, a breach of contract, in another state. In cases where compliance with the order of the foreign court is specifically prohibited, as for example in the case of Article 271 of the Swiss Penal Code, this is even more objectionable.

On the other hand, where the bank makes the payment to the customer, two adverse consequences may follow. First, the court which has made the injunction may hold it in contempt and impose penalties for this. Second, it may have to pay twice. This is shown in the insider trading case of *SEC v. Wang.* There, the New York district court ordered the freezing of the illegal trading profits which Lee, one of the defendants, had deposited at the New York branch of Standard Chartered bank, an English bank, and transferred to the account of a company he controlled at the branch of the bank in Hong Kong. Later, through the company, he demanded payment from an account at the Hong Kong branch of the bank but the bank refused relying on the freezing order of the New York court. Lee, then, sued the Hong Kong branch of the bank demanding payment. At about the same time, the New York court also ordered the New York branch of

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60 3 All E.R. 252 (1989).
the bank to pay into the court registry all the assets controlled by Lee. With protest, the bank paid.

With respect to the demand for payment in Hong Kong, in Nanus Asia Co. Inc. v. Standard Chartered Bank, the Hong Kong court considered the contract to be governed by Hong Kong law. Thus, as a principle, the bank would have to make payment unless it had a defence. Here, there was a US freezing order. However, the freezing order was denied enforcement because the SEC action was of a public law character and the enforcement would be contrary to the principle of non-enforcement of a foreign penal law, revenue law or other public law. As such, on the basis of the contract alone, there was no valid exception for the bank to refuse to make the payment. Fortunately, the Hong Kong court held that the bank was on notice given by the SEC that the funds could be the proceeds of insider trading and therefore the funds were subject to a constructive trust in favour of allegedly defrauded investors as beneficiaries. As a result, the bank was no longer under its contractual duty to comply with the instruction of the customer.

In so far as the third party is concerned, it is clear that the extraterritorial injunction is contrary to international law. It also puts the third party, especially the bank, which is not a wrongdoer in a dilemma: either to comply with the injunction and suffer the consequence under the law of the place of its location or to follow the law of the place of its location and engage in liability in contempt under the law of the state whose court makes the injunction. It is submitted that, in relation to the third party, any conflict of jurisdiction should be solved in favour of the state of territory. This should be the case, irrespective of whether compliance with the foreign injunction is a crime or simply makes the bank civilly liable to its customer. In Re M, this position appeared to be adopted. There, the injunction was served on the branch of the Irish bank in the UK but it prohibited the bank in Ireland from giving the money to the defendant. The court considered that the words “able to prevent acts or omissions” in (b)(ii) mean “lawfully able”, under the relevant domestic law, to prevent acts or omissions. This would recognise illegality of the acts or omissions in the foreign state as an exception to the extraterritorial effects of the injunction. Yet, this recognition

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64 It is an unreported decision, 9 July 1993.

178
would mean that the defendant could withdraw the funds subject to a freezing order in the foreign state and thereby avoid justice, as would have been the case in *SEC v. Wang* had the Hong Kong court not applied the trust law.

To give due respect for the sovereignty of another state and also at the same time to prevent the defendant from frustrating the injunction abroad, it is submitted that the injunction, in particular, and, more generally, other types of provisional measures should always be taken by the state of the location of the target property through mutual legal assistance under the relevant conventions.65

It should be emphasised that there is no objection under international law to the extraterritorial effects of the injunction as to the defendant. However, while he is liable for contempt in case he attempts to breach the injunction abroad, the injunction is not sufficiently effective, because he still is able to frustrate the injunction in some cases as in *SEC v. Wang*. Assistance by the state where the target property is located is necessary to ensure that the injunction is effective.

### 3.3 Confiscation

The proceeds of crime are often transferred abroad to avoid confiscation. For confiscation to fully deprive the criminal of the proceeds of crime, the proceeds located abroad must be capable of being confiscated. In other words, confiscation must be of extraterritorial scope. This, however, raises issues relating to the compatibility of extraterritorial confiscation with international law.

In this respect, a distinction must be drawn between the making of a confiscation order against the proceeds located abroad and the enforcement of the order which has been made. It is submitted that the making of the extraterritorial confiscation is not contrary to international law, because it is concerned simply with a prescriptive jurisdiction. It has been shown earlier that international law does not mandate that the power of the state to prescribe rules be confined within its territory. There are other valid bases for the state to exercise its prescriptive and adjudicative jurisdiction beyond its territory, such as the nationality principle, the protective, and the universal principles.66 Thus, the state is entitled to extend its confiscation power to the proceeds located abroad.67

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65 Article 5(4)(b) of the Vienna Convention and Article 12 of the Money Laundering Convention.
66 See sources cited in n.7 for detailed exposition of these principles.
67 STESENS, supra note 5, at 382.
In the UK and the US, the scope of confiscation, whether conviction-based or non-conviction-based, is not limited only to the proceeds located within their territory.\(^68\)

The enforcement of the confiscation order against the proceeds found in another state, however, is a different matter. Since enforcement jurisdiction is strictly territorial, any attempt to enforce confiscation beyond territory is a violation of international law. To ensure the full deprivation of the proceeds of crime and also pay due respect to international law, the enforcement of extraterritorial confiscation must in most cases be made through mutual legal assistance under the relevant conventions.\(^69\) Nevertheless, there are some methods employed in some countries, in particular the US, to enforce confiscation against the proceeds located abroad.

For example, in criminal forfeiture actions, US authorities may obtain enforcement jurisdiction by requiring, as part of plea bargaining, the defendant to repatriate the forfeited or forfeitable property to the US.\(^70\) In addition, also through plea bargaining, US authorities may require the defendant to liquidate his property and surrender it to the US by actually signing over the deed, ownership papers or stock certificates. Once the US holds title to such property or it is listed as the owner of shares in a company with foreign property, it may hire a local counsel to liquidate interest in such property in the state where it is located or to dispose of such property in accordance with the laws of such state.\(^71\)

While it is a generally accepted rule of private international law that the law governing the status of property is the law of its location, the *lex situs*,\(^72\) it is submitted that the above practices designed to deal with the problems of confiscation of property located abroad are not contrary to international law. Plea bargaining is an agreement between the prosecution and the defendant. Thus, in respect of the repatriation of property, the defendant voluntarily brings back property within the US territory for enforcement of forfeiture. The US does not

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\(^68\) Under the PCA 2002, see section 84 for criminal confiscation and section 316(4) for civil recovery. In the US, see, for instance, 21 U.S.C. § 853(1) for criminal forfeiture and 28 U.S.C. § 1355(2).

\(^69\) Article 5(4)(a) of the Vienna Convention and Article 13 of the Money Laundering Convention.


\(^72\) STESSENS, *supra* note 5, at 384.
enforce the forfeiture in the state of the location of the property; it does not exercise enforcement jurisdiction in this state. In case of liquidation, it is important to realise that the US has a right to liquidate property because the defendant voluntarily transfers title to it to the US. There is no enforcement of forfeiture in the state of the location of the property; the US only exercises enforcement of its proprietary right in this state. Nevertheless, plea bargaining should not be used to address the problem of confiscation of property located abroad, because the prosecution, in most cases, has to reduce charges in return for the repatriation or liquidation of the property. This is discriminatory since those who have ability to pay are better treated than those who do not. 74

In some cases, courts order the defendant to bring back property into the state for forfeiture enforcement. US courts may order the defendant to repatriate the forfeitable or forfeited property pursuant to a restraining order. 75 In this respect, the defendant may have to execute a power-of-attorney deed to his lawyer who will then withdraw or liquidate property in the foreign state and transfer it back to the US for enforcing forfeiture. 76 In the UK, even before the PCA 2002, while the DTA 1994 or the CJA 1988 did not provide for the power to make a repatriation order to support a restraint order, the court held that it had inherent power to do so. 77 Failure to comply with the repatriation order is punishable as contempt of court. Recall that the court in the UK can make a restraint order against a third party who holds realisable property. Thus, it can make a repatriation order against the third party. Once property is back in the UK, the court can appoint a receiver to manage it during the restraining period and realise it when a confiscation order is made.

The bringing back of property located abroad within the jurisdiction in this case is not voluntary. As title to property is universally determined in accordance with the lex situ, forcing the repatriation of property abroad to enforce forfeiture would constitute an exercise of enforcement jurisdiction

73 Id. at 385.
74 Id. at 59.
75 US v. Sellers, 848 F. Supp. 73 (E.D. La. 1994)(the court issued a restraining order directing the defendant to repatriate funds from the Cayman Islands.) See also US v. Lopez, 688 F. Supp. 93 (E.D.N.Y. 1988)(the defendant was ordered to execute a release and transfer of foreign funds subject to forfeiture.)
76 ASSET FORFEITURE, supra note 71, at 11-9.
beyond the territory of the state whose court made the order. However, this does not automatically render it contrary to international law, as one commentator has suggested. A distinction, it is submitted, should be made between where the repatriation order is made against the defendant and where it is made against a third party.

As the defendant must be criminally tried and convicted before a confiscation proceeding begins, he must be before and thus within the enforcement jurisdiction of the court. Making the order against him cannot be considered an exercise of enforcement jurisdiction beyond the territory. This is true even though he is to comply with it abroad. Further, even if this practice constitutes an exercise of enforcement jurisdiction abroad, it is still not a violation of international law, since the court has prescriptive jurisdiction with respect to him. However, while failure of the defendant to comply with the order is punishable as contempt of court, this way of dealing with confiscation of property located abroad is not effective, especially where he is subject to long-term imprisonment anyway.

The case is different with respect to a third party. Recall that courts in the UK could make a repatriation order against any person (including a third party) who holds realisable property. Thus, the service of the order may be made with a bank in the UK requiring its branch abroad to bring back property. As argued earlier, each branch should be treated as a different entity from the Head Office and other branches and thus, this practice is an exercise of enforcement jurisdiction beyond the UK territory. Even if the Head Office and its branch are considered a single entity, this should still be so, because the order is clearly intended to have effects abroad. As the bank is a third party over whom the court has no prescriptive jurisdiction, this practice is contrary to international law. Further, the bank is placed in a difficult position. It may be liable for contempt in the state whose court has made the order where it does not repatriate the property. Yet, where it repatriates the property, this is not a valid defence where the defendant demands payment from the branch located abroad; it may be doubly liable. Given the violation of international law and the difficulty faced by

78 STESENS, supra note 5, at 384.
79 Id. at 384.
the bank which is not a wrongdoer, it is submitted that states should not take this approach as to confiscation of property located abroad.

After the 11 September 2001 event, the US enacted the Patriot Act which provided another approach to dealing with the problem when forfeitable property is located abroad. Where funds are deposited into an account at a foreign bank and that foreign bank has an interbank account in the US with a US financial institution, the funds will be deemed to have been deposited into the interbank account in the US for purpose of forfeiture rules.\(^1\) Thus, the court may make a restraining order or a forfeiture order against the funds in the interbank account up to the value of the funds deposited into the account at the foreign bank. This approach was used with success. For instance, in 2001, US prosecutors could recover on behalf of defrauded investors, nearly US $1.7 million in funds that had been deposited into a foreign bank that maintained a correspondent account with a US bank.\(^2\)

Technically, the US does not enforce confiscation against property located abroad; it enforces confiscation upon property located in the US. However, in the eye of law, what is forfeited is money deposited in a foreign bank; the US bank does not forfeit its own money. Under US law, thus, it can net this sum with the foreign bank. Legally speaking, it is the money in the foreign bank which is forfeited and thus, should be treated as a case where the US exercises its enforcement jurisdiction beyond its territory. It follows that this is contrary to international law.\(^3\) In addition, it puts the foreign bank which is not a wrongdoer in jeopardy. Once netting between the US bank and the foreign bank is done, the foreign bank will be most likely to deduct the forfeited sum from the account of individual concerned. As earlier said, the governing law of the contract of deposit is the law of the location of the account. Under the foreign law, the foreign bank still owes the individual the forfeited sum. It cannot refuse payment where demanded. This creates a dilemma for the foreign bank as it may have to pay twice, just as in the case of repatriation order. Thus, it is submitted

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\(^1\) 18 U.S.C. § 981(k)(1)(A). It should be noted that the government need not prove that the funds are directly traceable to the funds that were deposited into the foreign bank. See 18 U.S.C. § 981(k)(2).


\(^3\) See SS Lotus, (SS Lotus, France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 9, at 18-19 (7 September).
that states should not follow this means in relation to confiscation of property located abroad. A preferred approach in this regard should be through mutual legal assistance under the relevant conventions.84

In concluding, the section on unilateral approach to confiscation of property abroad has shown that unilateral actions for this purpose should not be used to confiscate property located abroad. Unilateral measures may be used against the defendant and a third party. Where they apply to the defendant, while compatible with international law, they are very unlikely to be effective. Where they apply to a third party, they are contrary to international law, as they constitute an exercise of enforcement jurisdiction beyond the territory. They also punish the third party, particularly a bank which is not a wrongdoer. It may be that powerful countries, such as the US and the UK may give less regard to international law without serious consequences. However, this is not a case with respect to emerging economies where rejections and sanctions from other nations because of violations by the former of international law may have serious consequences. It is therefore preferable that states, especially emerging economies rely on cooperation with regard to international confiscation.

IV. Mutual Legal Assistance in International Confiscation

This section examines the confiscation of proceeds located abroad through a mutual legal assistance channel. Mutual legal assistance is a process by which one state assists another in the administration of criminal justice. Two forms of assistance may be distinguished: primary and secondary forms. The first covers all forms of assistance in which one state is to take over at least part of the procedure of another state, either by instituting criminal proceedings or by enforcing criminal sanctions pronounced in the latter. The second is the process whereby one state only gives assistance to another state without procedural responsibility being transferred to it; the requested state only gives assistance to the requesting state in order to enable the latter to continue its proceedings.85

In the context of confiscation, like unilateral actions, mutual legal assistance for this purpose, also involves three steps: investigation, preservation and confiscation. As will be seen below, mutual legal assistance in obtaining information as to the whereabouts of the proceeds and in preserving them for the

84 Article 5 of the Vienna Convention and Article 14 of the Money Laundering Convention.
85 STESENS, supra note 5, at 253.
The purpose of eventual confiscation does not require the requested state to take over proceedings in the requesting state, but the requested state only renders assistance to the requesting state so that the proceedings in the requesting state can continue, while mutual legal assistance in confiscation requires the requested state to enforce confiscation imposed in the requesting state or take actions to obtain confiscation under its law for the purpose of providing assistance to the requesting state. As such, mutual legal assistance in locating and preserving property fall within the type of secondary assistance while mutual legal assistance in confiscation of property is a form of primary assistance.

Before beginning our examination, it is useful to say a few words about the development of mutual legal assistance. A traditional method of obtaining assistance is the letter rogatory, which is a formal request from a court in one state asking for assistance from a court in another state. The use of the letter of rogatory, however, is problematic in many aspects. First, assistance is not generally available at the investigation stage, since, by definition, a proceeding must have been already commenced. Second, the giving of assistance is not obligatory. It is simply a matter of comity. Thus, the requested state may refuse assistance and need not provide a reason for the refusal. Third, the process generally involves a lot of bureaucracy and is time-consuming, as the request must go through diplomatic channels. Fourth, the information obtained may not be in a form admissible in the requesting state. Fifth, the requesting state has to hire private counsels and this is often at significant cost. Finally, the use of the letter rogatory does not override the local bank secrecy and other confidentiality

88 Generally, this means that the letter of rogatory made by the court has to go through the Minister of Justice and then through Foreign Minister which will send it to Foreign Minister of the requested state who will further forward it to the Justice Minister and finally to the court of the requested state. Once executed, evidence would be sent back to the requesting state by the same path. See Springer, supra note 86, at 158. See also Bruce Zagaris, Developments in International Judicial Assistance and Related Matters, 18 DENV. J. INT’L L. & POL’Y 339, 351-352 (1990).
89 Since the requested state would execute the request in accordance with its procedural laws, the evidence so obtained may not satisfy the requirements for its admissibility under the law of the requesting state.
law, a defect which is practically fatal to investigations of money laundering. To solve these problems, states enter into bilateral treaties or become parties to multilateral conventions providing for mutual legal assistance. An acronym, MLAT, is a term for bilateral treaties on mutual legal assistance. States often prefer bilateral treaties to multilateral conventions for the reason that the former can be tailored to the specific needs of their respective states and to provide clarity as to other important issues, such as evidentiary requirements, communication channels, and costs. Indeed, bilateral treaties are also suggested

92 The first major mutual legal assistance treaty was the European Convention on Mutual Assistance in Criminal Matters 1959. As most states which drew up this convention were civil law states, the convention reflects the legal tradition of the civil law states, in particular, the function of the judicial authorities in investigative supervision which does not exist in states of a common law tradition. As such, while a civil law state may make a request at the investigation stage, a common law state cannot make a similar request, since the judicial authorities in the common law state has no role in this stage. Note that Article 3 requires that letter of request be made by judicial authorities. It is this tradition that, in civil law states, mutual legal assistance is often termed mutual judicial assistance. The UN also made this pointed. See U.N., INTERNATIONAL REVIEW OF CRIMINAL POLICY NOs. 45 AND 46: MANUAL ON THE MODEL TREATY ON EXTRADITION AND MANUAL ON THE MODEL TREATY ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS: AN IMPLEMENTATION GUIDE, at 29, U.N. Sale No. E.96-IV-2 (1995).

Between states of a common law tradition, there is a Scheme Relating to Mutual Assistance in Criminal Matters. This instrument is without legal force, however. It is simply an agreed set of recommendations for legislative implementation by commonwealth states. See David McClean, Mutual Assistance in Criminal Matters: The Commonwealth Initiative, 37 INT’L & COMP.L.Q. 177, 180 (1988). It is worth noting that the Commonwealth Scheme, unlike the ECMA and other traditional MLAT, includes in its scope of application assistance in tracing, seizing and confiscating the proceeds and instrumentalities of crime. See Paragraphs 1(3)(i) and 26-28. This scheme is collected in Mutual Assistance in Criminal and Business Regulatory Matters 112-159 (William C. Gilmore ed. 1995).


by multilateral conventions on mutual legal assistance as a way to give practical
effects to, or enhance the provisions contained in, the multilateral conventions.95

MLATs create obligations for states to provide assistance.96 They
typically provide for a more direct communication between the authorities
concerned in the requesting and requested states to avoid a lot of bureaucracy
and delay in transmitting the request through diplomatic channels. For instance,
the European Convention on Mutual Assistance in Criminal Matters (ECMA)
1959 allows the letter of request to be sent between Justice Ministers of states
concerned97 and, in case of urgency, even between respective judicial
authorities.98 The UN Model Treaty on Mutual Assistance in Criminal Matters
(UNMA) suggests the creation of a Central Authority responsible for
transmitting or receiving a request99 which is in many states the Justice
Ministries. To ensure the admissibility in the proceedings in the requesting state
of evidence gathered by the requested state, the requested state is to consider and
comply with the procedural requirements of the requesting state in executing the
request.100 For instance, although the law of the requested state governs the
execution of the request, the requested state is to comply with procedures
specified in the request where this is possible and not contrary to the law of the
requested state.101 Finally, there would generally be no need to hire private
counsel, since the authorities of the requested state would execute the request.

MLATs are typically concerned with investigative assistance and
assistance in judicial proceedings but not with enforcement of judgments. For
example, the ECMA provides for assistance in procuring evidence and
transmitting articles to be produced as evidence,102 in effecting the service of
documents,103 and in asking appearance of witnesses.104 The UNMA contains

95 Articles 7(20) and 5(4)(g) of the Vienna Convention.
96 In some circumstances, assistance may be refused. See, for example, Article 2 of the ECMA
and Article 4 of the UN Model Treaty on Mutual Assistance in Criminal Matters (UNMA).
97 Article 15(1).
98 Article 15(2).
99 Article 3.
100 Paul Gully-Hart, Loss of Time Through Formal and Procedural Requirements in International
Cooperation, in PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW
262.(Albin Eser & Otto Lagodny eds. 1992)
101 See, for instance, Article 6 of the UNMA. See also 7(12) of the Vienna Convention and
Article 9 of the Money Laundering Convention.
102 Article 3.
103 Article 7.
similar types of assistance. MLATs do not normally include assistance in enforcement of foreign criminal judgments and, thus, foreign confiscation orders. While MLATs do have measures such as seizure, these are only concerned with investigation and therefore property seized is used only for evidentiary purposes and normally has to be returned to the requested state upon being used unless the requested state waives this return. The seizure of property for evidentiary purpose therefore is different from the seizure of property for its confiscation.

Let us now specifically examine mutual legal assistance for confiscation purposes.

4.1 Legal Frameworks

1) International Regime

The first international instrument that fully addresses this type of assistance is the Vienna Convention 1988. Building upon this convention but more comprehensive is the Money Laundering Convention 1990. Of course, there are subsequent conventions which provide for this type of assistance: the UN Convention against Transnational Organised Crime 2000 and the UN Convention against Corruption. However, the relevant provisions in this respect in these conventions follow substantially the approaches of the Vienna and/or the Money Laundering Conventions. Therefore, it is sufficient for our purposes to focus only on these two conventions. It should also be noted that

104 Article 10.
105 Article 1.
106 Article 1(3)(b) of the UNMA does include confiscation assistance but only as an Optional Protocol. In addition, it was noted that in n.125: questions of forfeiture are conceptually different from, although closely related to, matters generally accepted as falling within the description of mutual assistance. See this Optional Protocol reproduced in U.N., INTERNATIONAL REVIEW OF CRIMINAL POLICY NOS. 45 AND 46: MANUAL ON THE MODEL TREATY ON EXtradITION AND MANUAL ON THE MODEL TREATY ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS: AN IMPLEMENTATION GUIDE, at 52, U.N. Sale No. E.96-IV-2 (1995).
107 Article 6(2) of the ECMA.
108 It should be noted that some bilateral treaties included assistance in confiscation even before the Vienna Convention 1988. For example, the Treaty between the United States and the United Kingdom concerning the Cayman Islands relating to Mutual Legal Assistance in Criminal Matters 1986 includes in the scope of assistance the immobilisation and the forfeiture of criminally obtained assets. See Article 1(g) and 1(h). However, the way in which this type of assistance is provided is not sufficiently detailed; Article 16 simply mandates that the requested state assist the requesting state to the extent permitted by its law in the forfeiture of proceeds of crimes.
109 Article 13.
110 Article 55.
both Conventions provide for assistance in confiscation in respect of both proceeds and instrumentalities of crime. Nevertheless, the approaches in this respect under these conventions are the same, irrespective of whether property is the proceeds or instrumentalities. Thus, while the focus in our examination is on the proceeds, the examination and suggestions made herein are also equally applicable to the case of the instrumentalities.

(1) The Vienna Convention 1988

The Vienna Convention obliges states to afford one another the widest measure of mutual legal assistance in relation to drug-related criminal offences. It provides for investigative assistance termed identification and tracing for evidentiary purposes and for confiscation purposes. This does not mean that the request has to be relating to one or another; certainly it may relate to both.

The requested state may refuse assistance if

1. the request is not made in a required form;

2. if the execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

3. if the requested state is prohibited by its domestic law from carrying out the requested action with regard to any similar offence, had it been subject to investigation, prosecution, or proceedings under their own jurisdiction; or

4. if it would be contrary to the legal system of the requested state relating to mutual legal assistance for the request to be granted.

Bank secrecy is explicitly excluded as ground for refusal of assistance.

Article 5 specifically addresses confiscation assistance.

Paragraph 4(b) obliges states, upon receiving a confiscation request, to provide assistance in identifying and tracing property. Bank secrecy is no ground for refusal.

In the preservation stage, the requested state, upon receiving a confiscation request, is obliged to take provisional measures to freeze or seize

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111 Article 7(1).
112 Article 7(2)(g).
113 Article 4(b).
115 Article 7(5).
116 Article 5(3).
property for the purpose of eventual confiscation. At the confiscation stage, it provides for two approaches. One is for the requested state to submit a confiscation request to its competent authorities for the purpose of obtaining a confiscation order and, if it is granted, give effect to it. The request must contain a description of property to be confiscated and a statement of facts relied upon by the requesting state sufficient to enable the requested state to obtain confiscation under its law. The other approach is for the requested state to submit to its competent authorities, with a view to giving effect to it, to the extent requested, a confiscation order issued by the requesting state. A legally admissible copy of a confiscation order issued by the requesting state and a statement of facts and information as to the extent of execution sought are required. Given the contents of the request in this regard, it would seem that the first approach applies when there is not yet a confiscation order while the second governs the case where a confiscation order has already been made.

The decisions and actions to provide assistance in identification and tracing, preservation, and confiscation are subject to the laws of the requested state, its procedural rules, any binding bilateral or multilateral treaty, agreement or arrangement to which the requested state is bound in relation to the requesting state. Thus, while no grounds for refusal of assistance are provided, the requested state can still refuse assistance if the refusal is required under the provisions of the laws of the requested state, its procedural rules, and any instruments to which the requested state is bound in relation to the requesting state.

(2) The Money Laundering Convention

This is a specific convention and is by far the most comprehensive convention dealing with confiscation assistance. It obliges states to cooperate with each other to the widest extent possible for the purposes of criminal investigations and confiscation proceedings. States are to give the widest possible measures of investigative assistance in identifying and tracing

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117 Article 5(4)(a)(i).
1 Article 5(4)(b)(ii).
119 Article 5(4)(d)(i).
120 Article 5(4)(d)(ii).
12 Article 5(4)(c).
122 Article 7(1).
property. Upon receiving a request from another state which has instituted criminal proceedings or confiscation proceedings, states must take provisional measures, such as freezing or seizure, to preserve property for eventual confiscation. This obligation applies to a request for confiscation, whether property-based or value-based. The request for investigative assistance and provisional measures would be executed as permitted by and in accordance with the law of the requested state and, to the extent not incompatible with such law, in accordance with the procedure specified in the request.

The same also goes for the execution of a confiscation request except to the extent that states must cooperate in both property and value confiscation systems as well as investigative and provisional measures assistance pursuant thereto. It is explicitly provided that when enforcing value confiscation, the requested state can, if payment is not paid, realise it from any property. In a reversed situation, the requested state, if agreed by the requesting state, may enforce confiscation of specific property in the form of the payment equal to the value of the property. This goes further than the Vienna Convention which, although recognising both confiscation systems, does not require states to accommodate the difference in this respect, since it simply leaves to the requested state to execute the request under its own law.

In the confiscation stage, the Money Laundering Convention provides two options for the requested state to render confiscation assistance: either to initiate a proceeding to obtain a domestic confiscation order or to directly enforce a confiscation order made by the court in the requesting state. Recognising that the first approach is only possible where the requested state has competence under its own law to institute a confiscation proceeding, the Convention confers

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123 Article 8.
124 Article 11(1).
125 Article 11(2).
126 Articles 9 and 12.
127 Articles 14(1) and 7(2).
128 Article 13(3).
129 Article 13(4).
130 Article 13(1). The first method is a form of transfer of a confiscation proceeding and the second is a form of transfer of enforcement of a confiscation order. This follows the approaches taken in two European Conventions: the Convention on the Transfer of Proceedings in Criminal Matters 1972 and the Convention on the International Validity of Criminal Judgments 1970 respectively.

131 Article 13(1).
such competence upon the requested state where it does not exist under the
domestic law of the requested state.132 In most cases, where a confiscation request
is made, the requested state does not have a prescriptive jurisdiction over a
predicate crime committed in the requesting state on which a confiscation request
is based. Therefore, the initiation by the requested state of a proceeding to obtain
a domestic confiscation order is only possible when the requested state can
initiate a confiscation proceeding independently of the trial of the person
concerned.133

Taking into account the contents of the request,134 it would seem to follow
that the obtaining of a domestic confiscation order applies to the case where no
confiscation order has yet been made in the requesting state while the direct
enforcement of a confiscation order issued in the requesting state is more
relevant to the case where there has already been a confiscation order.
Nevertheless, the Explanatory Report explained that the simultaneous use of both
approaches is possible.135 The requesting state may ask the requested state to
enforce a confiscation order in respect of a certain type of property but to
proceed to obtain a domestic confiscation order with regard to some other
property, notwithstanding the underlying offence might be the same, as in the
case of substitute property, indirectly derived proceeds or intermingled property
or case where interests of third parties are involved.136 In addition, even when the
requesting state asks for the enforcement of its confiscation order, the requested
state may choose to initiate a proceeding to obtain a domestic confiscation
order.137 Indeed, in some circumstances, the initiation of a proceeding to obtain a
domestic confiscation order may be a better alternative or even a “must”, for
providing confiscation assistance. When, for instance, the defendant has
transferred most property abroad, the state where the property is located may be
clearly suited than the state where the predicate crime is committed to determine
the extent of the proceeds. Where a confiscation order in the requesting state is
imposed against a corporation but the requested state knows no corporate

132 Article 13(2).
133 Explanatory Report to the Convention on Laundering, Seizure, and Confiscation of the
134 Article 27(3)(a) and 27(3)(b).
135 Explanatory Report, supra note 133, at 27.
136 Id.
137 Id. at 28.

192
criminal liability, it is impossible to directly enforce the confiscation order but the requested state must institute a proceeding to determine whose property is to be confiscated.\textsuperscript{138}

Where the requested state directly enforces a confiscation order issued in the requesting state, the requested state is bound by the findings as to the facts in so far as they were stated in a conviction or judicial decision of the requesting state or in so far as such conviction or judicial decision is implicitly based on them.\textsuperscript{139} Further, the requested state is so bound if the requesting state asks for its confiscation to be enforced but the requested state opts to initiate a proceeding to obtain a domestic confiscation order.\textsuperscript{140} States, however, can subject this provision to their constitutional principles and the basic concepts of their legal system.\textsuperscript{141} Where no confiscation order has been made at the time when a confiscation request is made, the requested state is not so bound and the extent of confiscation would be determined under the law of the requested state.

The Money Laundering Convention provides for a number of optional grounds for refusing assistance. The requested state is not obliged to refuse even if any of the refusal grounds exists. This, however, does not exclude the possibility that any of them would be made mandatory at the national level.\textsuperscript{142} However, bank secrecy is explicitly rejected as a ground for refusal.\textsuperscript{143} The Money Laundering Convention contains in Article 18 the following refusal grounds:

1. The action sought would be contrary to the fundamental principles of the legal system of the requested state;

2. The execution of the request is likely to prejudice sovereignty, security, ordre public or other essential interest of the requested state;

3. The requested state considers that the importance of the case does not justify the taking of the action;

4. The offence to which the request relates is a political or fiscal offence;

\textsuperscript{138} STESSENS, supra note 5, at 386.
\textsuperscript{139} Article 14(2).
\textsuperscript{140} Explanatory Report, supra note 133, at 28.
\textsuperscript{141} Article 14(3).
\textsuperscript{142} Explanatory Report, supra note 133, at 34
\textsuperscript{143} See Article 7(5) and 18(7) of the Vienna and Money Laundering Conventions.
5. The requested state considers that compliance with the action sought would be contrary to the principle of *ne bis in idem*;

6. The offence to which the request relates would not be an offence under the law of the requested state, if committed within its jurisdiction,

7. So far as concerns coercive investigative assistance and provisional measures, the measures sought could not be taken under the law of the requested state, had it been a similar domestic case;

8. So far as concerns coercive investigative assistance and provisional measures, the measures sought or any other measures having similar effects would not be permitted under the law of the requesting state or if the request is not authorised by a judge or another judicial authority including public prosecutors, any of these authorities acting in relation to criminal offences;

9. Under the law of the requested state, confiscation is not available for the type of offence to which the request relates;

10. It would be contrary to the principles of the domestic laws of the requested state concerning the limits of confiscation in respect of the relationship between an offence and

(1) an economic advantage that might be qualified as its proceeds or

(2) property that might be qualified as its instrumentalities;

11. Under the law of the requested state, confiscation may no longer be imposed or enforced because of the lapse of time;

12. The request does not relate to a previous conviction, or a decision of a judicial nature or a statement in such a decision that an offence or several offences have been committed, on the basis of which the confiscation has been ordered or is sought;

13. Confiscation is either not enforceable in the requesting state or it is still subject to ordinary means of appeal; or

14. The request relates to a confiscation order rendered *in absentia* of the person against whom the order was issued and the requested state considers that the proceeding conducted by the requesting state leading to such decision did not satisfy the minimum rights of defence recognised as due to everyone against whom a criminal charge is made.
Grounds 1-6 are applicable to every stage of mutual legal assistance for the purpose of confiscation while ground 7-8 relate to investigative assistance which involves coercive measures and provisional measures. Grounds 9-13 pertain to confiscation assistance.

2) Domestic Regime

(1) The UK

The PCA 2002 provides for the enactment of secondary legislation, called Orders in Council, which enables domestic measures to be used for rendering assistance at the investigative, provisional measures and confiscations stages.

For domestic purposes, the PCA 2002 provides for a number of investigative measures: production order, search and seizure, disclosure order, customer information order, account monitoring order. An Order in Council may enable these measures to be used for the purposes of an external investigation. An external investigation is an investigation by an overseas authority into whether property has been obtained as a result of or in connection with criminal conduct. Similarly, an Order in Council may make provision for the restraint order to be used with respect to property specified in an external request. An external request is a request by an overseas authority to prohibit dealing with property identified in the request. Finally, an Order in Council may make provision for the realisation of property for the purpose of giving effect to an external order. An external order is an order which is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and is for the recovery of specified property or a specified sum of money.

At the time of writing, no secondary legislation has been enacted yet. However, this approach has already been used under the previous regime. The existing provisions under the DTA 1994, CJA 1988 and relevant secondary

144 Section 345.
145 Section 352.
146 Section 357.
147 Section 363.
148 Section 370.
149 Section 445(1)(a).
150 Section 447(3)(a).
151 Section 444(1)(a).
152 Section 447(1).
153 Section 444(2).
154 Section 447(2).

The power of the High Court to make a restraint order in domestic cases may be exercised for the purpose of preserving property which may be subject to an external confiscation order. An external confiscation order under the DTO is defined as an order made by a court in a designated country for the purpose of recovering payment or other rewards received in connection with drug trafficking or their value. Under the CJO, it is an order made by a court in a designated country for the purpose of recovering property obtained as a result of or in connection with criminal conduct, or of depriving a person of a pecuniary advantage so obtained.

Section 39 of the DTA 1994 and section 97 of the CJA 1988 authorise the High Court to register and enforce an external confiscation order if

1) at the time of registration, the order is in force and not subject to appeal;
2) where the person against whom the order is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and
3) enforcing the order would not be contrary to the interests of justice.

It is to be noted that although, before the PCA 2002, confiscation in the UK is primarily conviction-based, the definition of external confiscation order is wide enough to cover confiscation made without conviction. Therefore, the High Court may make a restraint order to preserve property pending the making of a US civil forfeiture order and once the order is made, the High Court may also register and enforce it order in the UK.

(2) The US

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155 Section 7 of the DTO Schedule 3 and section 76 of the CJO Schedule 3.
156 Section 1 of the DTO Schedule 2.
157 Section 71 of the CJO Schedule 2.
159 See Re: F Crown Office, Judgment of 29 November 1996 which is unreported but may be found at http://www.fear.org/re_f_op.html.)
Recently, the US has recently reformed its laws on providing confiscation assistance, particularly at the provisional measures and confiscation stages. It is useful to give an account of the US approach in this regard both before and after the reform in 2000 by the enactment of the Civil Asset Forfeiture Reform Act (CAFRA).

In identifying and tracing property, whatever measures which are available for investigators to use in domestic cases may also be similarly used in response to a foreign request in this regard. A foreign official may also interview witnesses in the US who are willing to give statements. Where witnesses are not so willing, the US may compel them to provide the statements through a compulsory process. A federal prosecutor may be appointed by a US district court as a commissioner to compel testimony and gather evidence for a foreign state.

Before CAFRA, the US had to initiate a domestic forfeiture proceeding in order to preserve property by way of a restraint or freezing order in response to a foreign request. In addition, the court could issue a restraint order in respect of specified property for 30 days which might be extended where its owner was arrested or charged abroad for a crime giving rise to forfeiture in the US. However, this was only pending the arrival of evidence from the foreign state to support a domestic forfeiture proceeding. It did not permit the court to make a restraint order in respect of property which may be subject to confiscation in a foreign state which is the more needed form of a proceeding for confiscation assistance.

After CAFRA, this form of proceeding was provided. There are two options depending on whether or not a restraint order has been issued in the requesting state. Where there is no restraint order in the requesting state, the court, upon the application of the US, may issue a restraining order pursuant to 18 U.S.C. § 983(j). However, where the foreign court has already issued a

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161 A foreign official, however, has to register as a foreign agent under 18 U.S.C. § 951. See id.


165 28 U.S.C. § 2467(d)(3)
restraining order, the court may simply register and enforce that order. The registration and enforcement of a foreign restraint order is a novelty. It is to be recalled that the Vienna and the Money Laundering Conventions leave the execution of the request for provisional measures to the law of the requested state without prescribing methods of execution. In the UK, the Crown Prosecution Service or the Commissioners of Customs and Excise would act on behalf of the requesting state to apply to the court for a restraint order. Yet, this is a local order, not a foreign order which is recognised and enforced in the UK.

As with provisional measures, the US for long had to initiate domestic forfeiture proceedings or to prove the laundering offence in order to provide confiscation assistance. For instance, the US can bring a civil forfeiture action against property in the US that is derived from or traceable to the violation of foreign drug laws. A certified copy of a foreign forfeiture judgment encompassing the subject property is admissible as evidence to establish the case in the court. A foreign drug conviction is admissible to create a rebuttable presumption that the unlawful drug activity giving rise to forfeiture had occurred.

For certain other foreign crimes, the US had to prove the laundering offence in order to forfeit property either civilly or criminally, since specified unlawful activity includes certain other foreign crimes, such as foreign fraud offence committed by or against a foreign bank, foreign kidnapping, and foreign robbery and extortion offences. In addition, the US can also forfeit property through the interplay between money laundering statutes and the statutes which prohibit knowingly transmitting or receiving through foreign commerce of the proceeds of theft, fraud, or conversion. This, however, is possible only if laundering has occurred, at lease, in part, in the US or involves US citizens.

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166 Sections 6 of DTO and CJO.
168 18 U.S.C. § 981(a)(1)(B). The conditions are that the foreign drug law must be punishable in excess of one year in the state where it was committed and would have been punishable for such a term had the offence occurred in the US. It should be noted that civil forfeitures are now authorised for proceeds of any specified unlawful activity which under 18 U.S.C. § 1956(c)(7) includes several foreign crimes. See 18 U.S.C. § 981(a)(1)(C).
170 Asset Confiscation: Response of the US, supra note 167, at 6.
171 Id.
Now under CAFRA, US courts are authorised to enforce a foreign forfeiture or confiscation judgment.\textsuperscript{172} There is no longer a need to institute a domestic forfeiture proceeding or prove the laundering offence. A foreign order, however, is denied enforcement if it was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law; the foreign court lacked personal jurisdiction over the defendant; the foreign court lacked jurisdiction over the subject matter; the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property of the proceedings in sufficient time to enable him or her to defend; or it was obtained by fraud.\textsuperscript{173}

4.2 Examination and Suggestions

As previously outlined, the Money Laundering Convention provides for a number of grounds for refusing assistance most of which relates to the differences in the laws relating to money laundering and confiscation between the requesting and requested states.

While the measures to control money laundering in many states are the product of obligations states have assumed upon being parties to the international instruments, these instruments provide state parties with flexibility to implement these international obligations. In addition, the standard required by the instruments is a minimum one and state parties are free to further strengthen their legislation, as they desire. This would unavoidably lead to differences in many aspects of anti-money laundering measures in many states, for example, the definition of the laundering offence, investigative measures, provisional measures, and approaches to confiscation. As discussed, the Money Laundering Convention treats the differences in respect of those measures between the requesting and requested states as optional grounds for refusal. It will be, however, shown that there are some circumstances where those differences

\textsuperscript{172} A forfeiture or confiscation judgment is a final order of a foreign nation compelling a person or entity to pay a sum of money representing the proceeds of an offence described in Article 3(1) of the Vienna Convention, any violation of foreign law that would constitute a violation or an offence for which property could be forfeited under federal law if the offence were committed in the US or any foreign offence in 18 U.S.C. § 1956(c)(7)(B) or property the value of which corresponds to such proceeds, or to forfeit property involved in or traceable to the commission of such offence. A foreign nation is a state which is a Party to the Vienna Convention or a foreign jurisdiction with which the US has a treaty or other formal international agreement in effect providing for mutual forfeiture assistance. See 28 U.S.C. § 2467(a).

\textsuperscript{173} 28 U.S.C. § 2467(d)(1).
cannot be optional. In other words, the requested state cannot give assistance even if it wishes to assist.

For effectiveness in controlling money laundering, a solution should be found in order to enable the provision of mutual legal assistance despite those differences. Specifically, it will be demonstrated that the lack of double criminality and the differences in the range of and legal requirements between the requesting and requested states for taking investigative and provisional measures may negatively affect the rendering of assistance. To overcome the problems in this regard, it will be suggested that states focus on the assistance sought, instead of particular measures, when making requests for assistance. This would enable the requested state to use whatever measures available under its law to assist the requesting state.

It will also be shown that the lack of double criminality and the differences in confiscation aspects between the requesting and requested states may render it contrary to the legality principle in the requested state to provide assistance in respect of provisional measures and confiscation. It will be suggested as a solution to this problem that the requested state directly enforces a confiscation order issued in the requesting state, instead of initiating a proceeding to obtain a confiscation order under its own law.

In expounding these arguments, this part will be divided into three sections dealing with investigative assistance, provisional measures assistance, and confiscation assistance. It, however, should be noted at the outset that this part is not intended to offer a comprehensive review of mutual legal assistance for the purpose of confiscation under the Vienna or the Money Laundering Conventions. In particular, it will not examine every ground for refusal of assistance. Rather, it will only explore the grounds for refusal which are caused by the differences in aspects of the legal measures against money laundering between the requesting and requested states.

1) Investigation

As with domestic cases, the purpose of the investigation is to discover property subject to confiscation. The Vienna and the Money Laundering

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174 For the Vienna Convention, those interested may find it useful to review COMMENTARY, supra note 111. For the Money Laundering Convention, see Explanatory Report, supra note 133. For an excellent textbook that offers a comprehensive review in this matter, see STESSENS, supra note 5.
Conventions call this the identification and tracing of property. It must be noted that property to be identified and traced need not be of criminal origin; it may be of lawful origin, especially where the requesting state operates value-based confiscation. While the words "identification and tracing" have relatively narrow implication, the Explanatory Report noted that it should be broadly interpreted so as to include in it notifications relating to investigations or evaluation of property. It would seem that any non-provisional measures which facilitate the confiscation objective are investigative measures.

(1) Problems

A. Definition of Money Laundering

(A) Double Criminality

Double criminality is a requirement that the activity which is the basis of the request, in addition to being criminal in the requesting state, must also be criminal in the requested state. This requirement is an optional ground for refusal only when coercive measures are involved.

The requirement of double criminality does not mean that the criminal denomination of the activity has to be the same. It is sufficient that the activity is a crime in both the requesting and requested states. In addition, it may be judged in abstracto or concreto. The first type of double criminality only requires that the relevant activity is a crime in both states, irrespective of whether the offender would have been punished in the circumstances of the case at hand if the activity had been conducted in the requested state. For double criminality in concreto, it is required, in addition to the activity being a crime in both states, that had the activity occurred in the requested state, the offender would have been punished. Thus, there is no double criminality in concreto where the offender would have been acquitted under the law of the requested state because of, for example, the existence of justifications or defences. The requirement of double criminality is judged in abstracto with respect to coercive investigative assistance.

175 Explanatory Report, supra note 133, at 22.
176 Article 18(2).
177 Dr. Christine van den Wyngaert, Double Criminality as a Requirement to Jurisdiction, in INTERNATIONAL CRIMINAL LAW AND PROCEDURE 139 (John Dugard & Christine van den Wyngaert eds. 1996).
178 Explanatory Report, supra note 133, at 37.
The double criminality requirement is likely to be a problem in mutual legal assistance where the offence to which the request relates is laundering proceeds of crimes other than drugs,179 because predicate crimes for the purpose of the laundering offence may be different in many states. Even if states are to apply the laundering offence to proceeds of serious crime or even any crime, this does not completely eliminate the possibility that the requirement of double criminality may not be fulfilled, since different states may have different views as to what activity should be made a crime. What is made criminal in one state need not be so considered in another, thereby the lack of double criminality in regard to this offence and also the laundering offence. The definition of the laundering offence may also be different in some aspects, such as the purposive element or the mental standard. For example, while the UK laundering offence in section 327 does not contain the purposive element, the offence in 18 U.S.C. § 1956 contains this element. Further, the US laundering offence requires knowledge of the criminal origin of property while the UK offence permits suspicion. In these cases, investigative assistance may be refused and the effectiveness of the international fight against money laundering would be thereby adversely affected.

(B) Response

It is submitted that the double criminality requirement should be abolished. Thus, when entering into bilateral relationships, states should not condition the provision of investigative assistance which involves coercive measures on it. Where provision of assistance is based on the multilateral conventions or treaties which recognise the double criminality as an optional refusal ground, the requested state should not refuse assistance on this ground.180

The provision of investigative assistance in the absence of double criminality is not a violation of human rights of the person concerned. Double

179 Since every state party to the Vienna Convention must criminalise a wide range of drug activities which are predicate crimes for the purpose of the drug money laundering offence, the double criminality in respect of the drug money laundering offence would always be fulfilled. See STESSSENS, supra note 5, at 289.

180 This suggestion is in line with the trend in mutual legal assistance generally. For example, the European Convention on Mutual Assistance in Criminal Matters 1959 does not condition the assistance on the double criminality requirement, although it leaves open the possibility for State parties to subject it to this condition where the request is for search and seizure. See Article 5(1)(a). The UN Model Treaty on Mutual Assistance in Criminal Matters is the same in this respect.
criminality is not a human right. Nor does the provision of investigative assistance without double criminality violate the legality principle, i.e., the principle that punishment for an act cannot be imposed without the law making it a crime when committed. By providing assistance, the requested state does not punish any individual, even if evidence obtained would be used to support a criminal proceeding or any other proceeding in the requesting state. Without punishment by the requested state, the legality principle does not bar the requested state from giving investigative assistance in the absence of double criminality. The carrying out of investigative measures in response to a request would still have to have a legal basis, since it interferes with individual rights. However, it does not mean that the offence to which the request relates must also be criminal in the requested state; a domestic law or a provision in the relevant treaty is sufficient.

The double criminality requirement, of course, may have some protective functions in respect of individual rights and freedoms. For instance, the decision of the requested state not to criminalise certain acts may be due to its having a more liberal attitude towards fundamental individual rights than the requesting state. Or the subject of the request relates to an act which, while criminal in and subject to the extraterritorial jurisdiction of the requesting state, is carried out in the requested state and lawful under its law. It would be contrary to the policy of the requested state if it is to provide assistance in these cases. However, the refusal of assistance in these types of cases need not be based on the lack of

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182 STESSENS, supra note 5, at 292. A further support for this position is that there is case law to the effect that double criminality is satisfied even if the offence to which the request relates is criminal in the requested state after it was committed. See id. at 292-293.
183 See the "prescribed by law" requirement in Article 8(2) of the ECHR and Article 17 of the International Covenant on Civil and Political Rights. This requirement is sometimes known as formal legality principle. This is contrast to the substantive legality principle, the "no punishment without law principle". See id. at 293.
184 Id.
185 Swart, supra note 181, at 522-523.
186 STESSENS, supra note 5, at 296-297.
double criminality. It may certainly be justified on the *ordre public* clause or the fundamental legal principles in the requested state clause.\textsuperscript{187}

The condition of double criminality should not be viewed as a condition for reciprocity. Some, however, argued that this is so.\textsuperscript{188} It must be first noted that the provision of assistance even without reciprocity does not impair the sovereignty of the requested state.\textsuperscript{189} Of course, the requested state cannot request the requesting state to provide similar assistance unless the offence to which the request relates is also criminal under the law of the requested state. It is submitted that this is too narrow a concept of reciprocity. It is not a case where the requesting state would not reciprocate. It is a case where the requested state has no basis to ask for assistance, since the requested state does not criminalise the offence which is the subject of the request. It is submitted that reciprocity is guaranteed whenever the requesting state agrees to assist the requested state in the absence of double criminality in other future cases. In short, it is also reciprocal when both waive the double criminality requirement.

Since the double criminality requirement does not safeguard the legality principle and its protective functions in respect of individual rights and freedoms may be fulfilled by the *ordre* public or fundamental legal principles of the requested state clause, it would be preferable to abolish this requirement with respect to investigative assistance to facilitate mutual legal assistance. This is particularly relevant, especially in the context of money laundering where there are differences as to the definition of the laundering offence in many states.

**B. Investigative Measures**

**(A) Unavailability of Measures Sought**

Differences in the range of investigative measures and the requirements for their use may also hamper mutual legal assistance in identifying and tracing property. For example, in the UK, the range of investigative measures is extensive: a production order, a search and seizure warrant, a disclosure order, a customer information order, and an account monitoring order. In other states, it

\textsuperscript{187} Id. For examinations of the fundamental legal principles or the *ordre public* exceptions to the provision of assistance, see id. at 400-403. The Vienna Convention and the Money Laundering Convention provide for these grounds for refusal. See Article 18(1)(a) and 18(1)(b).


\textsuperscript{189} Id. at 230-231.
may not be so extensive. Certainly, some of these investigative measures are unknown in some states. In addition, there may even be differences with respect to the same measures, such as the difference in the evidentiary standards for taking those measures. Thus, it is possible that the requesting state may ask the requested state to carry out investigative measures which do not exist or could not be taken in the requested state. Similarly, the requesting state may ask the requested state to carry out investigative measures which do not exist or would not be permitted in the requesting state.

The Money Laundering Convention allows the requested state to refuse assistance in these two situations. Of course, these refusal grounds are optional; the requested state may give assistance if it wishes. However, it is submitted that where the investigative measures sought do not exist or could not be taken in the requested state, assistance cannot be legally given. It is inconceivable that the requested state would be able to grant the request by taking those measures.

On the other hand, where the requested state wishes to refuse assistance on the ground that the measures or other measures having similar effects do not exist or would not be permitted in the requesting state, it would need to examine the law of the requesting state. This examination may be difficult and time-consuming, since the requested state has to consider the issue under the laws of the requesting state. The difficulty increases when the requested state has to examine not only with the laws in abstract but their application to particular facts. Where the outcome of the examination is wrong, this would lead to the refusal of assistance which should have been granted. Further, even if it turns out that the investigative measures sought or other measures having similar effects would be permitted in the requesting state, the rendering of assistance would be delayed.

(B) Response

See Articles 18(2) and 18(3). It should be noted that the way these refusal grounds are provided seems to address a situation where investigative measures sought exist in both the requesting and requested states but they could not be taken under the law of the requested state or would not be permitted under the law of the requesting state for whatever reasons, such as different evidentiary standards. However, it is submitted that these refusal grounds also apply to cases where investigative measures sought are unknown in the requested or requesting states. The reason is that the latter situation is more severe than the former. It is unreasonable that assistance may be refused in the former but not in the latter.
In order to be most effective in international control of money laundering, it is submitted that mutual legal assistance should be facilitated to the greatest extent possible. Of course, the requested state cannot legally take measures which do not exist or could not be taken in the requested state. However, the point is that where alternative measures in the requested state exist which may be used to fulfil the purpose of the request, the requested state should provide the assistance using the alternative measures. To facilitate this, it is suggested that the requesting state should not specifically request specific measures but should note simply the assistance required—tracing and identification of property subject to confiscation. By this means, it is submitted that the requested state would be able to take whatever measures available under its law to fulfil the request. For example, the requested state may be able to obtain evidence by means of a production order by a court, instead of a search and seizure warrant.

It is further submitted that where the request is made in this way, the requested state cannot refuse assistance on the ground that the measures sought or any other measures having similar effect do not exist or would not be permitted in the requesting state. The requesting state only requests investigative assistance; it does not request particular investigative measures in the absence of which under the law of the requesting state is a ground for refusing assistance.

Thus, by this way, the request for investigative assistance would always be provided, despite the differences in the range of, and requirements for use of, the investigative measures between the requesting and requested states.

In this connection, it should be noted that the case law in many states admits evidence obtained in accordance with the law of the requested state but by means that are not available under, or inconsistent with, the law of the requesting state, although it would be excluded where its admission affects the fairness of the proceeding. That being the case, it would seem unreasonable to allow the

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191 Of course, the requesting state may note particular investigative measures but it should make clear that they are simply examples.


193 Id.

refusal of investigative assistance where the measures sought or any other measures having similar effect do not exist or would not be permitted in the requesting state. While it would seem that this position would be in effect equal to allowing the requesting state to obtain evidence in violation of individual rights and freedom protected under the laws of the requesting state, it is submitted that it is the law of the state where the measures would be carried out that governs the matters relating to individual rights and freedoms. A person whose rights and freedoms would be affected by the carrying out of the measures cannot reasonably, it is submitted, expect rights and freedoms more than those available under the law of the place of the carrying out of the measures. In any event, the requesting state would subsequently be able to exclude evidence so obtained where this affects the fairness of the proceeding.

2) Preservation

Once the location of the property subject to confiscation is known, it is in most cases imperative that it be preserved for the purpose of eventual confiscation. Legal measures available for this purpose are often known as provisional measures.

Before addressing the problems, two points should be noted. First, provisional measures are by no means limited to freezing and seizure as mentioned in Article 11; they are certainly examples of such measures. This is in accordance with the obligation to provide provisional measures in domestic legislation where it does not specify any particular type of measures, but simply refers to the purpose of the measures: to prevent any dealing in or transfer or

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195 This is the reasoning of the Chief Justice of the Canadian Supreme Court in Schreiber v. Canada (Attorney General), 1 S.C.R. 841 (1998) where the issue was whether the Canadian Charter of Rights and Freedoms was violated where the Canadian standard for issuing a search warrant needed to be satisfied before a letter of request may be made to a Swiss authorities for assistance. The Chief Justice answered in the negative and stated that [A] Canadian residing in a foreign country should expect his or her privacy to be governed by the laws of that country. A search carried out by foreign authorities in a foreign country in accordance with foreign law does not infringe a person's reasonable expectation of privacy as he or she cannot reasonably expect more privacy than he or she is entitled to under that foreign law. In this case, there is no evidence that the records were seized illegally in Switzerland and it therefore cannot be said that his reasonable expectation of privacy was violated. See id.

196 Explanatory Report, supra note 133, at 24.
disposal of property subject to confiscation. A restraint order or a sequestration order is therefore included.\textsuperscript{197}

Second, the Money Laundering Convention provides for the making of the request for provisional measures assistance either before or after a confiscation has been ordered.\textsuperscript{198} The same goes for the position under the Vienna Convention.\textsuperscript{199} However, the Money Laundering Convention limits the possibility of making a request for provisional measures assistance where a confiscation has not yet been made to cases where the requesting state has already instituted a criminal proceeding or a proceeding for the purpose of confiscation.\textsuperscript{200} There does not appear to be a similar requirement under the Vienna Convention. Nevertheless, this may be required if it is so provided under the law of the requested state.\textsuperscript{201} Where the law of the requested state does not provide for this requirement, as in the UK\textsuperscript{202} and the US,\textsuperscript{203} provisional measures assistance may be given before a criminal proceeding has been instituted.

(1) Problems

A. Definition of Money Laundering

(A) Double Criminality

The Money Laundering Convention allows for this type of assistance to be refused on ground of the lack of double criminality.\textsuperscript{204} In contrast to investigative assistance, where double criminality is judged \textit{in abstracto}, the double criminality in the respect of provisional measures assistance may be judged \textit{in abstracto} or \textit{in concreto}. The former is used when the request for this assistance is made before a confiscation order has been made, but the latter applies when assistance is made after the making of the confiscation order.\textsuperscript{205} As the condition of double criminality has been fully explained in the context of investigative assistance,\textsuperscript{206} it will not be repeated here. Suffice it to note that

\begin{itemize}
\item \textsuperscript{197} STESSENS, \textit{supra} note 5, at 372.
\item \textsuperscript{198} Article 11(1) and 11(2).
\item \textsuperscript{199} Article 5(4)(b).
\item \textsuperscript{200} Article 11(1).
\item \textsuperscript{201} Article 5(4)(c).
\item \textsuperscript{202} See section 40(2)(a) and 246(1) in the contexts of criminal confiscation and civil recovery respectively.
\item \textsuperscript{203} See 21 U.S.C. § 853(e)(2) and 18 U.S.C. § 983(j)(3) for criminal forfeiture and civil forfeiture respectively.
\item \textsuperscript{204} Article 18(1)(f).
\item \textsuperscript{205} \textit{Explanatory Report, supra} note 133, at 37.
\item \textsuperscript{206} See \textit{supra} at 191-193.
\end{itemize}
where the basis of the request is the laundering offence, the condition of double criminality is a potentially significant obstacle to provisional measures assistance, particularly due to the difference in the scope of predicate crimes. This is even more serious in case where the request for provisional measures assistance is made after a confiscation order has been made, since double criminality would need to be judged in concreto.

(B) Response

For the reasons advanced above, the condition of double criminality should be waived in bilateral treaties states may enter into or it should not be exercised where the relevant multilateral conventions permit the refusal of assistance on it.

However, there are some circumstances where the lack of double criminality would render it legally impossible for the requested state to provide provisional measures assistance. To see this, one must appreciate that provisional measures are those measures the purpose of which is to preserve property for eventual confiscation. Thus, where property is not confiscable, it cannot be made subject to provisional measures. In the international context, this means that if the requested state cannot render confiscation assistance, it will not be able to give provisional measures assistance. One of the grounds that would make the requested state unable to provide confiscation assistance, although it is not explicitly provided in either the Vienna or the Money Laundering Conventions, is where doing so would engage the requested state in a violation of the legality principle. The lack of double criminality may in some cases render the provision of confiscation assistance contrary to the legality principle.

In chapter III, it has been argued that confiscation is punitive, notwithstanding the existence of the non-conviction-based regime. Thus, the imposition or enforcement of confiscation requires that a legal basis in accordance with the legality principle exists. The legality principle requires that no punishment may be imposed for an act which is not criminal at the time of its commission. It is, by implication, that punishment for the act must also be provided at that time and any other punishment not so provided may not be imposed. This has been explicitly so held in the case of Welch v. UK. The

legality principle does not only govern in the domestic context but it also applies in respect of the rendering of confiscation assistance, irrespective of which approaches the requested state uses for this purpose.

The Vienna and the Money Laundering Conventions provide for two forms of confiscation assistance. The requested state may either directly enforce a confiscation order issued by the court of the requesting state, or may institute a proceeding for the purpose of obtaining a domestic confiscation order and, if the order is granted, enforce the order. The difference between these two approaches is that, from a legal point of view, it is the order of the requesting state that is enforced in the requested state in the former case, but it is the order of the requested state that is so enforced in the latter case.

In the former case, of course, the confiscation order of the requesting state would generally need to be recognised through a procedure of *exequatur* before it is enforced in the requested state. Nevertheless, the *exequatur* procedure does not transform the confiscation order of the requesting state to that of the requested state. Thus, from a legal point of view, it is the requesting state that punishes the person concerned. The legality principle which is concerned with the legality of punishment should therefore be, it is submitted, considered by referring to the law the requesting state, not the law of the requested state in case of the direct enforcement of a confiscation order issued in the requesting state.

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208 Dietrich Oehler explained that the *exequatur* is a filter through which it is ascertained whether a foreign judgment harmonises with the most fundamental legal principles of the requested state. It will not excessively refer to the contents of the judgment, but to the way in which the judgment came to pass. Above all, the observance of constitutional principles within the foreign state’s proceedings will be considered. See Dietrich Oehler, Recognition of Foreign Penal Judgments: The European System, in II INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 622 (Cherif M. Bassouni ed. 2nd ed. 1998). Thus, in the UK, an external confiscation order will be registered if the court is satisfied that at the time of registration the order is in force and not subject to appeal, that, where the person against whom the order is made did not appear in the proceedings, he received notice of the proceedings in sufficient time to enable him to defend them, and that enforcing the order in the UK would not be contrary to the interests of justice. See section 40(1) of the DTA 1994 and section 97(1) of the CJA 1988. Similarly, in the US, registration is granted unless the foreign forfeiture or confiscation judgement was rendered under a system that provides tribunals or procedures incompatible with due process of law, the foreign court lacked personal jurisdiction over the defendant, the foreign court lacked jurisdiction over the subject matter, or the foreign nation did not take steps, in accordance with the principles of due process to give notice of the proceedings to a person with an interest in the property of the proceedings in sufficient time to enable him or her to defend; or the judgment was obtained by fraud. See 28 U.S.C. § 2467(d).

209 *Id.* at 621.

210 Guy Stessens made the same suggestion, although he did not provide reason why this should be so, apart from noting that in this case the individual concerned has been found guilty
Provided that confiscation is properly imposed in the requesting state, the direct enforcement of this order in the requested state in the absence of double criminality is not in violation the legality principle.

The requested state must also respect the legality principle where it provides confiscation assistance by way of initiating a proceeding to obtain a domestic confiscation order. However, unlike the case of direct enforcement of a foreign confiscation order, it is the confiscation order of the requested state that is enforced. This is clear where the requesting state has not yet made a confiscation order. Of course, this approach may also be used where a confiscation order has already been made in the requesting state. Further, the contents of the confiscation order which will be issued in the requested state may even be the same as those of the confiscation order which has already been issued in the requesting state, because the requested state is bound by the finding as to the facts stated in the conviction or judicial decision of the requesting state. Nevertheless, it is unarguably clear that, from a legal point of view, it is the confiscation order of the requested state that will be enforced. It is the requested state that imposes confiscation on the person concerned. It is then submitted that the respect for the legality principle should therefore be found in the law of the requested state.

If the offence to which the request relates is not according to the law of the requesting state. See STESENS, supra note 5, at 294. This reason is surely not sufficient. The reason is that even if the defendant has already been found guilty under the law of the requesting state, the requested state may choose to initiate a domestic proceeding to obtain a confiscation order.

Explanatory Report, supra note 133, at 28.

Article 14(2).

It is important to note that the respect for the legality principle in the requested state is not to be confused with the prescriptive jurisdiction of the requested state over the crime which is the source of property subject to confiscation. The requested state need not have this prescriptive jurisdiction in order to be able to render assistance. Often, the requested state which executes search and seizure in its own territory with respect to the crime committed in the requesting state over which it has no prescriptive jurisdiction. The requested state only exercises, upon a request, enforcement jurisdiction to support the trial of the criminal case over which the requesting state has proper prescriptive and adjudicative jurisdictions. This position also governs the provision of confiscation assistance. Although the requested state is to institute a confiscation proceeding in its court, it is still the exercise of enforcement jurisdiction for which prescriptive and adjudicative jurisdictions over the crime which is the source of property concerned is not required. Of course, the institution of a confiscation proceeding requires the requested state to have an adjudicative jurisdiction, but this adjudicative jurisdiction is not the same as the adjudicative jurisdiction which exists pursuant to the prescriptive jurisdiction over the crime which is the source of the concerned property. That being the case, the requested state need not have the prescriptive and adjudicative jurisdictions over the said crime to be able to institute a confiscation proceeding. A legal basis for this may be provided by the domestic law of the requested state or the relevant treaty. The Money Laundering Convention explicitly provides for this jurisdiction. See Article
criminal in the requested state, the initiation by the requested state of a proceeding to obtain a domestic confiscation order will be contrary to the legality principle.

Of course, it does not automatically follow that the rendering of provisional measures assistance in the absence of the double criminality is a violation of the legality principle where the requested state would initiate a proceeding to obtain a domestic confiscation order. However, where provisional measures assistance is made as part of the request for confiscation assistance, and there is a lack of double criminality, the requested state would be prohibited by the legality principle from initiating a proceeding to obtain a domestic confiscation order in which provisional measures may be made to preserve property. Provisional measures assistance would necessarily be refused.

Where the requesting state asks for provisional measures assistance before a confiscation order has been made, the provision of assistance in this respect in the absence of double criminality is not in violation of the legality principle, since there is not yet any punishment. However, as has been noted, provisional measures are those measures the purpose of which is to preserve property for eventual confiscation. If the requested state cannot provide confiscation assistance with respect to property sought to be made subject to provisional measures, the taking of those measures will not fulfil the eventual purpose and, for this reason, provisional measures assistance will be likely to be refused, although this refusal is not so required under the Money Laundering Convention.

In conclusion, although the Money Laundering Convention provides for the lack of double criminality as an optional ground for refusal of provisional measures assistance, it is suggested that the lack of double criminality will be an optional refusal ground in this regard only if the requested state renders confiscation assistance by way of direct enforcement of a confiscation order issued in the requesting state.

B. Provisional Measures

(A) Unavailability of Provisional Measures Sought

13(2). In addition, this jurisdiction need not have been expressly provided for by the law of the requested state; it follows directly from the request of the requesting state. See Explanatory Report, supra note 133, at 28. See also STESENS, supra note 5, at 247-248.

214 Article 11(2).
As with the case of investigative measures, states may have different provisional measures. Some states may use seizure as a measure to preserve the availability of property for eventual confiscation as was the case with US civil forfeiture before the enactment of CAFRA in 2000. Others may opt for the freezing or restraining type of orders as is the case of the UK. Yet, others may provide for both as is the case of the US criminal forfeiture and the current US civil forfeiture. It is possible in some cases that the provisional measures sought by the requesting state do not exist or could not be taken in the requested state. In particular, a state whose confiscation is property-based may not have a means to prevent the dissipation of property by way of a freezing or restraining order where this is requested by the state whose confiscation is value-based. On the other hand, a state whose confiscation is value-based may not have a means to preserve property through seizure when it is requested to do so by a state whose confiscation is property-based. Further, even when both the requesting and requested states have the same provisional measures, the legal requirements for taking those measures may be different. In many states, it must be shown that confiscation is likely to be made and there is a risk of property being dissipated. These requirements may be more stringent in some states but less demanding in others. Possibly, there may be circumstances where the provisional measures sought could not be taken in the requested state, due to the fact that their conditions for those measures are not fulfilled under its law. There may also be cases where the requesting state asks the requested state to take provisional measures which do not exist or which would not be permitted in the requesting state, because, for example, the laws in this respect in the requesting state mandates more stringent legal requirements than those required under the law of the requested state.

216 Section 41 for a restraint order in the context of criminal confiscation and section 246 for an interim receiving order in the context of civil recovery.
219 STESENS, supra note 5, at 373. Of course, in the UK, there is seizure to prevent the property from being taken out of the jurisdiction. However, it takes place after the restraint order has been made. See section 26(9) of the DTA 1994, section 77(10) of the CJA 1988, and section 45 of the PCA 2002.
22 In the UK, see Section 40 and Re AJ and DJ, Unreported, 9 December 1992, the case law under the DTA 1994, the previous template of the PCA 2002. In the US, see 18 U.S.C. § 982 and 21 U.S.C. § 853(e) for criminal forfeiture and for civil forfeiture, see 18 U.S.C. § 983(j).
In both situations, the Money Laundering Convention allows the requested state to refuse assistance. Of course, the requested state may give assistance if it wishes, as these are optional refusal grounds.\footnote{Articles 18(2) and 18(3).} However, it is submitted that where the provisional measures sought do not exist or could not be taken in the requested state, assistance cannot legally be given.

Where the requested state wishes to refuse assistance on ground that the provisional measures sought or any other measures having similar effects do not exist or would not be permitted in the requesting state, the requested state would need to examine the law of the requesting state. For the same reasons as in the case of investigative assistance, this may be difficult, time-consuming, and incorrect, thereby resulting in delay in giving assistance or the refusal of assistance which should have been given.

\textbf{(B) Response}

In order to be most effective in the international control of money laundering, it is submitted that mutual legal assistance should be facilitated to the greatest extent possible. Of course, the requested state cannot legally take provisional measures which do not exist or could not be taken under its law. The point, however, is that where alternative measures in the requested state exist which may be used to preserve property, the requested state should use these measures to fulfil the request. For this purpose, it is suggested that the requesting state should simply note the assistance sought without specifically requesting particular provisional measures.\footnote{Of course, the requesting state may note particular provisional measures but it should make clear that they are simply examples.} By this approach, it is submitted, the requested state would be able to take whatever measures available under its law to preserve property for eventual confiscation.

It is further submitted that this approach also practically excludes the possibility that the requested state would be able to refuse assistance on ground that the provisional measures sought or any other measures having similar effects do not exist or would not be permitted under the law of the requesting state. The reason is that the requesting state only requests assistance in the preservation of property; it does not identify particular provisional measures the absence of which under the law of the requesting state is a ground for refusing assistance.
By this approach, provisional measures assistance would always be granted and it would be given without a delay caused by examining whether the provisional measures sought or any other measures having similar effects exist or would be permitted in the requesting state. The rendering of provisional measures assistance would be fast and effective in tackling the reality of international money laundering that, once located, property would be moved elsewhere to avoid confiscation.

C. Difference in Confiscation

It should be recalled that the legality principle mandates that punishments not be imposed on a person for an act which is not a crime when committed and punishments for it cannot be other than those provided for in the law. When confiscation is imposed for an offence, it is undeniably a punishment. Where the provision of confiscation assistance by way of initiating a proceeding to obtain a domestic confiscation order would render confiscation of property which is not confiscable under the domestic law of the requested state, the requested state would be in violation of the legality principle to provide confiscation assistance. Of course, this does not mean that provisional measures assistance in this case would automatically be in violation of the legality principle and therefore must be refused in every case. This depends on when provisional measures assistance is requested. Where provisional measures assistance is sought as part of a request for confiscation assistance, the requested state would certainly be unable to render provisional measures assistance, since it cannot initiate a proceeding to obtain a domestic confiscation order wherein provisional measures may be made to preserve property. In case provisional measures assistance is sought before a confiscation has been made in the requesting state, although there is technically no issue relating to the legality principle at this stage, the rendering of provisional measures assistance would not fulfil the purpose of the measures, since the requested state would not be able to provide confiscation assistance once it is so requested due to the legality principle. As a result, provisional measures assistance even at this stage is also likely to be refused.

Let us now begin examining the different aspects of confiscation between the requesting and requested states which make the rendering of confiscation assistance by way of initiating a proceeding to obtain a confiscation order contrary to the legality principle.
(A) Aspects of Difference

a. Confiscation Systems

Property confiscation is enforceable against tainted property only, but value confiscation bites on any property of the defendant whether tainted or legitimate. This difference may create a situation in which the rendering of confiscation assistance would be a violation of the legality principle in the requested state. This is the case where a state whose confiscation system is value-based requests confiscation assistance with respect to untainted or legitimate property from a state whose confiscation system is property-based. While the Money Laundering Convention puts both systems of confiscation on an equal footing and requires that states be able to provide assistance in respect of both confiscation systems,\(^{223}\) it is submitted that the requested state in this case will violate the legality principle if it initiates a proceeding to obtain a confiscation order against untainted or legitimate property. The reason is that confiscation of the untainted or legitimate property constitutes a penalty which is not provided for under the law of the requested state. Since the provision of confiscation assistance in this type of cases is not possible, provisional measures assistance would similarly be impossible, especially where requested as part of the request for confiscation assistance.

Even when the requested state provides confiscation assistance through a non-conviction-based proceeding which implies that it does not consider confiscation a penalty, the giving of assistance by this approach against untainted or legitimate property is similarly problematic. For example, before CAFRA, the US had to initiate a domestic civil forfeiture proceeding in order to provide confiscation assistance.\(^{224}\) As property against which this forfeiture proceeding may be instituted must be tainted, the provision of confiscation assistance in this way against untainted or legitimate property is impossible. It also follows that provisional measures, such as a freezing order, cannot be obtained against such property.\(^{225}\)

There would be, however, no problem where a state whose confiscation system is property-based requests confiscation assistance from a state whose

\(^{223}\) See Articles 11 and 13(3). See also Explanatory Report, supra note 133, at 29.
\(^{225}\) Asset Confiscation: Response of the US, supra note 167, at 6-7. See also 18 U.S.C. § 981(i)(3).
confiscation system is value-based. A request in this case would in most cases name particular tainted property in respect of which assistance in confiscation and provisional measures is sought. Since value confiscation applies to any property of the defendant, irrespective of the nature of its origin, the requested state would be able to provide confiscation assistance and provisional measures assistance against the named property. For example, in the UK, where an external confiscation order has been made against specified property, the High Court may appoint a receiver to realise the property\textsuperscript{226} or make a restraint order in respect of it.\textsuperscript{227} This should also be the case where an external confiscation order has not yet been made because it must be shown in this case that that the external order may be made,\textsuperscript{228} notwithstanding the provision permitting the High Court to make a restraint order over any of his realisable property.\textsuperscript{229}

\textbf{b. Limitations of Confiscation}

In some cases, there are some limitations to confiscation under the law of the requested state but the law of the requesting state recognises none of them. The Money Laundering Convention allows the requested state to refuse confiscation assistance in three circumstances of this nature. Specifically, they are cases where, under the law of the requested state, confiscation is not provided for in respect of the offence to which the request relates, where property concerned is not confiscable due to its remote relationship with the offence, and where confiscation cannot be imposed or enforced because of the lapse of time.\textsuperscript{229}

In accordance with the argument that confiscation is a penalty, the initiation by the requested state of a proceeding to obtain a domestic confiscation order which would enable the confiscation in these circumstances would be in violation of the legality principle because this in effect constitutes the imposition of a penalty which goes beyond what is provided for or which is legally prohibited under the law of the requested state. Since the provision of

\textsuperscript{226} Sections 5(1)(a) and 11(2), Schedule 3, The Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order (DTO) 1990.
\textsuperscript{227} The DTO 1990, Schedule 3, Section 8(2)(a). While, in this example, unlike the case of the US above, the method of providing confiscation assistance is the direct enforcement of a foreign order, rather than the initiation of a domestic confiscation proceeding to obtain a confiscation order under the UK law, it is submitted that the position would be the same if the UK provides confiscation assistance by way of initiating a proceeding to obtain a domestic confiscation order.
\textsuperscript{228} Sections 7(1)(c) and 7(2), Schedule 3, The DTO.
\textsuperscript{229} Sections 8(2)(b), Schedule 3, The DTO.
\textsuperscript{230} Articles 18(4)(a)-18(4)(c)
confiscation assistance in these circumstances is not legally possible, provisional measures assistance cannot likewise be rendered, particularly where requested as part of a request for confiscation assistance.

It should be noted that the Explanatory Report to the Money Laundering Convention explained that provisional measures assistance should not be refused simply because the law of the requested state does not provide for confiscation in respect of the offence to which the request relates. Nevertheless, it is submitted that this explanation does not mean that provisional measures assistance would always be granted, despite the absence in the requested state of confiscation in that offence. Where the requested state cannot initiate a proceeding to obtain a domestic confiscation order, it would be impossible for the requested state to provide provisional measures assistance. In this connection, this is also true even with respect to the bringing of a civil forfeiture proceeding in the US. If the US law does not prescribe the offence to which the request relates as a basis for bringing the forfeiture proceeding, it would be impossible for the US to assist in confiscation and provisional measures in this respect.

As earlier argued, where the requested state directly enforces a confiscation order issued by the court in the requesting state, it is such order that is enforced and thereby the respect for the legality principle is referred to the law of the requesting state. As long as confiscation is properly imposed in the requesting state, there is no objection under the legality principle for the requested state to enforce the confiscation order issued in the requesting state, even when, under the law of the requested state, confiscation is not provided for in case of the offence to which the request relates, confiscation cannot be imposed due to the remote relationship between property and offence, or confiscation is time-barred. Thus, the requested state can provide confiscation assistance and therefore provisional measures assistance in these cases. This may explain why the Money Laundering Convention obliges states to provide for provisional measures with respect to all offences and cannot limit this obligation to certain offences or categories of offences, as permitted in the case of confiscation.232

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231 Explanatory Report, supra note 133, at 18.
232 Id.
It is then submitted that the above position in the Explanatory Report is to acknowledge this sort of cases. It does not go so far as to suggest that provisional measures assistance should never be refused where the offence to which the request relates does not provide for confiscation in respect of property sought to be made subject to provisional measures.

c. Requirement of Conviction

For confiscation, some states require conviction; others may have a non-conviction-based scheme. This difference also causes a problem where a state whose confiscation is non-conviction-based requests assistance in provisional measures and confiscation from a state which operates conviction-based confiscation. It should be recalled that the Vienna and the Money Laundering Conventions do not require that confiscation be made in a criminal proceeding and therefore confiscation need not be conviction-based. Furthermore, the Money Laundering Convention does not mandate the refusal of assistance in case of non-conviction-based confiscation; it is only optional.

In the case above, the requested state has a conviction-based confiscation scheme. This means that it surely considers confiscation is a criminal penalty. Being a criminal penalty, the legality principle mandates that a criminal penalty not be imposed without the law providing for the act to be criminal at the time of its commission and the penalty which is not provided for by this law must not be imposed. In the case at hand, no person is found guilty of the crime for which confiscation may be imposed. It would be a violation of the legality principle for the requested state to initiate a proceeding to obtain a domestic confiscation order in the absence of a conviction of a person against whom confiscation is sought. Since the requested state whose confiscation is conviction-based cannot provide confiscation assistance in respect of non-conviction-based confiscation, it cannot likewise render provisional measures assistance with regard to property for which confiscation is sought, in particular where provisional measures assistance is requested as part of the request for confiscation assistance.

There would be, however, no problem where the requesting state operates a conviction-based confiscation and the requested state operates non-conviction-based confiscation. This is because the requested state can provide confiscation assistance by way of initiating a proceeding to obtain a domestic confiscation order, either with or without conviction. It follows that the requested state would
be also able to render provisional measures assistance. Indeed, conviction may be used as evidence of the offence which would subject the property concerned to provisional measures and confiscation. For example, in the US, a foreign conviction creates a rebuttable presumption of the occurrence of unlawful drug activity which subjects property tainted with it to provisional measures and forfeiture.233

(B) Response

It is submitted that the differences in the systems and limitations of, and conviction requirement for, confiscation in the requested state should not be obstacles to giving assistance in confiscation and provisional measures. Refusal of assistance negatively affects the international fight against money laundering which would mean that full deprivation of the criminal of the proceeds of crime is not achieved.

As shown, the fact that the legality principle is judged under the law of the requested state in case of initiating a proceeding to obtain a domestic confiscation order makes the provision of confiscation assistance and provisional measures assistance where there are differences as to the systems and the limitations of, and the conviction requirement for, confiscation between the requesting and requested states problematic with respect to the legality principle.24 Therefore, the solution in this regard is to structure the provision of confiscation assistance in which the respect for the legality principle is judged by referring to the law of the requesting state. As earlier argued, this is the case where the requested state directly enforces a confiscation order issued in the

244 This would appear to be contrary to the position noted by the Explanatory Report to the Money Laundering Convention. In relation to Article 11(2) which concerns with the provision of provisional measures assistance, it was noted that the words “pursuant to Article 13” mean that both systems of international cooperation, i.e., direct enforcement or initiation of a confiscation proceeding, apply. See Explanatory Report, supra note 133, at 25. A similar explanation was noted in respect of Article 13(2) which provides competence for the requested state to initiate a proceeding to obtain a domestic confiscation order. It was explained that because Article 13(2) gives competence to the requested state to initiate the proceeding, the requested state has competence to take provisional measures also in case where it may be foreseen that confiscation assistance will be rendered by the initiation of a confiscation proceeding. See id. at 28. It, however, is submitted that our position is not contrary to the Explanatory Report. Our position is concerned with the question whether the initiation of a confiscation proceeding can be made if it is contrary to the legality principle. Thus, if it is so contrary, the confiscation proceeding cannot be initiated which necessarily means that the rendering of provisional measures assistance is impossible. The position in the Explanatory Report is concerned with the stage where it has already been determined that the requested state can legally initiate a confiscation proceeding.
requesting state. Once this is the case, the requested state would be able to provide confiscation assistance and also provisional measures assistance in those circumstances.

For instance, before the PCA 2002, the UK had conviction-based confiscation only. Nevertheless, an external confiscation order which may be registered and enforced in the UK was defined in a way that included confiscation without conviction, such as US civil forfeiture. In addition, the case law also showed that a restraint order may be issued to preserve property when the external confiscation order relied upon is a civil forfeiture order. In the US, after the CAFRA was enacted, a value confiscation order may now be registered and enforced. There is no longer the problem noted by the US authorities before CAFRA that it had difficulties to enforce confiscation order against legitimate property. It is also provided that the court, upon application of the US, may issue a restraint order to preserve property. While it is not provided that this includes legitimate property, it certainly does so. It cannot be the case that the US may enforce a value-based order but cannot preserve property which may be used to satisfy this order.

It is thus suggested that states approach confiscation assistance by directly enforcing a confiscation order issued in the requesting state, instead of initiating a proceeding to obtain a domestic confiscation order.

3) Confiscation

The Money Laundering Convention provides for two forms of confiscation assistance: direct enforcement of the order made in the requesting state or initiation of a proceeding to obtain a domestic confiscation order. It should be noted that the first method is only possible where a confiscation order has already been issued in the requesting state. Thus, however, does not mean that where a confiscation order has already been made, the requested state must directly enforce the order. Since it is the law of the requested state that governs

235 Section 39(2), the DTA 1994 and the Section 1, Schedule 3, the DTO 1990 defined external confiscation order as an order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value. It is obvious that an external confiscation order need not follow a conviction or be made in a criminal proceeding. A somewhat similar was used for the definition of an external confiscation order under section 97 of the CJA 1988 and Section 71, Schedule 3, the CJO 1991.


the execution of the request, the requested state, if its law requires, may also provide assistance by way of the initiation of a proceeding to obtain a domestic confiscation order. However, in such a case, the requested state is still bound by the finding as to the facts stated in a conviction or judicial decision of the requesting state or in so far as such conviction or judicial decision is implicitly based on them. Where, however, the requesting state asks for a transfer of a confiscation proceeding, the extent of confiscation would be determined in accordance with the law of the requested state.

(1) Problems

A. Definition of Money Laundering

(A) Double Criminality

This has already been examined in the context of provisional measures assistance and it will not be repeated here. It is sufficient for our purpose to note that the lack of double criminality is an obstacle to the provision of confiscation assistance. This is particularly so, because the double criminality at this stage need be judged in concreto. While the Money Laundering Convention only treats it as an optional ground for refusal, the requested state cannot treat it as such due to the legality principle in cases where confiscation assistance is provided by way of initiating a proceeding to obtain a domestic confiscation order.

(B) Response

To enable the requested state to provide confiscation assistance in the absence of double criminality, the requested state should render assistance by directly enforcing a confiscation order issued in the requesting state.

B. Differences in Confiscation

(A) Systems, Limitations, and Conviction Requirement

The issues in this aspect have been extensively examined in the context of provisional measures assistance. It will not be repeated. It is enough to note that where the law of the requested state operates property-based confiscation, contains limitations on confiscation, or requires a conviction for confiscation, it will be problematic as regards the legality principle if the requested state is to initiate a proceeding to obtain a domestic confiscation order against legitimate

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238 Explanatory Report, supra note 133, at 28.
239 Id. at 38.
property in response to a value-based request, or against property which under its law is not confiscable, or against property of a person who is not convicted of the crime for which confiscation is authorised.

(B) Response

To enable the provision of confiscation assistance, the requested state should allow the direct enforcement of a confiscation order issued in the requesting state.

In concluding, with respect to the provision of confiscation assistance, it is clear that the direct enforcement of a confiscation order issued in the requesting state is a better method than the initiation of a proceeding to obtain a domestic confiscation order. Furthermore, the direct enforcement of a confiscation order issued in the requesting state would also address the gap in cases where the requested state would initiate a proceeding to obtain a domestic confiscation order. This is explained below.

It should be recalled that the Money Laundering Convention allows the requested state to refuse confiscation assistance where confiscation is not enforceable or is not final under the law of the requesting state. While this ground for refusal is optional, it is submitted that it should be made mandatory at the domestic level. A request for confiscation assistance which is based on a non-final or unenforceable confiscation order should never be executed. This is in accordance with the general practice that a decision including a confiscation order will generally be enforceable if it is final. In addition, that this ground for refusal should indeed be mandatory may be appreciated from the contents of the confiscation request wherein the requesting state must include an attestation that a confiscation order is enforceable and not subject to ordinary means of appeal.

It appears self-contradictory on the one hand to allow the requested state to render confiscation assistance even if the confiscation order is unenforceable in the requesting state or is still subject to ordinary means of appeal, but, on the other hand, to mandate that the requesting state submit as part of the confiscation request an attestation that a confiscation order is enforceable in the requesting state and not subject to ordinary means of appeal.

240 Article 18(4)(e).
241 Article 27(3)(ii).
This ground for refusal, however, is applicable only in case of a request for enforcement of a confiscation order. It is not applicable when the requesting state requests the requested state to initiate a proceeding to obtain a domestic confiscation order. Thus, where, for example, the requesting state requests the initiation of a confiscation proceeding in case it cannot pursue confiscation under its law for such reason as the statute of limitation, the requested state cannot refuse assistance, since the Money Laundering Convention does not address the case of this type.\textsuperscript{242} The European Convention on the Transfer of Proceedings in Criminal Matters which this way of providing assistance takes after explicitly provides that where the time-limit for a proceeding sought has already expired in the requesting state under its legislation, the initiation of the proceeding cannot be made.\textsuperscript{243} There are a few solutions to this problem. The person concerned may apply to a judicial authority in the requesting state for a judicial review of the decision by which a request for cooperation was made.\textsuperscript{244} A ground for refusal in this case may be made in the implementing legislation. But, if the requested state provides confiscation assistance by way of directly enforcing a confiscation order issued in the requesting state, the problem will no longer exist, as the Money Laundering Convention in its current form provides for the refusal of assistance on the unenforceable or non-final nature of the confiscation order issued in the requesting state.

\textbf{V. Concluding Remarks}

This chapter has examined international control of money laundering in one aspect: the confiscation of proceeds of crime located abroad. Both unilateral actions and mutual legal assistance for this purpose have been analysed. The conclusion is that mutual legal assistance, rather than unilateral actions, is a preferable approach to the confiscation of the proceeds located abroad. Further, given the differences in many aspects of legal measures to control money laundering in many states, states should approach mutual legal assistance in the ways that would enable the provision of assistance despite those differences. Specifically, states should focus on the type of assistance sought in the investigative and provisional measures stages. Further, in the confiscation stage,

\begin{footnotesize}
\begin{enumerate}
\item[{242}] STESSENS, \textit{supra} note 5, at 395-396.
\item[{243}] Article 10.
\item[{244}] STESSENS, \textit{supra} note 5, at 395-396.
\end{enumerate}
\end{footnotesize}
states should directly enforce a confiscation order issued in the requesting state, rather than initiating a proceeding to obtain a domestic confiscation order.
Chapter V: The Control of Money Laundering in Emerging Economies: Thailand as a Case Study

This chapter is concerned with the control of money laundering in emerging economies in general and Thailand in particular. Its purpose is to make suggestions as to the improvement of the enforcement of the repressive measures against money laundering. It will be divided into three sections relating to the laundering offence, confiscation, and international confiscation respectively. Each section will further be separated into two sub-sections examining the case of emerging economies first and Thailand second. In approaching this task, this chapter will draw on the examinations of those measures conducted in chapters II, III, and IV. Thus, in the case of emerging economies, a summary of the findings in those chapters will be suggested as approaches to improving the enforcement of the repressive measures. In relation to Thailand, it should be noted that Thailand is a member of the Asia Pacific Group (APG) on Money Laundering of which mission is to facilitate the adoption, implementation, and enforcement of international standards against money laundering, particularly the Forty Recommendations.¹ In view of this, it is desirable that evaluation of the existing repressive measures in light of the international standards in this respect be first conducted.² For this purpose, the relevant Articles of the Vienna Convention and the concerned FATF Recommendations will be used. Following this evaluation, this chapter will consider what is necessary to increase effectiveness of those repressive measures in light of the findings in chapters II, III, and IV.

I. The Laundering Offence

1. Emerging Economies

As shown in chapter II, the criminalisation of laundering the proceeds of different crimes in different pieces of legislation leads to an evidentiary problem

¹ Note that the mission of the APG also includes the fight against terrorist finance. This work, however, does not deal with this issue.
² Note that the APG already conducted the review of the existing regime to control money laundering in Thailand in 2001. See Annual Report, Asia/Pacific Group (APG) on Money Laundering, at 72-73 (1 July 2001-30 June 2002). However, because the FATF released its revised Forty Recommendations in 2003, it is necessary to consider again this issue in light of this revision. Indeed, the APG has adopted the revision as its Anti-Money Laundering (AML) standard. See Annual Report, Asia/Pacific Group (APG) on Money Laundering, at 16 (1 October 2003-30 June 2004).
in respect of the mental state of the defendant in that the defendant must be proved to know that the source of the proceeds is the crime under the relevant legislation. Of course, there is no problem with respect to the perpetrator of the predicate crime. But, this difficulty is an obstacle where those who do laundering are third parties, particularly professional launderers, because they do not bother to inquire the precise origin of the proceeds, even though they know that the proceeds are criminally derived. Further, even when laundering the proceeds of different crimes is criminalised in a single piece of legislation, this does not completely addresses this evidentiary burden, since the prosecution has to prove that the knowledge relates to “any” of the predicate crime. We have suggested that the most practical solution is to follow the US by requiring the knowledge of the criminal origin only without having to know the precise criminal activity.

We have also suggested that the laundering offence should require both knowledge as to the criminal origin of property and the purpose to conceal or disguise its criminal origin. Requiring the knowledge does not make enforcement of the laundering offence difficult, since they are obvious in case of the perpetrator of the predicate crime and professional launderers. The purposive element is similarly not difficult since it need not be the only purpose. While both elements may be difficult to prove in case of ordinary businesspersons, we have suggested that they are justified in order to impose significant burden on the process of legitimate commerce.

We have further suggested that the laundering offence should apply to the perpetrator of the predicate crime without it being explicitly provided as in the US. This would offer evidentiary benefit since it is possible to prove the predicate crime for the purpose of the laundering offence to the criminal standard without necessarily establishing on this standard that the defendant charged with laundering is the perpetrator thereof. Hence, the laundering offence may be successfully used against the perpetrator of the predicate crime in case where evidence against him on the predicate crime may not be sufficient. This enables the laundering offence to be used as an indirect tool to fight against proceed-generating crimes.

In a prosecution for money laundering, it must be proved that the property which is the subject of the transaction is the proceeds of crime. Proving the proceeds of crime requires proving the link between the proceeds and the
crime. However, it is very difficult to prove this link for a number of reasons: the fungibility and lack of specific identity of money and the likely lack of direct evidence due to victimless nature of many proceeds-generating crimes and laundering techniques. To overcome the evidentiary problems in this regard, we have suggested that circumstantial evidence should be extensively used for this purpose and also that this circumstantial evidence may be divided into four groups: involvement in the predicate crime of the defendant or of the person for whom he engages in laundering, his financial backgrounds, irregularity or complexity of the transaction at issue, and expert evidence.

The subject of money laundering need not be proceeds directly derived from crime, i.e., the original property; it may be property so derived indirectly, i.e., substitute property. However, we have shown that when the proceeds are mixed with other money, whether criminal or legitimate, each loses its identity and, in some circumstances, it is impossible to identify with certainty the substitute property. Four cases of mixing have been examined: a mix of proceeds and legitimate money, a mix of proceeds from different crimes, a mix of proceeds from different occasions of crime, and a mix of proceeds of crime committed before the effective date of the laundering offence and those from crime committed thereafter. In each case, where the defendant proves that the account contains more of the legitimate money or the proceeds of crime other than that specified in the laundering charge than the withdrawn amount, the withdrawal does not necessarily contains the proceeds of crime, the proceeds of specified crime, the proceeds from a specified occasion of crime, or the proceeds from crime committed in a particular period. The laundering offence grounded upon the withdrawal fails as a result.

We have shown that the problem may be solved by tracing rules and therefore we have suggested that the substitute property is traceable property. We have noted the exchange product rule of tracing which renders property obtained from exchanging proceeds of crime are traceable proceeds, notwithstanding number of exchanges. We also have noted the tainted money-in, first-out and tainted money-in, last-out rules. The first holds that where the proceeds of crime are deposited into a legitimate account, any withdrawal contains traceable proceeds up to the criminal deposit. The second holds that traceable proceeds
remain in the account as long as the balance never drops below the criminal deposit.

In the above mixing cases, under the "tainted money-in, first-out" rule, the withdrawal would contain the proceeds of crime, of specified crime, of a specified occasion of crime, or of crime committed in a particular period. Thus, the withdrawal would be money laundering. This, however, is subject to the lowest intermediate balance rule under which no traceable proceeds will remain if the balance ever becomes zero before the withdrawal in which case it is no laundering. Accordingly, wherever possible, in case of mixing, tracing should be completely eliminated. As long as the withdrawal is made from the mixed account, the withdrawal should constitute money laundering. Where this is not possible, the tracing rules should be relied on as a way to address the problem. In cases of mixing proceeds from many occasions of crime and proceeds from crime committed before the laundering offence becomes effective and those of crime thereafter committed, there is a better approach than tracing. The absence of the need to link the proceeds to a specific occasion of crime in the former and the application of the offence to the proceeds of crime, whenever committed, in the latter would render any withdrawal money laundering.

2. Thailand

The Prevention and Suppression of Money Laundering Act (PSMA) was enacted in 1999. Section 5 makes it a crime for any person to

1. transfer, accept a transfer of, or convert the property connected with the commission of an offence for the purpose of covering or concealing the origin of such property, or for the purpose of assisting other persons to evade the penalty or to be able to receive lesser penalty for the predicate crime, whether before, during or after the commission of such crime; or

2. take actions in any manner whatsoever for the purpose of concealing or disguising the true nature, acquisition, the location, the distribution, the transfer of the property connected with the commission of an offence and the acquisition of any rights therein.

Section 3 defines predicate crimes as the followings:

1. Offences relating to narcotics;

2. Offences relating to trafficking in, or sexual exploitation of, children and women;
3. Offences relating to public cheating and fraud;

4. Offences relating misappropriation or offences relating to cheating and fraud under the laws on commercial banks, financial institutions, and securities businesses;

5. Offences relating to corruptions;

6. Offences of extortion or blackmail committed by organised crime; and

7. Offences of customs evasion under the Customs laws

8. Offences of terrorism under the Penal Code

Section 3 also defines property connected with the commission of an offence as follows:

1. Money or property derived from the commission of an act constituting a predicate crime, or from aiding and abetting or rendering assistance in the commission of such crime;

2. Money or property derived from the distribution, disposal or transfer in any manner of the money or property in 1; or

3. Fruits of the money or property in 1 or 2.

Notwithstanding on how many occasions the property in 1, 2, or 3 has been distributed, disposed of, transferred, or converted, and in whose possession that property is, to whom it has been transferred, or in whose ownership it is registered.

It is proposed to first examine the offence whether it meets the international standards in this regard and, for this purpose, the elements of the offence under the Vienna Convention and the relevant FATF Recommendations will be used.

The Vienna Convention prescribes three types of laundering conducts. First is conversion or transfer of property of criminal origin for specified purposes. Second is concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property of criminal origin. Third is acquisition, possession or use of property of criminal origin where consistent with constitutional principles and basic concepts of the

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3 Article 3(1)(b)(i).
4 Article 3(1)(b)(ii).
legal system of the Party. The FATF has also adopted this definition. Clearly, the laundering offence in section 5 includes the first and the second cases. Thailand does not criminalise the third case; however, this does not mean that Thailand does not meet its obligation.

First, the criminalisation in the third case is subject to the constitutional principles and basic concepts of the Thai legal system. The drafter may have considered it inconsistent with the Thai basic legal system to make it a crime. Second, even if this is not a case, section 5(1) would be applicable to the third type of laundering. One of the conduct criminalised in section 5(1) is receiving a transfer of proceeds of crime. Receiving a transfer is the same as acquisition. Thus, the absence of the third case of laundering does not mean that Thailand fails to fulfill its obligation in this respect.

The FATF in 2003 has noted with regard to predicate crime that the laundering offence should apply to all serious crimes which, at a minimum, should include

1. participation in organised crime;
2. terrorism;
3. human trafficking;
4. sexual exploitation;
5. drug trafficking;
6. illicit arm trafficking;
7. illicit trafficking in stolen and other goods;
8. corruption and bribery;
9. fraud;
10. counterfeiting currency;
11. counterfeiting and piracy of product;
12. environmental crime;

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5 Article 3(1)(c).
6 Recommendation 1. Of course, the scope of predicate crime under the FATF is a lot more than drug-related crimes.
7 The lack of the case of possession or use of property in section 5(1) matters not in this respect. The reason is as follows. The cases of possession or use of property of criminal origin in Article 3(1)(c) would apply only when property is first acquired with knowledge of criminal origin at the time of acquisition. This knowledge must be proved even in these cases. Once this knowledge is proved, the offence of acquisition of property of criminal origin is also proved. In other words, the offence of acquisition of property may be applied in cases of possession or use of property. It follows that receiving a transfer of property in section 5(1) may be similarly used.
13. murder and griveous bodily injury;
14. kidnapping, illegal restraint and hostage taking;
15. robbery or theft;
16. smuggling;
17. extortion;
18. forgery;
19. piracy;
20. insider trading and market manipulation.

In Thailand, predicate crime includes eight categories of crime which correspond to crimes listed in Nos. 2, 4, 5, 8, 9, 16, 17, and part of 15 and 20. This obviously falls well below the FATF list. Indeed, in 2002, the APG mutual evaluation of Thailand noted the limited number of predicate crimes under the PSMA and also suggested that it be expanded. Clearly, this well proves that the scope of predicate crime under the PSMA does not meet the FATF demand in this respect. Nevertheless, it is submitted that in determining what criminalities to be included as predicate crime for the laundering offence, Thailand should determine on its own. It is not right for Thailand to prescribe some criminalities as predicate crime simply because the FATF has so suggested if it is not appropriate within the Thai context. The FATF list cannot certainly be proper for every country. This approach, of course, is likely to cause problem in international cooperation due to double criminality and, perhaps, this is the reason for the FATF suggestion of a minimum list of predicate crime. However, to provide a solution to this problem, we need not have the same scope of predicate crime. It is submitted that abolition of double criminality, as will be suggested below, would be a better response.

The FATF has also suggested that predicate crime include foreign predicate crime which would be criminal, had it occurred domestically. The PSMA is silent as to this issue. Unless the PSMA provides that predicate crime

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8 Article 1.
9 See Annual Report, Asia/Pacific Group (APG) on Money Laundering, at 72 (1 July 2001-30 June 2002).
10 A proposal is currently pending which will add the followings in the definition of predicate crime: enviromental crime, foreign exchange crime, unfair securities trading crime, gambling crime, trafficking in firearms, conspiracy to defrad the government in project-bidding, labour-cheating and, customs and excise crime.
11 Article 1.
includes foreign one,\textsuperscript{12} it is submitted that the predicate crime does not so extend. It is in this aspect that the Thai laundering offence does not meet the FATF demand. As a result, the definition of the predicate crime under the PSMA should be explicitly made to cover foreign predicate crime which would be criminal, had it been locally committed.

We turn now to explore the offence in light of the findings in chapter II to make it capable of being effectively enforced.

While section 5 does not explicitly contain the mental element of the offence, this does not mean that the offence requires none. To be guilty, the accused must have known that property concerned is proceeds of predicate crime. A general provision on criminal liability in the Penal Code mandates this knowledge requirement.\textsuperscript{13} Given the problem in proving the knowledge as to specific type of crime, the followings should be provided in section 5.

\textit{For the purpose of this section, the offender will be considered to act intentionally in accordance with section 59 of the Penal Code if he knows that property connected with the commission of an offence is derived from \textquotedblleft some form\textquotedblright{} of crime.}

Section 5(1) requires the purpose to cover or conceal the origin of property, or to assist other persons to evade the penalty or to be able to receive lesser penalty for the predicate crime. In accord with our earlier suggestion, the prosecution need not prove that there could have been no other purposes but for either of these two.

One of the purposes in this section is to assist others to evade the penalty for the predicate crime, whether before, during or after the predicate crime. This is confusing. Money laundering is a form of accessory-after-the-fact offence. What matters is that the launderer must have this purpose at the time of laundering which, by its very nature, must occur after the predicate crime.

\textsuperscript{12} In the UK, the PCA 2002 provides explicitly that the laundering offence is applicable to proceeds from foreign crime which would constitute a crime in the UK, had it occurred domestically. See section

\textsuperscript{13} Section 59 of the Penal Code provides:

\begin{quote}
A person shall be criminally liable only when such person commits an act intentionally,

To do an act intentionally is to an act consciously and at the same time the doer desired or could have foreseen the effect of such doing

If the doer does not know the facts constituting the elements of the offence, it cannot be deemed that the doer desired or could have foreseen the effects of such doing.
\end{quote}
Accordingly, the wordings “whether before, during, or after, the commission of such crime” in section 5(1) should be deleted.

Section 5 governs both own proceeds laundering and laundering the proceeds of crime of someone else. In case of own proceeds laundering, the prosecution need not prove that the defendant has committed the predicate crime. As long as it is proved that the laundered proceeds are derived from the predicate crime on a criminal standard, it matters not whether evidence showing this also proves on the same standard that he has committed the predicate crime.

As earlier explained, the concept of tracing is used to determine the criminal origin of the substitute property. The PSMA adopted this concept, although the statutory form of it is far more limited in scope.

In section 3, the term “property connected with the commission of an offence” clearly includes substitute property. As defined, in (1) property connected with the commission of an offence is money or property derived from the commission of a predicate crime or aiding and abetting thereof. This is an original property. The first level substitute property is in (2) which is money or property derived from the distribution, disposal or transfer in any manner of the original property. Now, where this substitute property is distributed, disposed of, transferred, or converted, what is obtained is the second level substitute property in the second paragraph. However, what is obtained from the distribution, disposal, transfer, or conversion of the second level substitute property would arguably no longer property connected with the commission of an offence. The wording “Notwithstanding on how many occasions” is useless in this respect, since it only applies where the first level substitute property is distributed, disposed of, transferred, or converted.\(^\text{14}\) It does not apply to the distribution, disposal, transfer, or conversion of any subsequent level substitute property. To solve this limitation, the following should be added to the definition of the term “property connected with the commission of an offence:

\begin{quote}
(3) Money or property derived from a series of transactions of which the first transaction is one involving property in 1; or
\end{quote}

With this clause, property obtained from transactions, irrespective of numbers, would be property connected with the commission of an offence as

\(^{14}\) (3) is not applicable in the case at hand, since it applies only to fruits of property in (1) and (2).
long as the first transaction involves money or property directly derived from predicate crime.

The current definition of property connected with the commission of an offence appears to require that the original property is used to obtain the first level substitute property and this property is used to obtain the second level substitute property in order for both to be property connected with the commission of an offence. But, as earlier shown, this is not possible in case of mixing in some cases. We have suggested that the tainted money-in, first-out tracing rule to solve the problem in this regard. We have noted that the lowest intermediate balance rule which limits the traceability of the money in the mixed account. The suggested definition in (3) is better than this tracing rule in this aspect. Apart from statutorily recognising the concept of tracing, it also provides a solution to the lowest intermediate balance rule. As long as it is shown that the first of the series of transactions whereby property is obtained involves the money or property directly derived from predicate crime, the property obtained would also be so derived. The lowest intermediate balance rule is no defence.

This suggested definition may be used to solve the identification impossibility in any case of mixing noted above. However, it is not likely to be used in case of mixing proceeds from different occasions of crime and a mix of proceeds from crimes committed before the effective date of the laundering offence and those committed thereafter. The reason is that it applies when the prosecution has already proved that the mixed account contains the proceeds of a specific occasion or of proceeds from crimes committed in a particular period. In most cases, it is very difficult to find proof of that specificity. The absence of the requirement to link the proceeds to a specific occasion of crime would completely eliminate the need to use this provision in case of mixing proceeds from many occasions of the crime. The application of the laundering offence to proceeds of crime, whenever committed, would similarly dispense with the need to use this provision. Therefore, the legislation should explicitly provide that the predicate crime which generates the proceeds includes those committed before the laundering offence becomes effective. A word like "whenever committed" should be inserted into the definition of predicate crime in section 3.

II. Confiscation

1. Emerging Economies
As with the laundering offence context, proving that the proceeds are derived from crime requires proving the link between the proceeds and the crime. Proving this link is very difficult for the earlier noted reasons. One of the responses, therefore, is the extensive use of circumstantial evidence. However, the use of circumstantial evidence is unlikely to be sufficient in the context of confiscation, especially in a conviction-based regime where the prosecution generally must tie the proceeds to the convicted crime. This is particularly difficult where convicted criminals have engaged in crime for a number of times and/or in many criminal activities, notably in the case of careered criminals and organised crime. In the laundering offence context, the difficulty in tying the proceeds to a specific occasion of crime is addressed by the absence of the need to prove this specific link. However, this is not generally the case with respect to the conviction-based confiscation. Thus, we have suggested two more measures: the application of the civil evidentiary standard to determine the proceeds, and/or the rebuttable presumption of the criminal origin of the proceeds, for the confiscation purpose.

We have noted a variation of the presumption in this regard. One is a US type which simply presumes that the proceeds are from the crime of conviction; the other is a UK type which presumes that the proceeds are criminally derived. This distinction has a significant effect as to the rebuttal of the presumption. In the first case, confiscation of the proceeds cannot be made if the convicted crime is not their source, even if they are criminally derived. In the latter case, the burden of the defendant to disprove the presumption is higher; he is to prove that the proceeds have a legitimate origin; otherwise, they would be confiscated. We have shown that the use of civil standard of proof and both forms of the presumption are compatible with the right to fair trial and the presumption of innocence.

Proceeds of crime subject to confiscation include both original and substitute. For the laundering offence, it is sufficient that the substitute property is proceeds of crime, even though it is so partially. In property confiscation, however, this is not sufficient. Since this type of confiscation is enforceable against tainted property only, the prosecution must identify the tainted part of the substitute property against which this confiscation is to be enforced.
We, however, have shown in chapter III that mixing in some cases causes the identification of the criminal part in the substitute property to be impossible. We have examined the impossibility of making the identification in this respect in four situations: a mix of proceeds and legitimate money, a mix of proceeds from different crimes, a mix of proceeds from different occasions of crime, and a mix of proceeds from crime committed before confiscation becomes effective and those from crime committed thereafter. The tracing rules, such as the exchange product and the “tainted money-in, first-out” or “tainted money-in, last-out” rules, while of practical use in case of the laundering offence, is not capable of solving the problem in this regard. The reason is that which part of the mix, or of a withdrawal, is traceable to the proceeds, to the proceeds of the specified crime, to the proceeds of specified occasions of crime, or to the proceeds of crime in a particular period is unidentifiable.

We have suggested as a response to the identification problem the conviction-based value confiscation regime, instead of making adjustments in the property confiscation system, since identification is not necessary in the value system. Further, confiscation of proceeds beyond the convicted crime should be authorised, since this furthers effectiveness of confiscation against careered criminals and organised crime. Where this enables confiscation of proceeds from earlier crimes, it must be structured in a way which would not violate the prohibition against retrospective penalty. This is achieved by requiring crime which triggers confiscation of proceeds of previous crimes to be one committed after the effective date of confiscation.

The non-conviction-based regime has also been suggested as a way to deal with difficulties in proving the proceeds of crime for confiscation because of its advantage in the civil burden of proof. Of course, it has been argued that the non-conviction-based regime is not compatible with human rights, But, if it is going to be introduced, states should realise, as in the case of the conviction-based regime, the difficulty in proving that the proceeds come from a specific criminal occasion or a particular crime, and even from a particular period. It has therefore been suggested that linking the proceeds to a particular act or to a particular criminal activity is not necessary, or subjecting to confiscation the proceeds from crime, whenever committed. A provision should further be enacted which allows confiscation of the mix to the extent of the proceeds in
order to address the impossibility in identifying the proceeds in the mix, particularly where proceeds are mixed with legitimate money. This provision should be in a form similar to section 306 of the PCA 2002.

2. Thailand


The Penal Code authorises the court to confiscate property acquired by a person through the commission of an offence. Property is confiscable under this section only if it is directly acquired through an offence. In other words, this section does not enable confiscation of substitute property. This section, therefore, is of no use in money laundering context.

The MSDA provides for conviction-based confiscation in relation to drug-related crimes. Property is confiscable if it is connected with the commission of an offence. In section 3,

Property connected with the commission of an offence is defined as
Money or property derived from the commission of a drug-related offence, and money or property derived from using such money or property to purchase or from taking action in any manner to convert such money or property, notwithstanding number of conversion, in possession of others it is entrusted, or to ownership of others it is transferred, or under the name of others it is registered

The PSMA provides for the non-conviction-based confiscation in relation to predicate crimes. Property is confiscable if it is connected with the commission of an offence. In section 3,

Property connected with the commission of an offence is defined as
1. Money or property derived from the commission of an act constituting a predicate crime, or from aiding and abetting or rendering assistance in the commission of such crime;
2. Money or property derived from the distribution, disposal or transfer in any manner of the money or property in 1; or

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15 Section 33.
3. Fruits of the money or property in 1 or 2.

Notwithstanding on how many occasions the property in 1, 2, or 3 has been distributed, disposed of, transferred, or converted, and in whose possession that property is, to whom it has been transferred, or in whose ownership it is registered.

It is proposed to first examine confiscation in Thailand in light of international standards, particularly the relevant Articles in the Vienna Convention and the concerned FATF Recommendations.

The FATF has suggested that countries enable confiscation of property laundered, proceeds from money laundering or predicate crime. Obviously, this is not concerned with which confiscation systems—property or value type—or confiscation procedures—conviction-based (criminal) or non-conviction-based (civil)—would be used to enable those confiscations. As long as those confiscations are permitted, the Thai confiscation regime would meet the FATF standard.

Property subject to confiscation under the PSMA is property connected with the commission of an offence. This offence is predicate crime and thus, the PSMA authorises confiscation of proceeds from predicate crime. The issue left is whether the PSMA authorises confiscation of property laundered or proceeds from money laundering. In respect of the first, it is important to see that property laundered is proceeds from predicate crime. Since the PSMA permits confiscation of the latter, the former would necessarily be confiscable. Confiscation of proceeds from money laundering is problematic, however. The PSMA subject proceeds from predicate crime only to confiscation; proceeds from money laundering are not confiscable. As a result, fees obtained from carrying out laundering are not subject to confiscation. The confiscation regime under the PSMA, thus, does not meet the FATF demand in this respect. It needs to be revised to allow confiscation of proceeds from money laundering. A

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16 Article 3.
17 Recall that property obtained upon disposal of proceeds of crime is property traceable to those proceeds. Where the disposal of those proceeds constitutes money laundering, it may be considered that traceable property is obtained and therefore proceeds from money laundering. Thus, it is only in this case that proceeds from money laundering are confiscable under the PSMA.
suggestion below that proceeds of any crime be subject to confiscation would enable this.

The Vienna Convention subjects to confiscation

1. property obtained from the transformation or conversion of the proceeds of crime;¹⁸

2. legitimate property with which the proceeds have been intermingled;¹⁹

and

3. income or other benefits derived from those properties.²⁰

The PSMA provides for confiscation of property connected with the commission of an offence the definition of which explicitly includes property in 1 and 3. However, as earlier argued, number of transformations or conversions cannot be more than twice. Further, the above definition does not talk of the intermingled property in 2. Arguably, confiscation of intermingled property to the extent of the proceeds may be problematic. The limitations in this regard may well prove that the PSMA does not meet the Vienna Convention in respect of confiscable property. Improvements is thus necessary. The suggested definition of property connected with the commission of an offence made in the previous section would remove a limit in relation to number of transformations or conversions. As will be suggested below, the implementation of a conviction-based value confiscation and the authorisation of confiscation of the mix to the extent of the proceeds in a non-conviction-based regime would solve the confiscation problem in case of intermingled property.

Now, let us suggest further measures in light of the findings in chapter III to make it more effective in depriving criminals of the proceeds of crime.

1) Conviction-based Regime

The MSDA provides for a conviction-based confiscation scheme in drug-related crimes. There are no good reasons why this should be so. It is a waste of resources and time to institute a confiscation proceeding under the PSMA after a criminal has been convicted in a criminal court. While both a criminal proceeding and a confiscation proceeding under the PSMA may go concurrently,

¹⁸ Article 5(6)(a).
¹⁹ Article 5(6)(b). In this case, property is confiscated only to the assessed value of the mixed proceeds. See id.
²⁰ Article 5(6)(c).
it is still a waste because evidence in both is likely to overlap to a certain extent. A confiscation proceeding should follow in a criminal proceeding, once the defendant is convicted and this should be so in respect of any crime, not simply drug-related crimes. It is therefore suggested that the PSMA should be supplemented with the conviction-based regime. Given that drug proceeds are also confiscable under the PSMA, it would not be necessary to retain the confiscation scheme under the MSDA.

Some aspects of the confiscation scheme under the MSDA should be carried forward to the suggested conviction-based scheme in the PSMA. First, in the MSDA, the prosecution is to meet only the *prima facie* standard of proof in respect of the drug proceeds. Thus, once the defendant is convicted, the prosecution should only need to prove the proceeds of crime on this standard. Second, the MSDA currently provides for a presumption that where there is evidence showing the defendant involves or used to involve in a drug-related offence, those of his money or property beyond his status or capability of engaging in lawful occupation or other activities are presumed to be drug proceeds. It is worth noting that the term “property connected with the commission of an offence” [relating to drugs] includes those previous drug related offences of which the defendant is not convicted. Therefore, the presumption would in effect allow confiscation beyond the convicted drug crime. A provision like this may be expanded in the suggested conviction-based regime in the PSMA to allow also for confiscation of proceeds from other crimes to further effectiveness of confiscation against careered criminals and organised crime.

The use of the *prima facie* standard and the presumption in this regard would provide a response to the difficulty in linking the proceeds to a particular criminal act or to a particular crime. It should be noted that the proceeds subject to forfeiture should include those from crime committed before the effective date of the suggested conviction-based regime, but this must be structured in a way that does not constitute a retrospective penalty in violation of human rights.

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21 Section 29 provides in relevant part that: ..[I]f there is a prima facie case that property is connected with the commission of an offence relating to narcotics, the court shall issue an order forfeiting it.....
22 Section 29(2).
Most importantly, the suggested conviction-based scheme in the PSMA should be in a value-based system. This is in order to effectively address the identification impossibility where only part of substitute property is tainted and this part is unidentifiable. While the suggested definition of property connected with the commission of an offence appears to adopt the concept of property-based system, this is not necessarily an obstacle to the value-based system. It is certainly possible to conceive it as a measure for calculating the extent of the proceeds. However, when it comes to enforce confiscation, a provision may be made to allow confiscation to be enforced against any property of the convicted defendant, howsoever derived.

We have in chapter II rejected the view that the laundering offence should be applicable to the proceeds of any crime; the laundering offence should apply to serious criminalities. However, it is submitted that there should be no limit in case of confiscation; proceeds of any crime should be subject to confiscation. There is no reason whatsoever to allow one to keep profits from wrong. Further, where there is a provision authorising the confiscation of proceeds beyond the convicted crime with the aid of the presumption, the defendant would be able to escape confiscation by proving that the crime for which confiscation is not provided is the source of the proceeds. Where there is no presumption to aid the said provision, the prosecution would have to negate the possibility that the proceeds come from crime for which confiscation is not authorised, an additional burden to the already difficult burden to prove the proceeds of crime. A second paragraph should thus be added to the suggested definition of property connected with the commission of an offence which may read:

*For the purpose criminal confiscation, the term “predicate crime” shall include any crime, whenever committed.*

2) Non-conviction-based Regime

To address the difficulty in linking the proceeds to a specific criminal act or a particular crime and the identification difficulty caused by mixing, the PSMA should be supplemented with a provision which may read:

*For the purpose of the vesting property in the state under this Act, it shall not be necessary to show that the proceeds are derived from crime committed in a particular occasion or a particular type of crime; it is enough if it is shown that they are criminally derived.*

242
Where the proceeds are mixed with other property, the court shall order the vesting in the state of the portion of the mixed property which is attributable to the proceeds.

Like the conviction-based regime, proceeds of any crime should be capable of being confiscated. In addition, as a response to the difficulty in linking the proceeds to crime committed in a particular period, the non-conviction-based regime should be made applicable to the proceeds of crime, whenever committed. The PSMA should thus be added with a provision to this effect which may read:

For the purpose of vesting the property in the state, the term “predicate crime” shall include any crime, whenever committed.

III. International Confiscation

1. Emerging Economies

In chapter N, we have examined the issues relating to confiscation of the proceeds of crime located abroad. The first point is that confiscation legislation must be extra-territorial in scope; otherwise there would not be any issues. We have noted that international law does not prohibit states to prescribe rules with extraterritorial effects; however, they cannot enforce them beyond their territory. This is also applicable to confiscation. Therefore, states can make a confiscation order against the proceeds of crime located abroad, but cannot enforce it in the territory of other states.

Once the proceeds located abroad are subject to confiscation, the process for confiscating them begins. Typically, this involves three steps: investigation, preservation, and confiscation each of which may be achieved by unilateral actions or cooperation. The investigation generally involves attempt to locate the whereabouts of property. The preservation relates to the taking of measures, known as provisional measures, to prevent the dissipation of the proceeds. The confiscation stage involves enforcing confiscation against those proceeds.

So far as concern unilateral actions, we have shown that both UK and US courts, relying on jurisdiction over the person, have power to issue a disclosure order to discover the proceeds, a restraint order to preserve them, and a repatriation order to bring them into the jurisdiction for enforcing confiscation. These orders, in particular those of the UK courts, may be made against the defendant and a third party, especially a bank which has information relating
money laundering and holds property subject to confiscation. Making these orders extraterritorially effective against the defendant is not contrary to international law, since he is present within the jurisdiction and the court has prescriptive jurisdiction over him. Thus, although these measures are not really effective, since the defendant would be unlikely to cooperate, they can do no harm.\textsuperscript{24} It may be useful where the defendant cooperates.

With respect to a third party, particularly a bank, a typical scenario is that a bank or a branch of a foreign bank would be locally served with the orders demanding compliance outside the territory of the state whose court has made the orders. We have suggested that these orders are contrary to international law, since the state does not have enforcement jurisdiction over the matter demanded and it does not have prescriptive jurisdiction over the bank. In addition, the bank would be put into a difficult position either to comply with the orders and violate the law of the state of its location, such as banking secrecy law, or to fail to comply with the orders and suffer the penalty of contempt in the state whose court has made the orders. Further, the bank may even be potentially doubly liable in case of the repatriation order, since transferring money pursuant to the order does not discharge its obligation to return money to the defendant who is the account holder. Thus, we have suggested that while states can allow the orders above to have extraterritorial effects in respect of the defendant, they should avoid doing so with respect to third parties. For those orders to be effective against them, mutual legal assistance from the state of their location is necessary.

We have examined mutual legal assistance for confiscation purposes under the Vienna Convention and the Money Laundering Convention. While both aim to facilitate as much as possible the mutual legal assistance in this regard, they recognise a need for flexibility. Thus, they provide grounds for refusal of assistance a number of which relate to the differences in laws between the requesting and requested states. While these grounds are optional, we have suggested that in some cases, they become mandatory and the requested state cannot provide assistance even if it wishes to do so. To fight against money

\textsuperscript{24} Of course, with respect to the disclosure order, it is necessary that the information obtained must not be permitted to be used against the defendant, since this would violate the privilege against self-incrimination.
laundering which is typically transnational, we have suggested that ways to address the problems in this regard.

The Money Laundering Convention allows a refusal of assistance where investigative and provisional measures sought do not exist or could not be taken under the law of the requested state, had it been a similar domestic case. While treated as optional, we have suggested that it is mandatory. In view of alternative measures in the requested state, we have suggested that the request for assistance should refer only to assistance sought. This would enable the requested state to take whatever measures available under its law to fulfil the request. We have further suggested that in this way, the requested state can provide assistance, irrespective of whether the measures used to fulfil the request or others measures having similar effects do not exist or would not be permitted under the law of the requesting state. Thus, investigative and provisional measures assistance would always be rendered despite differences in laws in this respect between the requesting and requested states.

The lack of double criminality is another optional refusal ground. We have suggested in chapter IV that providing investigative and provisional measures assistance in the absence of double criminality is not a violation of the legality principle, since the requested state does not punish the person concerned by giving assistance. Thus, we have suggested the abolition of the condition of double criminality to facilitate investigative and provisional measures assistance.

The provision of confiscation assistance could raise the legality problem since confiscation is punitive, notwithstanding the non-conviction-based regime. The legality principle mandates that punishments not be imposed on a person for an act which is not a crime when committed and punishments for it cannot be other than those provided for in the law.

We have suggested that where the legality principle is judged under the law of the requested state, the provision of confiscation assistance would be in violation of the legality principle where the offence concerned is not a crime in the requested state. It is also a violation of the legality principle to provide confiscation assistance where the law of the requested state does not provide for confiscation in case of the offence concerned or where confiscation is not possible because of the remote relationship between the property and the offence concerned or of the lapse of time. The difference between conviction-based and
non-conviction-based confiscation also poses a similar problem. Where the requested state operates the conviction-based confiscation, confiscation assistance would amount to it punishing the person not found guilty of any crime. Indeed, it is similarly problematic even with regard to the difference between property and value confiscation systems, because, in the requested state, confiscation of lawful property is not provided as punishment. We have suggested that the provision of confiscation assistance in these circumstances is not legally possible notwithstanding their being optional refusal grounds under the Money Laundering Convention. We have further suggested that the legality problem with respect to the confiscation assistance in the above cases has a negative effect on the rendering of provisional measures assistance. As provisional measures are measures which would preserve property for confiscation, where confiscation assistance is not legally possible, it would be futile to give provisional measures assistance.

However, where the legality principle is judged by referring to the law of the requesting state, it would be no problem to provide confiscation assistance and provisional measures assistance in the above cases as long as confiscation is properly imposed in the requesting state.

The Vienna Convention and the Money Laundering Convention allow the requested state to either directly enforce a confiscation order issued in the requesting state, or initiate a proceeding to obtain a domestic confiscation order. In the former method, the confiscation order issued in the requesting state is enforced in the requested state. But, in the latter, it is a confiscation order which is to be issued in the requested state that would be enforced. We have suggested that, in the former method, the legality principle should be judged by referring to the law of the requesting state, while the legality principle in the case of the latter method should be considered by referring to the law of the requested state. Thus, only when the requested state directly enforces a confiscation order issued in the requesting state can the above circumstances be truly optional grounds for refusal or be completely abolished as grounds for refusal. To facilitate as much as possible mutual legal assistance, we have therefore suggested that states should directly enforce a foreign confiscation order, rather than initiating a proceeding to obtain a domestic confiscation order.

2. Thailand
The law relating to mutual legal assistance in Thailand is the Mutual Assistance in Criminal Matters Act (MACA) 1992. 

Section 9 provides:

The provision of assistance to a foreign state shall be subject to the following conditions:

(2) The act which is the basis of a request must be an offence under Thai laws unless Thailand and the Requesting state has a MLAT which provides otherwise....

(3) A request may be refused if it affects national sovereignty, security, or other crucial public interest of Thailand....

Section 32 provides:

Upon receipt of a request from a foreign state to confiscate property located in Thailand, the Competent Authority shall apply to the Court for an order confiscating or seizing the property.

In the first paragraph, if necessary, the Competent Authority may conduct investigation himself or authorise any inquiry official to conduct investigation on his behalf.

Section 33 provides:

The property specified in a request from a foreign state may be confiscated by the judgment of the Court if there is a final confiscation judgment of a foreign Court and it is confiscable under Thai laws.

Where the foreign Court has made a pre-judgment order seizing the property or made a confiscation order against it but the order is not yet final, the Court, if it thinks fit, may order seizing it if it seizable under Thai laws.25

We first explore some aspects of mutual legal assistance in Thailand in light of the relevant Articles of the Vienna Convention and the concerned FATF Recommendations.

The Vienna Convention and the FATF mandate that mutual legal assistance not be refused on bank secrecy.26 The FATF has also suggested that states should provide, to the greatest extent possible, assistance even in the

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25 Note that the term seizure includes attachment. There is a case law, although in the context of criminal procedure in which the Supreme Court held that the term "seizure" in provisions in the Criminal Procedural Code also includes attachment.

26 Article 7(5) and Recommendation No. 36.
absence of double criminality. In relation to the first, the MACA does explicitly provide for a refusal of assistance on ground of bank secrecy. In addition, even in domestic context, bank secrecy does not stand in the way of criminal investigations. There is no reason why it should be different in the context of providing legal assistance to a foreign state. The condition of double criminality, however, is explicitly required for rendering legal assistance unless otherwise provided for in the MLAT between Thailand and the requesting state. This mandatory requirement does not meet the international standard in this regard. The FATF has only suggested this. The absence of double criminality as a ground for refusal in the Vienna Convention does not mean that it mandates assistance even when this condition is not met. In most cases, double criminality would be fulfilled since Parties are to criminalise activities described in Article 3. In addition, subsequent conventions also allow a refusal of assistance on the lack of double criminality. Thus, the condition of providing mutual assistance on double criminality in the MACA is not incompatible with the international standards.

We turn now to examine and make further suggestions in light of the findings in chapter IV to improve mutual legal assistance for confiscation purposes in Thailand. First, we suggest the addition of the words like "wherever situated" or "irrespective of its location" in the definition of the term "property connected with the commission of an offence" to ensure extraterritorial scope of confiscation. Further, the PSMA should authorise a court to make a disclosure order, an attachment order, and a repatriation order, against the defendant with extraterritorial effects. While the court should be able to make those orders

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27 Recommendation No. 37.
28 Article 18(9) of the UN Convention against Transnational Organised Crime 2000 and Article 46(9)(b) of the UN Convention against Corruption 2003.
29 While the attachment doctrinally operates in rem, i.e., against a thing and thus is different from the restraint order which operates in personam, i.e., against a person, there are two French cases where the freezing of a bank account which is a form of attachment were made even in relation to property located abroad. But, of course, whether the order is enforceable outside France is another matter. It is not without precedent to give extraterritorial effects to the attachment. See Lawrence Collins, Provisonal and Protective Measures in International Litigation, in Essays in International Litigation and the Conflict of Laws 81-82 (1994). See also Campbell McLachlan, Extraterritorial Orders Affecting Bank Deposits, in Extraterritorial Jurisdiction in Theory and Practice 40 (Dr. Karl M. Meessen ed. 1996). Both have cited De Cavel v. De Cavel (No. 1) 1979 E.C.R. 1055 and Denilauler v. Couchet Freres 1980 E.C.R. 1553.
against a third party, it should not be extraterritorially effective unless they are so made by a foreign court.

For investigative assistance, it would be executed in accordance with the provisions in the Criminal Procedure Code. Thus, Thailand cannot employ investigative other than those provided under this Code. For this purpose, the request for investigative assistance should note only what assistance is requested, not what particular measures is sought. In this way, Thailand would be able to take whatever investigative measures available under this Code to provide assistance, irrespective of whether those measures would be permitted under the law of the requesting state.

It should be noted that the MACA does not condition assistance on investigative measures being permitted under the law of the requesting state. Thailand can provide investigative assistance even if the measures sought or any other measures having similar effects would not be permitted in the requesting state.

In the preservation stage, the MACA explicitly conditions the rendering of provisional measures assistance by seizeing property on two requirements: the foreign Court must have already made a pre-judgment seizing order and the property must be capable of being seized under Thai laws. Thus, for the first condition, Thailand is unable to seize or attach property where the seizure or attachment does not exist or they would not be permitted under the law of the requesting state. This condition in effect mandates the refusal of provisional measures assistance on the grounds which, under the Money Laundering Convention, are only optional. This condition under the MACA is even more demanding. The property must have already been seized or attached by the foreign Court; it is not sufficient that seizure or attachment of property is possible under the laws of the requesting state. To most facilitate mutual legal assistance, this condition should be abolished.

The second condition, of course, must be retained. It is legally impossible for the requested state, in response to a request, to take provisional measures which could not be taken under its law. To enable Thailand to assist, the request for assistance should note only what assistance is requested, i.e., the preservation of property, not what particular measures is sought. Thus, Thailand would be able to take whatever provisional measures available under its law to fulfil the
request. With the abolition of the first condition above, mutual legal assistance for the preservation of property would be most facilitated.

It should be finally reminded that the provision of assistance in investigation and provisional measures is conditional upon the condition of double criminality. For the reason earlier noted, this condition should be abolished or at least be made an optional ground for refusal.

At the confiscation stage, there are three conditions for Thailand to render confiscation assistance: the double criminality, the finality of a foreign confiscation judgment, and the confiscability under Thai laws of the property concerned.

The finality of the confiscation judgment is clearly a necessary condition. This is in accord with the general practice of most states and is therefore in no way to be changed. The confiscability requirement under Thai laws, in effects, incorporates and makes mandatory a number of optional refusal grounds in the Money Laundering Convention. Specifically, this condition makes it impossible for Thailand to provide assistance where, under Thai laws, confiscation is not provided for in the offence concerned, confiscation cannot be imposed because of the remote relation between property and the offence, or confiscation cannot be imposed or enforced because of the lapse of time. In addition, since Thai confiscation system is only property-based, property against which confiscation is enforceable must be tainted. Where a request comes from a state whose confiscation is value-based and assistance is sought in respect of legitimate property, Thailand would be unable to render assistance, since legitimate property is not confiscable under Thai laws.

We have earlier suggested that confiscation assistance should not be refused on the double criminality and the confiscability requirements under the law of the requested state in order to facilitate mutual legal assistance. However, the abolition of this requirement can only be legally made where the requested state directly enforces a confiscation order issued in the requesting state, instead of initiating a proceeding to obtain a domestic confiscation order. It is therefore necessary to examine which of the two is the current Thai approach.

The MACA authorises the Court to order the confiscation of property as requested. The mutatis mutandis application of confiscation provisions in the
Penal Code\textsuperscript{30} which are of a substantive character would seem to indicate that the approach to confiscation assistance is the initiation of a proceeding to obtain a Thai confiscation order. This would appear to be confirmed by the requirement that property must be confiscable under Thai laws. If this is the case, then, it follows that the legality principle demands that the double criminality and confiscability requirements cannot be legally waived or even be made optional. On the other hand, the approach of the MACA may be the direct enforcement of a confiscation order issued in the requesting state, but those requirements are only conditions for giving confiscation assistance. If this is the case, then, both requirements may be made optional or even completely abolished.

In view of the uncertainty in this respect, it is suggested that the MACA should be explicitly amended with a provision allowing a confiscation order issued in the requesting state to be directly enforced in the Thailand and the double criminality and confiscability requirements be completely abolished or at least be turned into optional refusal grounds.

\textbf{IV. Concluding Remarks}

In this chapter, we have noted a number of suggestions drawn on the previous chapters to emerging economies with a view to making enforcement of the repressive measures against money laundering effective. The repressive measures against money laundering in Thailand have been used as a case for study. The examination has revealed that some aspects of the Thai repressive measures are flawed and do not meet international standards. As a result, many suggestions have been made to improve them.

\textsuperscript{30} Section 34.
Conclusion

This thesis is about the control of money laundering in emerging economies using Thailand as a case study. It has focused on criminal aspects of anti-money laundering measures: the laundering offence and confiscation, both domestically and internationally. The principal purpose of this thesis is to examine problems in relation to the enforcement of these measures and suggest ways to address these problems in order to make the measures more effective against money laundering. We have used as reference points the UK and US laws as well as the international instruments, particularly the UN Convention Against Illicit Traffic Narcotic Drugs and Psychotropic Substances 1988 and the Convention on Laundering, Seizure, and Confiscation of Proceeds from Crime 1990.

Money laundering is an activity the purpose of which is to conceal or disguise the proceeds of crime and make them appear as having come from a legitimate source. In both the laundering offence and confiscation, it must be proved that the property concerned is the proceeds of crime or is of a criminal origin. Proceeds of crime often originate in the form of money. It is true, of course, that what is to be proved as having a criminal origin for the purpose of the laundering offence and confiscation may not be money but may be any kind of property. However, in most cases of the latter scenarios, the property would be proceeds of crime or is of a criminal origin only if it is shown to have been acquired with the original criminal money. This means that the fact that money is the proceeds of crime has to be established even in such cases.

Money is fungible. It has no specific identity or particulars which may be used to distinguish one from another. Money, whether criminal or legitimate, is the same. Criminal money does not stink. It is practically impossible to establish its criminal origin by relying on its particulars as is possible in case of goods. Direct proof is unlikely to be available. There are others factors which pose further difficulty in proving that money is the proceeds of crime. Many proceeds-generating crimes, particularly ones with high returns, are victimless, as in the case of drug trafficking, for example. There are no victims who can provide useful information as to the criminal origin of money in the possession of targeted individuals. Further, there would almost always be an attempt to conceal...
or disguise the criminal origin of money, whether this is sophisticated or simple. Moreover, many criminals are not one-time offenders; career criminals and criminal organisations engage in a number of criminal activities each of which may be committed on a number of occasions. Proceeds from those crimes are often mixed. Once mixed, the proceeds from each specific occasion or each criminal activity in the mix are indistinguishable due to each having no specific identity. Proceeds of crime are not only mixed with other criminal proceeds; they are also frequently mixed with legitimate money. Again, it is impossible to identify which part of the mix are proceeds. We have addressed four cases of mixing: a mix of proceeds and legitimate money, a mix of proceeds from different crimes, a mix of proceeds from many occasions of crime, and a mix of proceeds from crime committed before effective date of the laundering offence or confiscation and those from crime committed thereafter. It is impossible to identify in some circumstances in each of the above cases which part of the mix is the proceeds of crime, the proceeds of a specified crime, the proceeds of a specified occasion of crime, and the proceeds of crime committed in a specified period respectively.

Further, where part of the mix is taken as, for example, when a withdrawal is made from a mixed account, it would be impossible to prove in each case that the withdrawal contains the proceeds of crimes specified in the laundering charge in case the withdrawn amount is less than the legitimate money, the proceeds from other crimes, the proceeds from other occasions of crime, the proceeds from crime committed in other period. The laundering offence grounded upon the withdrawal would fail as a result. The “tainted money-in, first-out” and the “tainted money-in, last-out” rules, while they may be applied or adjusted to address the evidential difficulty in this respect in most circumstances, are not a complete response. The account may contain no traceable proceeds if the balance in the account goes to nil after the last criminal deposit and before the making of the withdrawal under the lowest intermediate balance rule.

It is clear that both the laundering offence and confiscation should be structured and applied in a way that would properly address the evidentiary problems in respect of the proceeds of crime in order to be effective. A number of principal suggestions, therefore, have been made for this purpose.
1. The Laundering Offence

1) Circumstantial evidence should be extensively admitted to prove the criminal origin of the proceeds. This is to compensate for the likely lack of direct evidence due to the fungibility and lack of specific identity of money as well as the absence of the victims.

2) The crime which is the source of the proceeds need not be proved with specificity, i.e., a specific criminal act. Nor should the crime which is the source of the proceeds be limited to that which is committed only after the effective date of the laundering offence, i.e., the laundering offence should be made applicable to proceeds of crime, whenever committed. This is a response to the impossibility in linking the proceeds to a specific criminal act and in linking the proceeds to crime committed in a given period.

3) A withdrawal from a mixed account should always be considered to contain the proceeds of crime and thus constitute money laundering without the need to trace the withdrawn amount back to the criminal part in the account. This is to address circumstances where it would be impossible to trace the withdrawn money back to the proceeds of crime or the proceeds of specified crime contained in the account. Otherwise, the “tainted money-in, first-out” rule should be applied or adjusted with the effect of the withdrawn amount containing the proceeds of crime or the proceeds of specified crime; thereby making the withdrawal money laundering. This, of course, is subject to the lowest intermediate balance rule.

2. Confiscation

1) Conviction-based Regime

(1) A civil evidentiary standard should be used in determining the criminal origin of the proceeds for the purpose of confiscation.

(2) A rebuttable presumption of property being the proceeds of crime should be enacted. It may be a US type presumption which only presumes that the proceeds are derived from the convicted crime, not others, or a UK type presumption which presumes that the proceeds are criminally derived, not necessarily derived from the convicted crime only. Where the latter is the case, the legislation should explicitly provide for the authorisation of the proceeds beyond the crime of conviction.
It should be noted that both (1) and (2) are not incompatible with the rights to fair trial and to have the prosecution to prove its case beyond a reasonable doubt.

(3) The confiscation system should be value-based.

Property confiscation which is in principle enforceable against criminal or tainted property only is problematic in above four cases of mixing where only part of the mix is tainted with the crime, the specified crime, a specified occasion of the crime, the crime committed in a particular period. This is because which part of the mix is so tainted cannot be identified. Adjustments in the property confiscation system to cope with the impossibility in this regard have been examined but they are inconsistent with the nature of this type of confiscation and unnecessarily burdensome as compared with value confiscation. A value confiscation order is enforceable against any property of the convicted defendant, howsoever derived. Identifying the tainted part is not necessary.

2) Non-conviction-based Regime

(1) It should not be necessary to link the proceeds to a specific criminal act or to a particular type of crime. As long as the government proves that the proceeds are criminally derived, although which specific act or which crime has produced the proceeds is not shown, confiscation should be authorised. These two measures are similar in effect to the rebuttable presumptions as to the criminal origin of the proceeds in the conviction-based regime. Of course, this is unlike the case of the presumption where the defendant is to prove the legitimate origin of the property.

(2) Proceeds of crime committed before the effective date of the regime should also be made subject to confiscation. This is not a violation of the prohibition against retrospective penalty, since this type of confiscation is classified under domestic law as civil.

(3) A provision should be enacted which authorises the enforcement of confiscation to the extent of the proceeds against the mix. This is to respond to the impossibility caused by mixing in the above four cases in identifying the part tainted with the crime, the specified crime, a specified occasion of the crime, the crime committed in a particular period. Of course, with (1) and (2), this suggestion would be mostly used in case the proceeds are mixed with legitimate money.
3. International confiscation

Money laundering is typically a crime of international dimension. Its control will not be successful if measures against it are national in scope. For this reason, a number of international instruments concerned with money laundering provide for a system of mutual legal assistance to address the international scope of money laundering. One of the most important international controls of money laundering examined in this thesis is the confiscation of the proceeds of crime located abroad.

As a first step, the legislation must make it clear that the proceeds of crime, even if it is located abroad, are also subject to confiscation. The court must be authorised to make extraterritorial confiscation orders. Once this is clear, we have shown that both unilateral action and cooperation through mutual legal assistance may be used to achieve the confiscation of the proceeds located abroad. Unilateral actions involve the making of a disclosure order, a restraint order, and a repatriation order, with extraterritorial effects. Making them extraterritorially effective against the defendant is not contrary to international law, since he is present within the jurisdiction and the court has a prescriptive jurisdiction with respect to him. Although they are unlikely to be effective, since cooperation from the defendant is improbable, there is no harm for doing so. However, making those orders extraterritorially effective against third parties is in violation of international law. We have thus suggested that the unilateral actions should be avoided in so far as third parties are concerned.

With regard to mutual legal assistance, we have shown that most states have legislation providing for the laundering offence, confiscation and related investigative and provisional measures. Nevertheless, differences in approaches, conditions, and limitations in regard to these measures exist in their respective legislation. The Money Laundering Convention recognises the differences in this regard as optional grounds for refusal of assistance. However, there may be cases where assistance has to be refused on these differences despite their optional nature.

With respect to assistance in investigation and preservation, where the request specifically identifies the measures sought but the law of the requested state does not provide for them, assistance would certainly be refused, as it would be legally impossible for the requested state to carry out those measures.
In the confiscation stage, because confiscation is punitive, irrespective of the existence of non-conviction-based regime, the provision of confiscation assistance must not be in violation of the legality principle in the requested state. We have shown that where the requested state initiates a proceeding to obtain a domestic confiscation order to provide confiscation assistance, the legality principle must be judged by referring to the law of the requested state, but the legality principle would be considered under the law of the requesting state where the requested state directly enforces a confiscation order issued in the requesting state.

The legality principle mandates that punishment not be imposed for an act which is not a crime at the time of commission and any other punishments beyond those provided for it cannot be inflicted. Where the legality principle is considered under the law of the requested state, i.e., it provides confiscation assistance by initiating a proceeding to obtain a domestic confiscation order, many optional grounds for refusal of confiscation assistance under the Money Laundering Convention cannot be optional. These include the absence of double criminality, the absence of confiscation for the crime to which the request relates, the limitation of confiscation due to the remote relationship between the proceeds and the crime, the expiration of time for confiscation. In addition, where the confiscation system in the requested state is conviction-based, it cannot legally initiate a proceeding to obtain a domestic confiscation order where a non-conviction-based confiscation is a basis of the request. Nor is it legally possible for the requested state whose confiscation system is property-based to do the same where confiscation assistance is sought in relation to legitimate property.

In order to facilitate mutual legal assistance for confiscation purposes which in turn furthers effectiveness in the international control of money laundering, the following suggestions have been made.

1) Proceeds of crime located abroad should be explicitly made subject to confiscation.

2) The court should be authorised to make the orders with extraterritorial effects requiring the defendant to disclose the extent and whereabouts of his proceeds, requiring him to refrain from dissipating his property subject to confiscation, and requiring him to bring back his property to the jurisdiction for
enforcing confiscation. However, these orders should never be effective against a third party.

3) For investigative and provisional measures assistance, states should not specifically request particular measures, but should focus on the assistance sought. This would enable the requested state to employ whatever measures available under its law to fulfil the request. With respect to the provision of confiscation assistance, states should directly enforce a confiscation order issued in the requesting state which would avoid the problems with respect to the legality principle caused by the differences in laws on money laundering between the requesting and requested states in the above circumstances.

In light of international standards as to the laundering offence, confiscation, and international confiscation as well as the findings in relation thereto, the Thai regime in this regard has been examined and suggestions for improving it have been made.
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