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‘Rethinking Money Laundering Offences: A Global Comparative
Analysis’

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ABSTRACT

Since the late 1980s, efforts made by the international community to deal with the complex and global problem of money laundering have stimulated the creation and definition of the so-called 'international crime of money laundering', which is included in various United Nations and Council of Europe international treaties, as well as European Union Directives. The central purpose of this research is to investigate if the main goal of effectiveness in the adaptation of the international crime of money laundering at the domestic level, might undermine other values that international law is seeking to protect, namely the guarantee of due process and the adequate protection of human rights principles. Then, if the adoption of any element of the crime shows to be inconsistent with civil rights and guarantees, to propose how deficiencies could be remedied. To do this, the study is divided as follows: first, I put the international crime of money laundering in context by analyzing the main extra-legal and legal aspects concerning money laundering (Part I); then, I provide a global comparative perspective to determine whether or not the adoption of money laundering offences is consistent with sound principles of criminal law and criminal procedure (Part II); and finally, I examine the jurisdictional problems with respect to money laundering offences (Part III). By studying money laundering offences from a global-comparative angle, the research reveals that the international crime of money laundering is a widely drafted offence so it generates an unjustified inflation of criminal law and, moreover, it offers many moving parts that can spread across many jurisdictions. In order to remedy these deficiencies and inconsistencies, this work is proposing the adoption of a new, more detailed and less ambiguous definition of this international criminal offence, which is in line with human rights principles.

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I have conducted this thesis with an open mind and without a preconceived conclusion. Indeed, over the last years I have changed my position more than once. It was only towards the end of the writing process that I formed my conclusions and felt, at last, that I had found the answers to my research questions. During the research process, the more I tried to find an answer to my questions, the more convinced I am that the implementation of a consistent, more detailed and less ambiguous definition of the crime of money laundering at both the international and domestic levels, could lead us to more effectively count money laundering worldwide. However, this maximum goal of effectiveness in the adoption of the criminal rule, can never subordinate the respect and promotion of human rights principles and values, such as the principle of legality, the privilege against self-incrimination, the presumption of innocence (as applied to reverse burdens of proof) and the right not to be placed in double jeopardy. These fundamental procedural and judicial guarantees have matured as general principles of law, or generally accepted custom and have found their way into the Statutes of all contemporary international criminal tribunals.

We should move, then, beyond the relative and the universal to build a common legal definition of this crime by progressive adjustments that preserve diversity and accept pluralism. In other words, the punitive approach against money laundering must be called upon to invent a flexible process of harmonization and integration that leaves room for a general consensus in how to deal with the complex and hidden problem of ML, which is neither national nor regional, but transnational or supranational.

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LIST OF ABBREVIATIONS

AML	Anti-Money Laundering
AML/CFT	Anti-Money Laundering/Countering Financing of Terrorism
APG	Asia/Pacific Group on Money Laundering
AR\$	Argentine Pesos
BCBS	Basel Committee on Banking Supervision
CFATF	Caribbean Financial Action Task Force
<i>CLJ</i>	<i>Cambridge Law Journal</i>
Ch.	Chapter
CTF	Countering Terrorism Financing
<i>CUP</i>	<i>Cambridge University Press</i>
DEA	Drug Enforcement Agency
EC	European Community
ECJ	European Court of Justice
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EU	European Union
FATF	Financial Action Task Force on Money Laundering, Group d'action Financiere sur le blanchiment de capital (GAFI)
FIU	Financial Intelligence Unit
FT	Financing of Terrorism
GAFI	Grupo de Acción Financiera / Group d'action Financiere sur le blanchiment de capital
GAFISUD	Financial Action Task Force on Money Laundering in South America
<i>HLR</i>	<i>Harvard Law Review</i>
IAIS	International Association of Insurance Supervision
ICC	International Criminal Court
ICC RPE	Rules of Procedure and Evidence of the ICC
ICL	International Criminal Law
<i>ICLR</i>	<i>International Criminal Law Review</i>
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda.
IMF	International Monetary Fund

IOSCO	International Organization of Securities Commission
IVTSs	Informal Value Transfer Systems
<i>JICJ</i>	<i>Journal of International Criminal Justice</i>
KYC	Know Your Customer
<i>LL</i>	<i>Revista La Ley, Buenos Aires</i> (Thomson Reuters)
MD	Money Dirtying
ML	Money Laundering
MONEYVAL	Council of Europe, the Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures
NCCT	Non-Cooperative Countries and Territories
NGO	Non-governmental organizations
OECD	Organization for Economic Cooperation and Development
OTP	Office of the Prosecutor
<i>OUP</i>	<i>Oxford University Press</i>
SAR	Suspicious Activity Report
SCSL	Special Court for Sierra Leona
S.	Section
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNSCRs	United Nations Security Council Resolutions
UK	United Kingdom
US	United States
USC	United States Code
USD	United States Dollars
v.	<i>versus</i>
Vol.	Volume
WB	World Bank

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Venezuela

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*A new idea comes suddenly and in a rather intuitive way.
But intuition is nothing but the outcome of earlier intellectual experience.¹*

INTRODUCTION

Since the late 1980s, efforts made by the international community to deal with the problem of money laundering worldwide have stimulated the creation of an international legal order composed of laws, norms, rules, criminal offences, regulations and procedures agreed upon to regulate this issue-area. More precisely, this international legal order against ML is founded upon civil-administrative law and banking regulations (the so-called preventive/regulatory AML regime)² and criminal law (the international crime of ML).³

This international legal order against ML was influenced by the evolution of a norm-making process mainly composed of the United Nations (UN), the Council of Europe and the Organization of American States (OAS) International Treaties or Conventions and European Union Directives (hard law instruments), as well as a set of international Recommendations (soft law instruments). For the purpose of this dissertation, the term ‘hard law’ refers to international treaties or conventions that have the effect of law in a country once that country has signed, ratified and implemented the convention, depending upon the country’s constitution and legal structure. It should be

¹ Einstein to Dr. H.L. Gordon, 3 May 1949, AEA 58-217. Cited in Walter Issacson, *Einstein, his life and universe* (Simon & Schuster, London 2006) 113.

² After the 9/11 attacks, the preventive/regulatory approach against ML (that is, the preventive/regulatory ‘AML system’), was called upon to provide a preventive/regulatory apparatus against the Financing of Terrorism, conforming the so-called Anti-Money Laundering/Countering Financing of Terrorism (AML-CFT) system. See below, in chapter II, section 3, the tremendous evolution of the international legal order against ML in the last three decades.

³ After the 9/11 attacks, the global legal order against ML established the so-called international crime of Financing of Terrorism’. See below, in chapter 2, section 3.1., a definition of the international crime of FT.

stressed that the expression ‘hard law’ also includes European Union Directives that have a special constitutional significance and raise obligation on the member States.⁴ At the same time, the term ‘soft law’ refers to the untidy nature of international legal documents, resolutions and recommendations issued by intergovernmental organizations.⁵

Although I present a general overview and analysis of the preventive/regulatory AML regime, I will focus this dissertation on the study of ML offences that have been put in place on an international and national level. More precisely, the central purpose of this thesis is to evaluate if the main goal of effectiveness in the adaptation of the international crime of ML at the domestic level might have a negative impact in this regard and undermine other values that international law is seeking to protect, namely the guarantee of due process and the adequate protection of human rights principles. Then, if the adoption of any part or element of this international crime has shown to be unsatisfactory to counter ML with effectiveness and/or is inconsistent with sound principles of criminal law and criminal procedure, this work will propose amendments that would be necessary to remedy the identified inconsistencies and deficiencies.

To do this, I will divide the discussion in three parts. In *part I*, I first place the treaty-based crime of ML⁶ in context by describing and analyzing the phenomenon of ML *per se* and clearly showing the interconnection of the international crime of ML and the whole global legal order. This first part will also examine the evolution of ML offences, as drafted in hard law instruments, in the last three decades.

⁴ In certain cases, the term ‘hard law instrument’ also includes the UN Security Council Resolutions issued under Chapter VII of the UN Charter. These UNSCRs also have the authority to bind all the UN member states, regardless of other action on the part of an individual country.

⁵ For further details about the influence of ‘soft law instruments’ in the development of anti-ML measures see, chapter II, section 3.2.

⁶ The terms ‘treaty-based crime of ML’ and ‘international crime of ML’ will be used interchangeably. For a discussion about possible differences between these two terms, see chapter 2, section 6.1.

Subsequently, in *part II*, I will try to determine whether or not the implementation of the international crime of ML at the domestic level is consistent with the guarantee of due process and the adequate protection of human rights principles;⁷ and argue that there is a danger that the main goal of effectiveness in the adaptation of ML offences might create tensions or a possible clash between the promotion of human rights principles and the prosecution of ML criminal offences in domestic proceedings. The application of effective, consistent and dissuasive criminal rules by the competent national legislative body is an essential measure to prevent and combat serious ML offences. However, this objective of adopting ML offences with consistency and effectiveness should be balanced with the need to respect fundamental general principles of criminal law and criminal procedure, such as the principle of legality, the presumption of innocence, the immunity against double jeopardy, the minimalist theory of criminalization, the prosecutorial burden of proof, the right of self-defence, the principle of double criminality, the role of territoriality, among other criminal justice and constitutional law principles. Currently, there is a debate in criminal law theory where concerns have been expressed about the challenges imposed by ML offences to these basic and cherished principles of criminal justice and constitutional law.⁸ Moreover, it should be noted that these human rights principles have matured as general principles of law; they have found their way into the Statutes of all contemporary international criminal tribunals and should also guide domestic criminal proceedings.

⁷ The expression 'human rights' will be used interchangeably with other expressions such as 'fundamental rights' and 'basic' or 'constitutional rights or civil guarantees'.

⁸ For a nice discussion on the principle-based and due process limitations of ML offences see, e.g.: Heba Shams '*Legal Globalization: Money Laundering: Money Laundering and Other cases*' (Sir Joseph Gold Memorial Series, Vol. No. 5, The British Institute of International and Comparative Law, London 2004) 5-11; Stessens '*Money Laundering: A New International Law Enforcement Model*' (CUP, Cambridge 2000). This discussion seems to emerge also in J. Norton and H Shams, 'Money Laundering Law and Terrorist Financing: Post-September 11 Responses-Let Us Step Back and Take a Deep Breath' (2002) 13 *International Law* 103, and Peter Alldridge, '*Money Laundering Law*' (Hart Publishing, Oxford 2003).

Finally, in *Part III*, I will discuss the jurisdictional problems in ML cases. More precisely, in this final part of the thesis I will evaluate the possible tensions between the prosecution of trans-border ML operations at the domestic level and the traditional role of territoriality.

This extensive discussion of ML offences will be undertaken from an international-comparative angle. In an even more democratic world with independent legislative and judicial systems facing even more similar problems, nation's lawmakers and scholars may and should learn from the experience and differences of those of other nations. In fact, lawmakers and scholars across the world make increased use of each other's opinions and comparative analysis.⁹ The use of this international comparative perspective will help us to imagine and draft the new, more detailed and more integrated definition of the international crime of ML that this work, at the end, is proposing to implement.

A good argument always considers and evaluates opposing points of view. Thus, this work also deals with the arguments made by other authors, which are confronted and critically analyzed. The primary and secondary sources of this investigation, which I also analyse critically, include laws, regulations, court decisions, law enforcement agency publications, among other relevant documentary resources. These documentary sources pertain to different jurisdictions, including international, regional and domestic jurisdictions.¹⁰

Let me anticipate the main conclusions of this study. By providing an extensive discussion of ML offences, from a global-comparative angle, I identified two main legal problems in the definition of the international crime of ML: *first*, that the treaty-based

⁹ For an interesting discussion about comparative law methods in a global, changing and new world order see: Peter de Cruz, '*Comparative law in a changing world*' (3rd ed., Routledge, London 2008) chapter 14.

¹⁰ It should be noted that the effective date of completion of this study is 8 December 2011—the date I deposited this thesis at the Examination School of Oxford University.

crime of ML is a broadly drafted offence so it generates an unjustified expansion of criminal law and punishment. This is particularly true when the definition allows the adaptation of a wide scope of predicate offences (see chapter IV) and, moreover, when the definition allows for the penalization of negligent ML operations (see chapter V). It should be noted that there is currently a debate in national criminal law and criminal law theory more generally where concerns have been expressed about the phenomenon of overcriminalization, specifically with regards to ML and FT offences.¹¹

Secondly, the definition of the international crime of ML offers explicit variants concerning the adaptation of key elements of the offence, and it does not define key elements of the crime (or defines them with broad and wide terms). This is specially true when the definition refers to the following three key elements: (i) the scope of the predicate offence;¹² (ii) the degrees of fault or criminal liability (i.e., intent, recklessness and negligent offences);¹³ and, finally, (iii) when the definition allows State Parties to adopt ML offences that do not apply to the person(s) who committed or participated in the commission of the predicate offence of ML.¹⁴ The inclusion of many moving parts and options at the international level is contrary to the evolution in international criminal law,¹⁵ which is towards longer, more detailed and more integrated definitional

¹¹ See, e.g., A. Ashworth, 'Criminal Law, Human Rights and Preventive Justice', in B. McSherry and others (eds.) in *Regulating Deviance: the Redirection of Criminalization and the Future of Criminal Law* (Hart Publishing, Oxford 2009) 87-107. See also, D. Husak *Overcriminalization* (OUP, Oxford 2009).

¹² See chapter IV, section 4.

¹³ See chapter V.

¹⁴ See chapter VI.

¹⁵ In the terminology used here, the term 'international criminal law', is used in a broad sense, meaning a body of international rules designed to proscribe international crimes and to impose upon States the obligation to prosecute and punish at least some of those crimes. For further details about the extension of this term see, A. Cassese *International Criminal Law* (2nd ed., OUP, Oxford 2008) 3-10.

provisions.¹⁶ Longer and less ambiguous definitions of international crimes are important, among other reasons, to understand whatever commitment States may believe they have to prevent and prosecute the ML offence. The more ambiguous and poorer the definition is, the less responsibility States will be prepared to assume.

In order to remedy the above mentioned deficiencies and inconsistencies, this work is proposing the adoption of a new, longer, and more integrated definition of the international crime of ML, which is in line with sound principles of criminal law and criminal procedure. I will conclude in this work that ML is a complex and worldwide problem,¹⁷ so the proposed new definition of the crime has to be necessarily derived and implemented in the sphere of international law—the law that governs relationships between States. This new definition is described in the Conclusion of this work. True integration and harmonization¹⁸ of this international offence can only be achieved by the adoption of a uniform act, elaborated in a new international convention that is signed and ratified by several countries. In this way, they would all commit themselves to provide a more detailed, narrower and consistent definition of ML offences in their internal legislation.¹⁹

Despite its place in international treaties ever since the Vienna Convention in the late 1980s, there have been no legal monographs on the implications of effectiveness

¹⁶ W. Schabas, *An Introduction to the International Criminal Court* (3rd ed., CUP, Cambridge 2009) 84.

¹⁷ See, chapter II, section 5.

¹⁸ With the term ‘harmonization’ in the area of international criminal law, we refer to a wide variety of methods and techniques which attempt to realise, to a variable degree, an approximation of different national legislations in the adoption of international criminal rules. Harmonization, therefore, stands as an original process that aims at integration (normative and/or legal), but without insisting on perfect integration or imposing unification.

¹⁹ For further details about the harmonization and integration process with respect to diversity and pluralism see: Mireille Delmas-Marty, *Ordering Pluralism* (translated by Naomi Norberg) (Hart Publishers, Oxford 2009) 59-76. She asks how we can move beyond the relative and the universal to build order without imposing it, to accept pluralism and accept diversity without giving up on a common and international law.

and the respect to human rights principles in the adaptation of the international crime of ML at the domestic level, for more than a decade. This research attempts to fill this gap in the literature. In 2000, Guy Stessens published a book entitled '*Money Laundering: A New International Law Enforcement Model*' (Cambridge University Press, Cambridge 2000), which analyzed the legal problems that may arise in the adaptation of the international crime of ML at the domestic level. Part of my research was built on his work. However, I disagree with him in several issues, as it will be shown throughout this work.

PART I
THE MAIN EXTRA-LEGAL AND LEGAL ASPECTS CONCERNING MONEY
LAUNDERING

CHAPTER I

The main extra-legal factors

1. Overview.

Before any useful legal discussion or policy recommendations concerning ML offences are derived, it seems critically important to better understand the phenomenon of ML itself. Acknowledgement of the main extra-legal factors of ML is an absolute prerequisite to think critically about a more effective and consistent implementation of the international crime of ML at the domestic level, with a properly balanced respect for fundamental human rights principles and due process guarantees. For reasons which will become clearer as the thesis goes on, it could be said that misunderstanding the meaning and specificities of ML and, for instance, its possible nexus with the Financing of Terrorism (hereinafter FT), seems to be one of the basic philosophical errors of many legal investigations concerning anti-ML norms. A primary aim of this first chapter is, therefore, to achieve a better understanding of the complexities of ML in a more general context, and reflect upon its significance, implications and dangers.

To do this, the discussion is organised as follows: first of all, I will deal with the definition of ML *per se* (Section 2). Later, I will try to explain how ML operates (Section 3). Finally, I will focus on the relationship between ML and FT (Section 4).

2. What is ‘money laundering’?

In accordance with the opinion of several scholars such as Stessens,²⁰ the origin of the term ‘money laundering’ arises from the practices of mafia groups in the 1920s, when laundromats functioned as facades for criminal activities. Mafia groups acquired these launderettes as they gave them a means of giving a legitimate appearance to assets derived from criminal activities. They declared the proceeds of their crime to be profits generated through legal activities, namely these launderettes, and thus ‘recycled’ or ‘laundered’ them.²¹ Given that during the 1920s there were no ML statutes and, in particular, because this explanation about the roots of the term ‘money laundering’ is not supported by empirical evidence showing, in practice, the link between mafia groups and ML during the 1920s, it is likely that these roots are the product of myth making.²²

But, beyond the above discussion, it seems to be clear that the earliest reported use of the term ‘money laundering’ in the legal context was in 1982, in the case *US v. \$4,225,625.39*,²³ and it was not until the late 1980s that ML became a criminal offence.

²⁰ Stessens, *‘Money Laundering: A New International Law Enforcement Model’* (CUP, Cambridge 2000) 82.

²¹ For further details about the roots of the term ‘money laundering’ see, e.g., Heba Shams *‘Legal globalization: Money Laundering Law and Other Cases’* (Sir Joseph Gold Memorials Series, Vol. 5, The British Institute of International and Comparative Law, London 2004) 2-3. See also, J.A. Blum, M. Levi, R. Naylor and P Williams, *‘Financial Havens, Banking Secrecy and Money Laundering’* (Report) (United Nations Office for Drug Control and Crime Prevention, New York 1998) 5-14.

²² I borrowed part of this argument from: Joseth D. Serio, *‘Fueling Global Crime: The Mechanics of Money Laundering’* (2004) *International Review of Law Computer & Technology*, Vol. 18, No. 3, p. 442-443.

²³ Federal Supplement, vol. 551, South District of Florida (1982) 314. Cited, for instance, in Nicholas Ryder, *‘The Financial Services Authority and Money Laundering. A game of Cat and Mouse’* (2008) *Cambridge Law Journal*, Vol. 67, Part 3, p. 636; among others.

In 1986, the US and the UK were the first two countries in the world to criminalize ML.²⁴ I will further refer to the norm-making process of ML offences at both the international and national level in due course.

It is necessary now to analyze the phenomenon of ML itself. Experts in the areas of law and economics, and those who work in political relations and international organizations, differ in their views of the ML phenomenon. Thus, the definition of the term ‘money laundering’ is more ambiguous than one would expect. As a result, a variety of definitions have been suggested. I will provide the following definitions as examples:

The Financial Action Task Force on Money Laundering (FATF)²⁵ defines the word ML as ‘the processing of [...] criminal proceeds to disguise their illegal origin’.²⁶ A similar description is the one suggested by The Joint Money Laundering Steering Group, which understands this activity as the ‘process whereby criminals attempt to hide and disguise the true origin and ownership of the proceeds of their criminal activities’.²⁷ According to the United Nations Office on Drugs and Crime (UNODC) and the International Monetary Fund (IMF), money laundering can be described as ‘the process by which a person conceals or disguises the identity or the origin of illegally

²⁴ For more details about ML offences adopted in the UK and the US in 1986, see below chapter II, section 3.

²⁵ A special intergovernmental body set up by the G-7 Summit in 1989 to combat ML. For further information about the FATF see chapter III, section 2.3, and visit: <<http://www.fatf-gafi.org>> accessed 8 November 2008.

²⁶ FATF, Money Laundering FAQ, What is money laundering? See <<http://www.fatf-gafi.org>> accessed 4 October 2009.

²⁷ Joint Money Laundering Steering Group, *Prevention of Money Laundering / Combating the Financing of Terrorism: Guidance for the UK Financial Sector Part I* (London, 2006).

obtained proceeds so that they appear to have originated from legitimate sources'.²⁸ At the same time, Stessens says that money laundering is a process by which one expects to conceal the criminal origin of assets and 'to ensure that the criminals can "enjoy" their proceeds, by consuming or investing them in the legal economy'.²⁹ Finally, from an economic point of view, the economist Masciandaro explains that 'money laundering is an autonomous criminal economic activity whose essential function lies in the transformation of liquidity of illicit origin, or potential purchasing power, into actual purchasing power usable for consumption, saving, investment or reinvestment'.³⁰

In the following lines, I will compare these definitions with one another:

- a) All the descriptions mentioned above assert that 'money laundering' is a process. I will refer later, in section 3, to the different stages of a ML process. At this time, it is sufficient to say that, according to the UNODC terminology, the process of ML could be divided into three different stages. The first stage is the *concealment or placement*, which involves the disguise and placement of ill-gotten funds into the financial system, usually through a financing institution. The second step is *layering or converting*, which includes moving the funds derived from crime through a series of transactions in order to obscure the money trail. The third and last stage is *integration*, in which the criminal funds are invested or consumed in the formal or legal economy.³¹

²⁸ United Nations, Office for Drug Control and Crime Prevention and International Monetary Fund, 'Model Legislation on Money Laundering and Terrorism Financing (for civil law legal systems)' (Report) (IMF, UNODC, 1 December 2005) 1.

²⁹ Stessens, '*Money Laundering: A New International Law Enforcement Model*' (2000) 83.

³⁰ D. Masciandaro, '*Black Finance: The Economics of Money Laundering*' (Edward Elgar Publishing Ltd., Cheltenham, UK 2007) 2.

³¹ For a description of a 'money laundering cycle' (United Nations Office on Drugs and Crime) (Report, 2006), see online: <www.unodc.org/unodc/money_laundering_cycle.html> accessed 8 January 2009.

- b) A common feature of the description given by the FATF and the Joint Money Laundering Steering Group is the concealment character of the ML process. Both definitions suggest that ML is a concealment process by which a person conceals or disguises the criminal origin of the assets.
- c) The description offered by the UNODC/IMF goes one step further, not only stressing that ML endeavours to conceal the criminal source or origin of the assets, but also emphasising the more active approach of making them appear legal.
- d) At the same time, Stessens goes beyond the above descriptions, claiming that ML is not only a process by which a person intends to conceal the criminal origin of the assets (as stressed by the FATF and the Joint Money Laundering Steering Group), but also one in which that person will 'enjoy' their accumulated ill-gotten assets by consuming or investing them in the legal or formal economy.
- e) Masciandaro finally says that ML is only a process of conversion or transformation by which criminals can invest, consume or save their ill-gotten assets in the legal economy. That is to say, this author is stressing the final aim and stage of a ML process, its transformation and investment in the legal economy; instead of emphasising both the concealment and the recycling/ investing aims of a ML process (as stressed by Stessens).

Inspired on the above definitions of ML, I will try to offer a more detailed description of a ML process. A complete ML operation can be described as a process by which a person conceals or disguises the origin of ill-gotten assets and consumes, invests or saves them in the legal or formal economy so they can look legitimate. Throughout a ML process, ill-gotten assets are usually transferred from one place to the other and criminal revenues are converted or transformed in legally gotten assets, so

they move from the so-called parallel or underground economy³² to the legal or formal economy.³³ As a consequence of this recycling process, a launderer is able: first, to conceal, disguise and enjoy the proceeds of crime by purchasing, for instance, houses, yachts and cars in the legal economy; second, to maintain control of the proceeds of crime in the legal economy;³⁴ third, to invest, for instance, in real estate businesses or in the financial sector by purchasing negotiable instruments (e.g., shares, bonds or bank notes) so they can generate legal profits and save on those investments like any other ordinary and honest person;³⁵ or, finally, to use the already recycled or clean assets for the finance of further criminal activities, such as drug trafficking or other forms of organized crime.³⁶

One may argue, however, that this description of a complete ML process is too long and complex. In general, the best descriptions of a phenomenon are the simplest and shortest ones. Therefore, a complete process of ML could be simply described as the ‘process of making money or any other economic value that comes from a criminal source A, look like money or any other economic value coming from a legitimate source B’.

³² Throughout this dissertation, the terms ‘illegal’, ‘parallel’, ‘informal’ or ‘underground’ economy will be used interchangeably. These terms refer to the economic market consisting of all commerce, cash money or any other asset on which applicable taxes and regulations of trade are being avoided.

³³ For the purpose of this research ‘legal’ or ‘formal’ economy means the opposite to ‘illegal’ and ‘informal’ economy. Thus, these expressions refer to assets that are regulated or declared before the fiscal legal authorities of a country.

³⁴ Angela Veng Mei Leong, *The Disruption of International Organised Crime* (Ashgate, Hampshire, UK 2007) 32.

³⁵ M. Michelle Gallant, *Money Laundering and the Proceeds of Crime* (Edward Elgar Publishers, London 2005) 12.

³⁶ Edward Rees and others, *The Proceeds of Crime Act 2002* (3rd edn., Oxford University Press, Oxford 2008) 127; or Brigitte Unger, ‘Implementing Money Laundering’, in Masciandaro and others (eds.) *Black Finance: The Economics of Money Laundering*, (Edward Elgar, Cheltenham, UK 2007) 105. See also, Angela Veng Mei Leong (2007) 32.

A drug trafficking example of a ML process is the ‘Juarez Cartel’ case study.³⁷ During the 1990’s, the Juarez Cartel was known as one of the biggest drug trafficking criminal groups in Mexico and one of the most important in the world.³⁸ In 1996, the Argentine federal police, in coordination with the FBI, discovered that the Juarez Cartel invested more than USD 16,000,000 in the Argentine economy. The invested money derived from this Cartel’s drug-trafficking activities in Mexico and the US. Argentine’s prosecution demonstrated that during the period between 1994 and 1996, part of these proceeds—estimated to be over USD 2,000,000—were transferred to Argentina by mail and in suitcases containing cash money brought personally by members of the Juarez Cartel, including its leader Amado Carrillo Fuentes (alias ‘*The Lord of the Rings or Skies*’ or, in Spanish, ‘*El Señor de los Anillos*’); meanwhile the rest of the drug-trafficking proceeds— estimated to be over USD 14,000,000—were exchanged through electronic wire-transfer systems, made from the US to bank accounts in Argentina. These bank accounts were opened in financial institutions such as the ‘MA Bank Limited’, the ‘MA Casa de Cambio’ and the ‘Mercado Abierto S.A.’. Once the assets entered Argentina, part of them were converted or recycled through the acquisition of financial instruments, such as shares in an oil company named ‘Petrolera Mar del Plata S.A.’, so they looked legitimate. The rest of the criminals’ assets that entered Argentina were used by Amado Carrillo Fuentes—through the use of front men—to purchase an *estancia* or countryside in the Province of Buenos Aires, rural machinery, apartments in the City of Buenos Aires and cars, among other assets or economic values. The

³⁷ See, in the Appendix I, case study No. 5 entitled ‘Di Tullio, Nicolas A., Carrillo Fuentes, Amado, and others’ (1996-2000).

³⁸ See, for instance, James R. Richards, ‘*Transnational Criminal Organizations, Cybercrime and Money Laundering*’ (CRC Press, Washington DC 1998) 165.

coordinated investigation resulted in seizures and freezing of more than USD 15,000,000 and dozens of arrests.³⁹

Once we have conceptualized the term ML, then, it is possible to describe the way ML operates and analyze its main characteristics.

3. How does money laundering operate?

The purpose of this section is to explain how money laundering works and, at the same time, identify its main features. There is little empirical evidence derived from ML academic studies that shows how ML operates. Moreover, the limited academic literature that explains the way ML works is based on inferences and assertions made in international documents and textbooks, rather than supported by enough empirical evidence.⁴⁰ Since the empirical data is so poor, I will rely on assertions from international documents and textbooks. However, to further support what I write, I produced a cross-case analysis of eleven relevant ML cases, which I will refer to as examples throughout the explanation. These ML cases are included in a comparative chart in *Appendix I* and pertain to the Argentine jurisdiction. I have selected the jurisdiction of Argentina to practice this examination, for two reasons: first, there is a perception that ML is a significant problem that is vastly widespread in this country.

According to Richards, ‘Argentina has been identified as one of the world’s biggest

³⁹ According to Federal High Criminal Courts, City of Buenos Aires, Room 1 (13 February 2002). Law case entitled ‘*Di Tullio, NA*’; published in *JA* (Lexis Nexis Argentina), 2002-II500.

⁴⁰ In this sense see, e.g.: Michael Levi and Peter Reuter, ‘Money Laundering’ (2006) 34 *Crime & Just.* 294: ‘There is very little empirical research either on the phenomenon of money laundering or on the controls that deal with it (...)’; J. D. Serio ‘Fueling Global Crime: The Mechanism of Money Laundering’ (2004) *International Review of Law Computer & Technology*, Vol. 18, No. 3, p. 442-443. See also, Petrus C. van Duyne, ‘Money Laundering Policy: Fears and Facts’, in P. C. van Duyne, Klaus von Lampe, and James L. Newell (eds), *Criminal Finance and Organizing Crime in Europe* (Wolf Legal, Nijmegen, Netherlands 2003).

money laundering countries'.⁴¹ More recently, the FATF's Mutual Evaluation Report of Argentina, underlined that this country 'has not made adequate progress in addressing a number of deficiencies' in their legal framework against ML, so 'the legal and preventive AML/CFT measures that are in place lack effectiveness'.⁴² Secondly, the analysis of ML cases in a developing country such as Argentina makes it easier to explore this subject in other comparable jurisdictions.⁴³ Basic reasoning is roughly the same across other ML cases perpetrated in comparable jurisdictions. I selected these eleven ML cases, since they are the only ones that have substantial and complete court statements in this country.⁴⁴ To date no comparative cross-case analysis appears to have been done in this country. This analysis is an attempt to fill that gap.

The questions and topics addressed in this section are organized as follows: (a) why do criminals choose ML? (b) understanding the stages on a process of ML; (c) the internationalization of ML operations; (d) a 'white collar crime'; and, finally, (e) what is the scale of the problem? Each of these is described, in turn, below.

(a) *Why do criminals choose ML?*

In a process of ML there is always a criminal agent or a group of criminals who, by committing a criminal offence, the so-called 'predicate offence', they generate and accumulate criminal revenues or funds. For the purpose of analysis in this chapter, the

⁴¹ James R. Richards (1998) 266.

⁴² See Third FATF Evaluation on Argentina and Second joint FATF/GAFI-SUD, 'Mutual Evaluation Report on Argentina' (Report) (22 October 2010) 5.

⁴³ Argentina is a member of the G-20, an international forum composed of 20 developing and emerging market countries. For more information see the following website: <http://www.g20.org/G20/> accessed 5 January 2009. In addition, Argentina is one of the thirty-four member countries of the FATF; see online: www.fatf-gafi.org last accessed 10 January 2011.

⁴⁴ Substantial and complete court statements of the cases described in the chart were found online through 'Lexis Nexis Argentina' academic gateways/hubs.

term ‘predicate offence’ refers to any criminal offence as a result of which profits, economic values or properties were acquired or generated; and the expressions ‘dirty’, ‘ill-gotten’ or criminal profits, properties, assets or money or simply ‘proceeds of crime’ will refer to any economic benefit, financial or otherwise, tangible or intangible, derived from, or traceable to, a criminal offence.⁴⁵ Criminal assets can be derived from the commission of several predicate offences such as extortion, corporate fraud, cross-border prostitution, financing of terrorism,⁴⁶ smuggling of illegal migrants, kidnapping, drugs, human and arms trafficking and corruption, among other crimes committed for the purpose of asset collection. These are the so-called ‘acquisitive crimes’.

These predicate offences can be performed by one single criminal agent or by a group of two, three or more criminals. However, if predicate offences are complex criminal activities that require highly technical knowledge and generate substantial amounts of ill-gotten assets, then, the participation of ‘organised crime’⁴⁷ throughout the commission of acquisitive (predicate) crimes could be more frequent. In this context, it could be assumed that one, two or three criminals not organized in an ‘organized crime’ could neither easily nor effectively perpetrate serious and complex crimes and deal with the high amount of criminally acquired revenue. It is outside the scope of this dissertation to enumerate all the definitions for organised crime. For the purpose of this research, we define ‘organised crime’ as follows: (i) a collaboration of three or more people, (ii) for a prolonged or undefined period of time, (iii) suspected or

⁴⁵ Despite the fact that differences in the meaning of these terms may be more than mere semantics, in this dissertation they will be used interchangeably. For further details about differences between ‘proceeds’ or ‘profits of crime’ see, for instance: M. Michelle Gallant (2005) 2.

⁴⁶ In its Second Special recommendation on Terrorist Financing, FATF recommended countries to list the crime of financing of terrorism as one of the predicate offences of ML.

⁴⁷ For the purpose of this dissertation the terms ‘criminal organization’, ‘organised crime’ or ‘organised criminal group’ will be used interchangeably.

convicted of committing serious criminal offences; and (iv) having the objective of pursuing profit and/or power.⁴⁸

In general, one of the main goals of a criminal agent, a group of criminals or organized crime that commit acquisitive crimes is to generate profits for the individual(s) or organized criminal group that carry out the predicate offence.⁴⁹ From the criminals' point of view, the relatively small amounts of dirty profits that they could generate by committing an acquisitive crime can easily be employed or used in the 'underground' or 'informal' economy without the detection of law enforcement authorities. However, a *first dilemma* could arise when criminals accumulate significant amounts of criminal profits. The dilemma is whether or not the generated and accumulated ill-gotten assets should be transferred to a ML process:

- *Option A*: If criminals decide to keep huge amounts of the accumulated dirty assets without submitting them to a process of ML, the probabilities of being discovered and, therefore, incriminated could be high. Without ML operations, which disguise the criminal origin of the assets and provide them with an apparently and ostensibly legitimate origin, the accumulation of significant ill-gotten assets itself could draw the attention of law enforcement officials and link criminals with their criminal activities. The need to use ML techniques could arise from the fact that several acquisitive crimes such as drug trafficking tend to be highly cash intensive. In fact, the physical volume of cash money may exceed the volume of, for instance, the drugs themselves. The amount of cash money involved in drug trafficking is

⁴⁸ This definition of 'organized crime' was given by an expert group commissioned by the Council of Europe in the Third High-Level Meeting of Ministers of the Interior on the 'Fight against Terrorism and Organised Crime to improve Security in Europe' (Council of Europe, Warsaw, 17-18 March 2005). For an identical definition of 'organized crime', see: The European Union definition of 'organised crime' (doc 6204/2/97 Europol 35, Rev 2: for its annual organised crime report).

⁴⁹ The FATF-OECD, Policy Briefs on 'Money Laundering', Report prepared and published by the OECD's Secretariat, (July 1999) 1.

astronomical. The United Nations estimates the value of drug trafficking in the world to be around USD 400 billions per year.⁵⁰

- *Option B:* If criminals, however, decide to submit at least part of the accumulated dirty assets to an effective ML activity, whereby they conceal the origin of the proceeds of crime so that they appear to have originated from a legitimate source, they could minimize or reduce the risk of prosecution and conviction.

However, to disguise or conceal the predicate offence as a result of which proceeds of crime were generated or ill-gotten assets derived might not be the ultimate goal of a launderer. Throughout a process of ML, criminals or organized crime may also intend to: first, enjoy the accumulated ill-gotten assets by purchasing, for instance, houses, yachts and cars in the legal economy;⁵¹ second, purchase financial instruments (e.g., shares, bank notes) and corporations, so that they can generate legal profits on their investments;⁵² third, use the already recycled or clean assets for the financing of their criminal activities.⁵³ Perhaps more importantly, a complete process of ML could be undertaken to protect funds derived from the commission of crimes from seizure, confiscation and forfeiture by law enforcement authorities, by creating a veil of legal cleanliness around the object. This veil not only prevents the proceeds' associated with

⁵⁰ United Nations Office on Drugs and Crime (UNODC), *Global Illicit Drug Trends 2005* (Report) (Vienna, UNODC) 16. See online: www.unodc.org/unodc/en/data-and-analysis/wdr.html. See also, Drug Policy Alliance, Drug Treatment vs. supply side measures (fact sheet). Retrieved (Report) (19 April 2004); see online: www.drugpolicy.org/library/factsheet/drugtreatment/index.cfm <accessed 27 February 2011>.

⁵¹ According to all the cases, except cases No. 7 and 8, the last stage of reinvestment of criminal assets in the legal economy included the purchase of houses, cars, country-sides, among other assets.

⁵² See, e.g., case study No. 5 entitled 'Di Tulio, Carrillo Fuentes, and others', which includes the purchase of shares in corporations, such as an oil company named 'Petrolera Mar del Plata S.A.'; and case study No. 10 and 11 that included the purchase of corporations and trustees/escrows that managed gastronomy businesses.

⁵³ As a result of a 22-month investigation practiced by agents of the US Drug Enforcement Administration, it was established that the Sinaloa narco-trafficking Cartel had bought planes in the US with criminal money they had laundered through the financial and banking system. The purchased planes were then used in the drug trade or trafficking.

See <<http://www.guardian.co.uk/world/2011/apr/03/us-bank-mexico-drug-gangs>> accessed 4 April 2011.

criminal activities from being traced and identified, but also enables the object to be used in the legal economy without fear of criminal, civil, or equitable legal sanctions.⁵⁴ Ultimately, based on this explanation, it could be concluded that ML allows criminals or organized crime to consolidate their economic power in the legal or formal economy.⁵⁵

If a criminal agent, a group of criminals or organized crime decides to submit their accumulated proceeds of crime to a ML operation for any of the above mentioned purposes—that is to say, if they decide in favour of the above explained option B—a *second dilemma* could arise. This second dilemma is whether or not the ML process will be practised by the criminal agent, or any of the members of the criminal group that committed or participated in the commission of the predicate offence or by a *third party* that did not commit or participate in any form, neither directly nor indirectly, in the commission of the predicate offence. When criminals opt to launder the proceeds of their own criminal activities—instead of delegating this activity to a third party—they engage in the so-called ‘self-laundering’ behaviour.⁵⁶ Whereas, when they decide to delegate the laundering operation to a third party (e.g., a lawyer, an accountant, a politician or a banker), they engage in the so-called ‘third party laundering’ behaviour. Rational criminals may decide to launder their own ill-gotten assets, without third party assistance, when they wish to control their own laundering activity, or when they have the necessary professional expertise and technical know-how to practise self-laundering

⁵⁴ Kris Hinterseer, ‘*Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context*’ (Kluwer Law International, Netherland 2002) 11.

⁵⁵ See, e.g., Stessens (2000) 83; and Edward Rees and others (2008) 128.

⁵⁶ The expression ‘self laundering’ is used, for instance, in: R.E. Bell, ‘An Introductory Who’s Who for Money Laundering Investigators’, (2002) *Journal of Money Laundering Control*, Vol. 5, No.4, p. 287-288.

operations or, simply, when they feel unable to trust anyone else to carry out the laundering.⁵⁷

A drug-trafficking example of a *self-laundering behaviour* is the following. A Cartel produces cocaine in country A, but the buyers of this drug are located in country B; so drug-derived assets are accumulated and laundered in that country B, with the assistance of professionals in ML, who are also members of the drug-trafficking Cartel.⁵⁸

A drug-trafficking example of a *'third party laundering'* operation is the case 'Mario Caserta, among others'.⁵⁹ A branch of an organized criminal group dedicated to drug-trafficking activities in the US and led by José Patiño (also named as Ramon Puentes) delegated the laundering of their drug-trafficking proceeds to third parties; that is to say, to persons that were not members of the referred drug-trafficking organization. According to the prosecution, between August and November 1990, the defendants Amira Yoma, Mario Caserta, Ibrahim Al Ibrahim, among others, regularly acted as camels for drug-smugglers by bringing at least USD 1,000,000—wrapped in a blanket inside a suitcase—into Argentina and Uruguay, after each of their trips to New York and Miami. Once cash money entered Argentina, it was recycled and integrated into the formal economy, through the purchase of financial instruments (e.g., shares and bonds);

⁵⁷ These assertions are based on logical reasoning; assuming that more individuals are participating in the commission of both the predicate offence and the subsequent laundering operation, then, there is a higher risk and chances of being discovered and, therefore, prosecuted for both the commission of the predicate offence and the laundering of proceeds of crime. Put simply, the more people involved in these activities, the greater the chance of drawing the attention of legal authorities.

⁵⁸ It should be noted that none of the Argentine ML cases included in Appendix I are self-laundering cases, since Argentina does not penalize self-laundering behaviour. See, chapter VI, particularly, sections 2 and 4.

⁵⁹ See, in the Appendix I, case study No. 2, entitled 'Mario Caserta, among others' (1990).

while the assets transferred to Uruguay were deposited in bank accounts opened by ‘front-men’.⁶⁰

Once we have assessed the incentives that individuals could face when they engage in ML operations, it becomes possible to examine the different stages of a ML process.

(b) Understanding the stages of a money laundering process:

Launderers can make use of a wide variety of techniques in order to accomplish their ends: to make money or any other economic value that comes from a criminal source A, look like money or any other economic value coming from a legitimate source B.

The techniques designed to launder the proceeds of crime can be performed in a single stage, as well as in two, three, four or more phases, depending on the creativity and skill of the person who decides to submit assets derived from crime to a process of ML. Although there is no question that ML can be practiced in various ways and phases (e.g., one, two, three or more phases) international organizations such as the UNODC,⁶¹ the World Bank and the IMF⁶² have developed a three-stage theoretical description to assist investigators and academics in understanding the phases throughout a ML process. These three ML stages are: (i) pre-washing, placement or concealment; (ii) layering, conversion or decanting; and (iii) integration or reinvestment. Each of them will be described in the following lines.

⁶⁰ Federal High Criminal Courts, City of Buenos Aires, Room 1 (1992). Reviewed by The National Court of Criminal Cassation of Argentina, Room 1 (2006); and the Supreme Court of Argentina (2010).

⁶¹ See online:
<www.unodc.org/unodc/money_laundering_cycle.html> accessed 8 January 2009.

⁶² Paul Schott ‘*Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*’ (2nd ed., The World Bank/IMF, Washington DC, 2006) I-8.

(i) *Pre-washing, placement or concealment stage*: during this first stage, the launderer disposes of the so-called dirty assets. Cash money is the most common medium of exchange and disposal, particularly in drug trafficking.⁶³ Funds are usually placed into the financial system through a financial institution (e.g., bank, exchange bureau, insurance agent and credit union), in this first stage of the process.⁶⁴ The objective of this maneuver is to separate the assets at least one step away from their original source. The deposit of funds into financial institutions might be practiced by the use of ‘*smurfing*’⁶⁵ operations. Smurfing refers to the act of dividing a large sum into small amounts, making a series of small payments into bank accounts. This avoids drawing attention to the individual payments and keeping them below the minimum amount that requires the transaction be reported to a monitoring body. For instance, a large number of currency deposits in amounts of USD 9,000, in a jurisdiction where any deposit in excess of USD 10,000 is reportable, may be an indicator of smurfing.⁶⁶

The movement of cash money outside the area where the assets have been generated or accumulated is another mechanism classified in this first stage of the process. In order to move assets from one place to another in a quick and anonymous way, launderers may employ two well-known mechanisms: first, the so-called informal value transfer systems (IVTSS), also known in the global financial jargon as ‘*hawala*’

⁶³ Ibid.

⁶⁴ All the analyzed relevant ML cases included in Appendix 1 (except cases No. 3, 9 and 11) involved financial institutions throughout the process of ML.

⁶⁵ The term ‘*smurfing*’, derived from the small blue figures in the children’s cartoon series, is also called ‘structuring activities’.

⁶⁶ Case study No. 8, entitled ‘Geosur S.A.’, is a clear example of a deposit of funds into financial institutions through the use of smurfing conduct. Legal authorities of Argentina detected the deposit of Argentine pesos, in ‘Banco Patagonia’, ‘Banco de Tierra del Fuego’ and ‘Banco de Chubut’. These deposits were done in small amounts and under the name of straw-men and with false ID documents, to avoid drawing attention.

systems,⁶⁷ which are based on trust and occur in the absence of, or in parallel to, formal banking channels;⁶⁸ and, secondly, money transportation mechanisms, including cash courier or mailing, or simply by physically carrying or smuggling cash money from one place to another, or even to different jurisdictions or regions.⁶⁹ To limit cash transportation mechanisms, FATF issued the ‘Special Recommendation IX: Cash Couriers’ suggesting that jurisdictions introduce domestic anti-ML norms in order to prevent physical cross-border cash currency transportation in sums over EUR/USD 15,000.⁷⁰

(ii) *Layering, conversion or decanting stage*: The second stage occurs after the money has already entered the financial system. At this point in the process, the funds or securities placed in the first stage could be moved to other financial institutions or jurisdictions, further separating them from their criminal origin or source. The aim is to cut any trail of evidence that may appear if an investigation regarding the origin or destination of the money is undertaken. To that end, layers of transactions and business entities such as ‘off shore’⁷¹ or ‘shell’ corporations⁷² could be used. These types of

⁶⁷ The word ‘*hawala*’ means ‘transfer’ in the Arabic language. It should be noted that the *hawala* system is also used as a legitimate method of money transfer.

⁶⁸ See, e.g., cases No. 2, 3, 4 and 5, which included *hawala* operations. The following example describes how the *hawala* system works: An Argentinean citizen (‘A’) wants to send USD 10,000 to his colleague (‘B’) in Turkey. ‘A’ contacts a *hawalador* (‘H1’) in Argentina to effectuate this transfer. ‘H1’ consents to make this value transfer for a 1% fee, an amount less than charged at banks or wire transfer businesses. ‘A’ then pays ‘H1’ USD 10,000 and ‘H1’ gives ‘A’ a password. After this, ‘A’ contacts ‘B’ to give him the password and tells him whom to contact in Turkey to receive the money. At the same time, ‘H1’ contacts his business partner, a *hawalador* in Turkey (‘H2’) to inform him of the transaction and the password. Finally, ‘B’ receives from ‘H2’ the USD 10,000 minus the 1% commission. For additional details about the ‘*hawala system*’ see World Bank/IMF, ‘Informal Funds Transfer Systems: An Analysis of the Informal Hawala System’ (Paper No. 222, 18 August 2003) 3.

⁶⁹ See, e.g., cases No. 2 and 5, which included physical cash transport in ‘suitcases’ and express mailing systems.

⁷⁰ FATF, ‘Interpretative note to Special Recommendation IX: Cash Couriers’ (Report, 2004). See <http://www.fatf-gafi.org/dataoecd/5/48/34291218.pdf> accessed 8 November 2008.

⁷¹ ‘Off-shore’ corporations are defined as foreign corporations opened in countries with extensive provisions for secrecy in corporate formation. These may include the non-disclosure of company officers,

corporations could be opened in a so-called ‘tax haven’ jurisdiction where bank secrecy makes following the money trail difficult among other concealment mechanisms.⁷³ In this stage the form of the accumulated funds could be converted into financial instruments, such as money orders or checks, to also divert suspicion. Whenever possible, the accumulated illegal funds could be deliberately mixed with assets derived from legal activities, to further conceal its origin and destination.⁷⁴ This second stage could be entwined with the placement/concealment of the first stage.

(iii) *Integration or reinvestment in the legal and official economy*: In the ML process the economic circle ends with the integration of the proceeds of crime in the legal economy. In other words, during this last stage, ill-gotten assets are recycled, integrated or consumed in the formal economy so they appear to have originated from legal sources. This is accomplished, for instance, by purchasing assets such as real estate, bank notes, loans or other market-based instruments, in the legal and official economy.⁷⁵ It is important to highlight that the integration stage could take place in jurisdictions far away from the location where the original predicate offence was committed and probably after the assets have gone through various financial markets around the world.

shareholders or owners. See John Madinger, *‘Money Laundering: A guide for criminal investigators’* (Taylor & Francis, Florida, USA 2006) 170.

⁷² ‘Shell corporations’ have no assets and no liabilities, just a charter to operate. *Ibid.*

⁷³ An international report, commissioned by the United Nations, correctly stresses that off-shore financial jurisdictions offer an excellent channel not only for ML operations, but also for the perpetration of other offences, such as fraud and tax crimes. See Jack A. Blum, M. Levi and others ‘Financial Haven, Banking Secrecy and Money Laundering’ (Report) (New York, United Nations, 1998) 26.

⁷⁴ For instance, in the case study No. 10 entitled ‘M. E. Rodriguez, and others’, criminal funds were deliberately mixed with legitimate funds, through the purchase of nominee shares in a trust/escrow, which manages a restaurant-bar named ‘*Como en Familia*’. The restaurant was used as a façade/fronting to conceal the recycling. This same type of mixed operations occurred, e.g., in case No. 9 entitled ‘Orentrajch and others’.

⁷⁵ See, e.g., cases No. 1, 2, 4, 5, 6, 10 and 11.

A drug trafficking example of the above explained three-stages ML process could be the ‘Medellin Cartel’ case study.⁷⁶ At the end of 1995, the Argentine police discovered a house in the City of Pilar, Province of Buenos Aires, with five cubic meters of US dollars, Argentine pesos, and many other currencies. The prosecution established that these cash monies came from Colombian cocaine trafficking activities practiced by the so-called Medellin Cartel (i.e., the predicate offence). This cash money was accumulated and converted in Colombia (the first placement phase) and later it was transferred and moved from Colombia to Argentina through informal values transfer systems (IVTSS) such as the so-called *hawala* systems and, simply, by carrying cash money physically from one country to the other (the second layering phase). It was also established that part of the cash money that was discovered in the garage of the house, was finally introduced into the economic and financial system of Argentina, by purchasing a hotel, houses and cars (the third integrating phase).⁷⁷

(c) The internationalization of ML operations:

The question to tackle now is: Where does money laundering occur? As explained previously, the process of ML is a necessary consequence of almost all profit generating crimes (i.e., acquisitive crimes or predicate offences); the process usually starts in the jurisdiction where the predicate offence was committed and/or the proceeds of crime are accumulated and subjected to a process of ML and it finishes when ill-gotten assets are totally recycled and mixed in the formal economy, so that they may look like assets

⁷⁶ Case study No. 4, entitled ‘Santos Caballero, Maria, and others’.

⁷⁷ High Federal Criminal Courts, City of Buenos Aires, Room II (2000). Reviewed by National Court of Criminal Cassation of Argentina, Room III (2001), and Federal Oral Criminal Courts No. 6, City of Buenos Aires (2005).

derived from a legal source. Then, on this basis, it could be said that a complete process of ML can occur practically anywhere in the world: where the predicate offence was committed or the proceeds of crime are accumulated and subjected to a full process of ML.

Moreover, a process of ML can occur in one single jurisdiction or in two or more jurisdictions. We refer to a 'domestic process of ML', when the whole ML process occurs in the same jurisdiction. In contrast, we refer to an 'international/transnational ML process' when two or more jurisdictions are involved in the ML operation; that is to say, for instance, the jurisdiction where the predicate offence was perpetrated and ill-gotten assets accumulated and one or more other countries or territories where the proceeds are transferred, concealed, recycled and invested in the legal economy.

Despite the fact that a complete process of ML can occur in one single country or territory, international hard law instruments⁷⁸ as well as the academic literature believe and assume that ML is an international process that involves and includes cross-border elements and effects.⁷⁹

⁷⁸ See, EU Directive 91/308/EEC, Preamble. See also, EU Directive 2005/60/EC, Preamble, par. 5.

⁷⁹ See Santha Vaithilingam and Nahendhiran Nair, 'Mapping global money laundering trends: Lessons from the pace setters' (2009) *Research in International Business and Finance* 23 18-19; House of Lords, 'Money Laundering and Financing of Terrorism' (European Union Committee) (Report) (19th Report of Session, 2008-2009) 11; Paul Schott (2006) 1-6: 'these activities [money laundering] take place on a global basis'. See also, E. Rees, R. Fisher and P. Bogan, *The Proceeds of Crime Act 2002* (2008) 127: 'The process of money laundering is international in its extent'; Brigitte Unger, 'The Scale and Impact of Money Laundering' (Edward Elgar, Cheltenham UK 2007) 74-88. This last scholar uses a gravity model to calculate the cross-border flows of laundering money. Or, in addition, Peter Alldridge, 'The Moral Limits of the Crime of Money Laundering' (2001) *Buffalo Criminal Law Review*, Vol. 5, p. 280: 'Rational launders may prefer conservative portfolios. One conservative choice is to expatriate the money [derived from a crime]'; FATF 'Global Money Laundering and Terrorist Financing Threats Assessment' (Report) (July 2010) 52; K. Alexander, 'The International Anti-Money Laundering Regime: The Role of the Financial Anti Task Force' (2001) 4 *Journal of Money Laundering Control* 231-248, at. 233; Jackie Harvey 'The search for crime money-debunking the myth: facts versus imagery' (2009) *Journal of Money Laundering Control*, Vol. 12, p. 97; and, Angela Veng Mei Leong, *The Disruption of International Organized Crime: an analysis of legal and non-legal strategies* (Ashgate, London 2007) 55, among others.

Founded on the idea that ML is very likely to be a transnational process and assuming that ML is usually practiced in three clear stages (i.e., placement, layering and integration) the FATF and the OECD estimate that ML may be concentrated geographically according to the stage or phase the ML process has reached.⁸⁰ At the *placement stage*, for example, ill-gotten funds are usually processed relatively close to the place or country where the predicate offence was committed. With the *layering phase*, the launderer might choose a ‘regulatory haven’ jurisdiction⁸¹ or simply a large regional business or banking centre. According to these intergovernmental organizations, this is because ill-gotten funds may only transit bank accounts at various locations where this can be done without leaving traces of their source or ultimate destination. Finally, at the *integration phase*, launderers may choose to invest recycled or laundered funds in still other locations if they were generated in unstable economies or locations offering limited investment opportunities. It should be said, however, that neither the FATF nor the OECD have published the empirical evidence or data to support these assertions.

The internationalization of ML operations could be the consequence of different factors. One might be the expansion of organized crime during the last decades. As the FATF has estimated:

Organized crime continues to be responsible for a large proportion of the dirty assets or money flowing through financial channels. The Italian Mafia, the Japanese yakuza, the Colombian cartels, Russian and Eastern European criminal enterprises, American ethnic gangs, and other, similarly structured groups are involved in a wide range of criminal activities. In addition to drug trafficking, these enterprises generate funds from loan sharking, illegal gambling, fraud, embezzlement, extortion, prostitution, illegal trafficking in arms and human beings, and a host of

⁸⁰ The FATF-OECD, Policy Briefs on ‘Money Laundering’ (Report) (July 1999) 1.

⁸¹ The expression ‘regulatory havens’, means countries or territories in which the identity of the controlling bank accounts or corporations is readily concealed. The expression ‘regulatory havens’ is used interchangeably with other labels, such as ‘tax haven’ jurisdictions or ‘off-shore centres’.

other offences. Frequently, they maintain extensive holdings in legitimate businesses which can be manipulated both to cloak and to invest illegally generated funds.⁸²

In this vein, Galeotti notes that ‘global organized crime is evolving, embracing new markets and new technologies, and moving from traditional hierarchies towards more flexible, network-based forms of organisations’.⁸³

It is clear that organized crime could take advantage of the facilities of globalization, not only by colluding with other criminal groups, but also by laundering their proceeds of crime on an international and globalize scale. In other words, they can easily take advantage of globalization to do legal and illegal businesses in any place, instantaneously and under any circumstances.⁸⁴ In some contexts, the term ‘globalization’ is used to refer to economic relations within a single ‘world economy’. In the context of this thesis, I use the term ‘globalization’ in a broad sense; following Anthony Giddens,⁸⁵ to go beyond economics to include any processes that tend to make human relations—economic, political, cultural, communicative, etc— more interdependent.

A second factor is related to the growth of e-commerce systems, technological innovation, free trade, the globalization of the economy and consumerism, which have increasingly brought the world together. Today, individuals, organizations, and governments can move people, goods, services and capital almost as if there were no international borders between them. Unfortunately, the interplay between technology

⁸² Financial Action Task Force on Money Laundering: Annual Report 1995-1996 (Report, Paris) (28 June 1996) 3.

⁸³ Mark Galeotti, *Global Crime Today: The Changing Face of Organized Crime* (Routledge, Oxford 2005) 1.

⁸⁴ Pedro R. David, *Globalización, prevención del delito y justicia penal* (Zabalia, Buenos Aires 2004) 20.

⁸⁵ A Giddens, *The Consequences of Modernity* (Stanford University Press, Stanford 1990) 64.

and cross-border finance activities has created unparalleled opportunities for the development of complex and transnational operations of ML. Criminals take advantage of globalization, for instance, when they move, transfer or submit their accumulated ill-gotten assets through the instantaneous payment systems made over the Internet, which have created and broadened opportunities for criminals and their ML activities. As technology advances, so alas do opportunities for money laundering.⁸⁶

A third factor is the collapse of a number of communist governments —mainly during the 1980s and 1990s—which converted abruptly from centrally controlled economies to capitalist markets. For instance, the result of the abrupt change on the Russian’s economy during the 1990s was a dramatic increase in property and economic transactions that facilitated the development of crime in general and certain types of financial crimes, such as the crime of ML, in particular.⁸⁷

A final factor is based on the essence of ML operations. One of the main purposes of ML operations is to conceal the criminal origin of the proceeds of crime. Thus, under the view of a rational launderer and in the context of economic globalization, the criminal origin of the assets could be better disguised by moving the criminal assets between different jurisdictions and engaging in complex ML operations within the territory of more than one country. The EU Directive 91/308/EEC, took account of this, noting that ‘Money laundering is usually carried out in an international context, so the criminal origin of the funds can be better disguised’.⁸⁸ In this same line

⁸⁶ For further details about the interplay between technology and cross-border finance with the increase and development of transnational ML processes, see: Bruce Zagaris and Scott B. Mac Donald, ‘Financial Fraud and Technology: The Perils of an Instantaneous Economy’ [1992-3] *Geo. Wash. J. Int’l Law & Economics* 61-72.

⁸⁷ See e.g., F. Varese, *The Russian Mafia: Private Protection in a New Market Economy* (OUP, Oxford 2001) 17-36.

⁸⁸ EU Directive 91/308/EEC (Preamble). For further details about this EU Directive, see below chapter II, section 2.2.

of reasoning the FATF also stressed that ML is likely to be a transnational process, since criminals and organized crime can shop around the world looking for the best legal environment or jurisdiction in which to conceal and recycle the proceeds of their crimes.⁸⁹

Examples of inadequate anti-ML norms, adopted at the domestic level, that could be attractive for ML operations are the so-called ‘off-shore centres’. The provisions in the formation of ‘off shore’ or ‘shell’ corporations could allow the non-disclosure of company officers, shareholders or owners to the State’s Registration Offices. Another example are the so-called ‘tax haven’ jurisdictions, where the exchange market is slightly regulated and the existence of certain rules makes the lifting of bank/professional secrecy difficult. A final example may be, simply, jurisdictions that implemented an inadequate crime of ML, among other inadequate civil or administrative anti-ML provisions.

As a result of the comparative cross-case analysis of the eleven Argentine ML cases, the following findings can be summarized:

- (i) At least two jurisdictions are involved in all the analyzed cases (except case No. 10). That is, for instance, the jurisdiction where the proceeds of crime have been accumulated and/or concealed; and one or two other jurisdictions where the proceeds have been transferred, converted and, finally, integrated in the legal economy. Therefore, ML is a transnational process in 10 out of 11 of the analyzed cases.
- (ii) According to all the cases (except cases No. 7, 8, 10 and 11), the placement and/or layering phases in a process of ML are developed outside the territory of Argentina, but assets are finally integrated, invested, saved or consumed in the

⁸⁹ FATF, Annual Report 1989-1990 (7 February 1990) 16.

Argentine legal economy. Therefore, in 7 out of 11 of the analyzed cases, this country was attractive for launderers to develop the third and final phase of laundering: that is to say, the integration or reinvestment phase, where ill-gotten assets are invested, for instance, in real estate, or used to purchase shares, diamonds, among other financial instruments and economic values.

(iii) In all the cases (except cases No. 3, 9, 10 and 11) Uruguay, the US Virgin Islands and the UK Virgin Islands seem to be the best jurisdictions to develop the first and second phases of laundering, before criminal assets are finally integrated, invested, saved or consumed in Argentina. In the referred case studies, ‘off-shore’ and ‘shell’ companies opened in Uruguay and the US/UK Virgin Islands seem to be the ML mechanisms used by launderers to separate and/or disguise the proceeds of crime from their illegal source.⁹⁰

In conclusion, it could be argued that launderers may not recognize borders and spread beyond the territory of a country. This fact has strengthened the need to treat the problem of ML in a cooperative, coordinated and consistent way. The world should give a harmonized answer to transnational and trans-border common problems such as ML, trying to avoid the creation of illegal and regulatory havens.⁹¹

(d) A White Collar crime:

Scholars first began to use the term ‘white collar crime’ in 1940 when Edwin H. Sutherland defined it as ‘a crime committed by a person of respectability and high

⁹⁰ Uruguay, the US Virgin Islands and the UK Virgin Islands have provisions on the formation of ‘off-shore’ and ‘shell’ corporations that allow the non disclosure of company shareholders to their ‘State Registration Offices’. See online: www.secrecyjurisdictions.com accessed March 2012. For a general and further discussion regarding the abuse on the use of off-shore corporations see: Daniel R. Vitolo, ‘Uso y abuso de las estructuras societarias off-shore’, *La Ley*, 23 February 2005.

⁹¹ For a more detailed analysis concerning the harmonization of anti-ML legislations at both the international and domestic level, see below, chapter II, section 3.

social status in the course of his occupation'.⁹² Unwilling to embrace existing sociological and psychological assumptions about criminal behavior, Sutherland began the study of upper class's substantial and largely overlooked involvement in criminal behavior. In doing so, he sought to provide a new theoretical framework for the study of criminology.⁹³

Decades later, however, the term 'white collar crime' continues to be the subject of intense academic debate in fields ranging from law to journalism. Scholars have been unable to formulate an acceptable definition for the term 'white collar crime', disagreeing on the following three key issues: (i) the extension of the term to include activities of a non-criminal nature; (ii) the categorization of the term based on the actors involved, as opposed to the act itself; (iii) the selection of factors used to determine whether or not a particular act can be considered a 'white collar crime'.⁹⁴ Apart from these differences and for the purpose of this work, the so-called white collar crimes are those criminal offences committed by persons with professional backgrounds and above-average levels of social status and respect. The social and professional status of the offender serves as one of the main characteristics that differentiate 'white collar crimes' from conventional crimes or also named 'black collar crime' or, simply, 'street crimes'.⁹⁵

⁹² Hazel Croall, 'Understanding white collar crime' (Open University Press, Buckingham 2001) Chapter I.

⁹³ For more on Sutherland's theoretical framework, see Stuart P. Green, 'The Concept of White Collar Crime in Law and Legal Theory' (2004-2005) *Buffalo Criminal Law Review*, Rev. 2, Vol 8:1.

⁹⁴ For helpful clarifying comments and discussion on this matter see: M.I. Dixon 'The Re-Defining of White Collar Crime' (Spring 1995) *J. Int'l L.* 561; James William Coleman, 'Toward an Integrated Theory of White-Collar Crime' (September 1987) *AJS*, Vol. 93, No. 2, 406 – 39.

⁹⁵ *Ibid.*

In the comparative cross-case analysis of eleven ML cases, all involved actors of a ‘certain social status and occupation’.⁹⁶

Based on the above discussion, it seems reasonable to conclude that ML, which often requires a certain level of technical knowledge, and access to several businesses and financial institutions in more than one jurisdiction, can be categorized as a ‘white collar crime’.

(e) *Quantum*:

The amounts of ill-gotten assets usually managed by launderers are high. In mid 1996, the International Monetary Fund (IMF) estimated that the sum of illegal assets that entered into the world financial system ranged between USD 300,000 and USD 500,000 billion annually.⁹⁷ Later, there were estimates showing that the amount was around USD 500,000 billion⁹⁸ and, more recently, USD 1.3 trillion.⁹⁹ More updated reports indicate that proceeds of crime involved in ML activities generate a world movement of approximately USD 3 trillion a year.¹⁰⁰ In 1998, the then-managing director of the IMF, Michel Camdessus, affirmed that ML could account for around 5% of the global Gross

⁹⁶ See, e.g., the case study No. 2 captioned ‘Martio Caserta, and others’, which involved the following actors/offenders with ‘a certain social standard and occupation’: Amira Yoma (a personal secretary to the Argentine President); her former husband Ibrahim Al Ibrahim (the Chief of Immigration and Custom Services in the International Airport of Argentina) and Mario Caserta (former Director of the Federal Cleanup and Potable Water of Argentina). Another example is the ‘Medellin Cartel’ case study No. 4, which involved María I. Santos Caballero (the widow of Pablo Escobar Gaviria, the leader of the Medellin Cartel), her son Juan Sebastian Marroquín Santos, his girlfriend, María los Angeles Sarmiento del Valle, the accountant Juan Carlos Zacarías and two assistances or assessors, Carlos Gil Novoa and Oscar Luppia.

⁹⁷ V. Tanzi, ‘*Money Laundering and the international financial system*’, (Washington DC, WP/96/55-EA).

⁹⁸ See UN Doc. E/Conf.82/16, Vol. 1, p.3. Cited in M. Gallant, ‘*Money Laundering and the Proceeds of Crime – Economic Crime and Civil Remedies*’ (Edward Elgar, Cheltenham, UK 2005) 12.

⁹⁹ For more information on statistics gathered in the mentioned periods see, for instance, the following website corresponding to the UNODC:
<<http://www.unodc.org/unodc/en/money-laundering/indez.html>> accessed 8 Nov 2008.

¹⁰⁰ Ibid.

Domestic Product (GDP), although this international organization has never formally published these estimates.¹⁰¹

Some scholars, such as Elizabeth Joyce, criticize these estimates alleging that launderers do not document the extent of their operations or record the amounts of their profits. Due to its secretive nature it becomes difficult to determine precisely the value of the assets involved in ML operations.¹⁰² I agree with this opinion, adding that ML activities can take place on a global basis, in a huge variety of ways and well outside the normal range of economic statistics, making estimates even more difficult to produce.

4. Money laundering and its nexus with the financing of terrorism.

The main purpose of this section is to demonstrate whether or not there is a connection between the processes of ML and financing of terrorism (FT). I will first define what I mean by an ‘act of terrorism’ and discuss the main differences and similarities between organised crime and terrorist groups. These preliminary comments are necessary to determine, later, the similarities and differences between ML and FT.

The term ‘terrorism’ has never been defined in international law.¹⁰³ The absence of an internationally agreed upon definition of ‘terrorism’ poses serious problems to convey the meaning of ‘financing of terrorism’. However, I will overcome this obstacle by using the term ‘act of terrorism’, which has been defined in international law. The

¹⁰¹ Elizabeth Joyce, ‘Expanding the International Regime on Money Laundering in Response to Transnational Organized Crime, Terrorism, and Corruption’, in Philip Reichel (ed.) *Transnational Crime & Justice* (Sage Publications, London 2005) 81.

¹⁰² Ibid.

¹⁰³ For a general discussion of this, see: B. Saul *Defining Terrorism in International Law* (OUP, Oxford 2006).

UN Convention for Suppression of the Financing of Terrorism notes that the primary objective of an act of terrorism is to ‘intimidate a population, or to compel a government or an international organization to do or abstain from doing any act’.¹⁰⁴ Therefore, an act of terrorism includes the deliberate use of violence against civilian targets, with the intention of instilling terror in a population, government or an international organization for some political purpose.

An organized criminal group differs from a terrorist group in that its main objective is to obtain financial gains, while the ultimate objective of a terrorist group is to instil terror in a population, government or an international organization for some political purpose.¹⁰⁵

Despite their different objectives, one could say that both terrorist and organised criminal groups require financial support to finance their activities and enhance their power.¹⁰⁶ For instance, the CIA estimates that it cost Al-Qaeda about USD 30 million a year to sustain its activities before the 9/11 attacks.¹⁰⁷ Given the fact that terrorist organizations require financial aid to support their goals (among these: training, materials, travelling costs, etc.) it is of vital importance for them to have an international flow of funds which they can allocate to fulfil their aims. While the overall funds required by a terrorist organization may be large, the cost of a particular attack can be

¹⁰⁴ Article 2. This convention is described in chapter II, section 2.2.

¹⁰⁵ This assessment is based on a comparative analysis of the definitions of organized crime and terrorist groups that I am using for the purpose of this dissertation. One of the key elements of ‘organized crime’ is the objective of pursuing profit and/or power, rather than committing an ‘act of terrorism’; which is the main purpose of a terrorist group. See also R.C.H. Alexander, *Insider Dealing and Money Laundering in the EU: Law and Regulation*, (Ashgate, London 2007) 174: ‘the terrorist does not seek to become rich, or indeed any personal gain. His goal, and that of his organisation, is the achievement of a political end; the independence of a territory, a change in governmental order or, as with Al Qaeda, the complete destruction of a given system worldwide’.

¹⁰⁶ Alexander (2007) 174.

¹⁰⁷ CIA, ‘Final Report of the National Commission on Terrorist Attacks upon the United States’ (Report) (July 2006) Ch. 5.4.

relatively small. For instance, US authorities have estimated that the total cost of planning and carrying out the 9/11 attacks was below USD 300,000.¹⁰⁸

But what do we mean by ‘financing of terrorism’? An international book commissioned and published by the World Bank and the International Monetary Fund defined ‘financing of terrorism’ as ‘the financial support, *in any form*, of terrorism or of those who encourage, plan, or engage in terrorism’ (emphasis added).¹⁰⁹ In other words, the objective of this activity is to channel funds of any origin and source to individuals or groups with the purpose of enabling acts of terrorism.

According to this same international Reference Guide, the expression ‘*in any form*’ means that funds used to support terrorist groups may have their origin in legitimate sources, criminal activities, or both.¹¹⁰ However, this reference to the expression ‘in any form’ is too restrictive, too vague. In particular, it fails to clearly identify in a certain manner, which are the precise ways or forms that terrorist groups, or those who encourage, plan, or engage in acts of terrorism can use to finance their activities. Probably, because of this failure to find a clear description of these forms of financing, several scholars have failed to establish and identify the nexus between the processes of ML and FT. Donato Masciandaro affirms that the main difference between ML and FT lies in the origin of the funds: while in the ML process the source of funds always derives from criminal activities, the source of funds used to finance terrorist organizations may be of both ‘dirty’ and ‘legal’ origin.¹¹¹ This opinion has been widely accepted by the rest of the literature.¹¹²

¹⁰⁸ D. Hopton, ‘*Money Laundering: A concise Guide for All Business*’ (Gower Publishing Ltd., Hampshire, UK 2006) 4.

¹⁰⁹ Paul Allan Schott (2006) 1.

¹¹⁰ Ibid.

¹¹¹ D. Masciandaro ‘Economics: The Demand Side’, in Masciandaro and others (eds.) ‘*Black Finance: The Economics of Money Laundering*’, (2007) 4.

The following discussion, though, will reveal that Masciandaro's assessment is, at least, incomplete. More precisely, I will show that terrorist groups or those who encourage, plan, or engage in acts of terrorism can use not only dirty and legal assets as a form of financing, but also ML and 'money dirtying' processes. In the following lines I will explain in detail these ways of financing. This discussion about the forms of FT, will allow us to establish, finally, the nexus between the processes of ML and FT.

Terrorist groups can finance their activities with *criminal assets*. Not only criminals or organized crime can commit acquisitive crimes to acquire criminal funds. Criminal assets can be used to fund terrorist activities as well. An example would be the financing of terrorism with the proceeds from the production and trafficking of narcotics, kidnapping or extortion. These criminal activities seem to be a sizable financial contributor to terrorist organizations.¹¹³ In this respect, Fletcher Badwin estimates that the terrorist group Al-Qaeda gets about forty percent of its funds from drug trafficking, twenty percent from extortion, and about ten percent from kidnapping.¹¹⁴ Consistent with these estimations, numerous FATF's Reports have shown narcotics trafficking to be the most prevalent criminal activity used to raise terrorist funds, and this is followed by fraud, then smuggling and extortion.¹¹⁵

¹¹² See, e.g., Peter Reuter and Edwin M. Truman, *Chasing Dirty Money: Progress on Anti-Money Laundering* (Institute for International Economics, Washington D.C. 2004) 2; Bruce Zagaris, 'The Merging of the Anti-Money Laundering and Counter-Terrorism Financing Enforcement Regimes after September 11, 2001' [2004] Berkley Journal of International Law, Vol. 22:23, p. 123-158. See also, Joseph D. Serio 'Fueling Global Crime: The Mechanism of Money Laundering' (2004) International Review of Law Computer & Technology, Vol. 18, No. 3, p. 442-443; and, Robin Booth, Simon Farrell and others *Money Laundering Law and Regulation: A practical guide* (OUP, Oxford 2011) 13.

¹¹³ See, e.g., Thomas J. Biersteker and Sue E. Eckert, 'The challenge of terrorist financing', in T. Biersteker and others (eds.) *Countering the Financing of Terrorism* (Routledge, London 2008) 12.

¹¹⁴ Fletcher Badwin 'Organized Crime, Terrorism and Money Laundering in the Americas' [2002-03] Florida Journal in International Law, Vol. 15, p. 4.

¹¹⁵ FATF, 'Global Money Laundering and Terrorist Financing Threat Assessment' (Report) (July 2010) 8.

Secondly, it should be made clear that terrorist groups do not only finance their activities with the proceeds of crime, but also with the management of *legitimate assets* and businesses, such as Osama bin Laden's enterprises in Sudan or honey trading in Yemen.¹¹⁶ Foundations and political parties, among other benefactors, can provide terrorist groups with these clean funds. An example of this involves those donations made to organizations by individuals who believe them to be real Islamic charities but which later on turn out to be a cover-up for supporting terrorism.¹¹⁷

Thirdly, like criminals and organised crime, terrorist groups also need to practice *money laundering*, after generating and accumulating substantial amounts of dirty assets. Indeed, during the last decades, the so-called War-on-Terror and the expansion of organized criminal enterprises have increased worldwide awareness of ML. This arises from the fact that 'trade-based money laundering is used by organized crime groups and, increasingly, by terrorist financiers as well'.¹¹⁸

Terrorist groups that accumulate significant amounts of dirty profits may need to use ML techniques in order to conceal or disguise the identity or the origin of criminally obtained proceeds so that they appear to have originated from legitimate sources (that is, what I call the concealment aim of a ML process).¹¹⁹ Furthermore, when terrorist groups decide to launder the proceeds of crime, the importance of this concealment aim is greater since the need to lower the risk of being discovered concerns both the crime that generated the dirty money (the predicate offence) and the destination of these

¹¹⁶ Thomas Biersteker and Sue Eckert *The challenge of terrorism financing* (2008) 9.

¹¹⁷ R.C.H. Alexander, *Insider Dealing and Money Laundering in the EU: Law and Regulation*, (Ashgate, London, UK 2007) 174.

¹¹⁸ US Department of State, Bureau for International Narcotics and Law Enforcement Affairs (International Narcotics Control Strategy Report 2005, March 2005). Available online: <http://www.state.gov/p/inl/rls/nrcrpt/2005/vol2/html/42380.htm>> 10 June 2009.

¹¹⁹ See above, in section 2, the *first dilemma* of a launderer.

assets: that could be, to finance and support the general structure of the organization or to commit the terrorist attacks they intend to undertake.¹²⁰

Moreover, terrorist groups—like organized crime—could also be looking to legitimize or recycle their ill-gotten assets so that they can enjoy, consume or invest them in the legal economy by purchasing economic values in the legal economy and investing, for instance, in real estate, financial and commercial markets. Perhaps more importantly, they may even practise ML to use the already recycled or clean assets to continue financing their activities in the legal economy (that is, what I referred to as the cleaning or investment aim of a ML process).

Another way or form in which terrorist groups can finance their activities is by a process of *money dirtying*. As explained above, terrorist groups are not only financed with assets derived from crime, but also with legal flows of assets. So, after accumulating significant amounts of legal assets terrorist groups could need and decide to submit part of these legal assets to a ‘*money dirtying*’ process.¹²¹ ‘Money dirtying’ (MD) involves a process diametrically opposite to the ML process; instead of being ‘laundered’, the money is ‘dirtied’. Through a process of MD, money or any other asset moves from the so-called legal or formal economy to the parallel and underground economy.

Terrorist groups could require practicing MD operations for the following two reasons:

- a) *The concealment aim*: the disposition of significant amounts of legal assets without justification about their origin, could draw the attention of law enforcement

¹²⁰ B. Unger, ‘*The Scale and Impacts of Money Laundering*’, in D. Masciandaro and others (eds.), ‘*Black Finance: The Economic of Money Laundering*’ (Edward Elgar, Cheltenham 2007) 170-171.

¹²¹ The ‘money dirtying’ process is also named ‘reverse ML process’. See e.g., Angela Veng Mei Leong, ‘*The Disruption of International Organized Crime: an analysis of legal and non-legal strategies*’ (Ashgate, London 2007) 45.

authorities. Hence, after accumulating significant amounts of legal profits they could prefer to channel their legitimate funds through a MD process to prevent authorities from tracing back the legal source. It could also be said, for instance, that a rational person who expects to finance terrorist activities, will not simply write a personal check or give cash money derived from legal activities to purchase the necessary elements to support their terrorist activities. Instead, they may prefer to use a process of MD to separate or disguise these financial flows from their legal origin or source.

- b) *The 'dirtying' and investing aim:* terrorist groups may also require to conceal, convert and invest their accumulated legal assets into the informal or underground economy (i.e., to display a MD process) to purchase and use, in that informal economy, some key elements they could require to support their terrorist activities. An example could be the transfer of money proceeding from a legal activity or source (e.g., a factory owned by a terrorist group, through a straw/front man or false shareholder) to the parallel or informal economic system in order to purchase chemical weapons that are only offered in the underground economy.

As a consequence of the above explanation, the process of money dirtying could be described as a concealment process, by which a terrorist group mainly tends to separate or disguise legitimate profits from its legal source, for the purpose of consuming, saving or investing them in the underground economy. As a process MD techniques can be performed in a single stage, as well as in two, three, four or more phases, depending on the imagination and ability of the person who decides to submit assets derived from a legal source to a process of MD.

The discussion in this section can be summarized as follows: (i) a criminal agent, a group of two or more criminals, organized crime and terrorist groups could commit crimes to acquire funds; (ii) however, according to international documents and textbooks, that are themselves supported by empirical data, a substantial proportion of terrorist financing may come from legitimate donations, contributions and legitimate businesses; (iii) moreover, I explained that terrorist groups may also use ML and MD procedures to finance their activities; (iv) hence, it can be suggested that the ‘financing of terrorism’ can be undertaken in four different ways or forms. These four ways of financing are: first, the concealment, cleaning and investing process of ML (flows of ill-gotten assets that are transferred and converted from the informal or underground economy to the formal economy); second, the concealment and dirtying process of MD (flows of legal assets that are converted and transferred from the legal economy to the informal economy); third, ‘legal funds’ (which are economic values that never leave the legal economy) and finally, ‘ill-gotten funds’ (which are economic values that never leave the parallel or underground economy).

The first conclusion of this discussion is that the link between ML and FT, the main problem to solve and examine in this section, is that ML is part of the process of FT. To be precise, ML is one of the four ways or forms that terrorist groups or those who are engaged in acts of terrorism may use to finance acts of terrorism. The second conclusion is that the expression ‘financing of terrorism’ should be re-defined and refer to the financial support, in the above mentioned four ways or forms, that terrorist groups, or those who encourage, plan or engage in acts of terrorism, could use to finance their activities.

5. Conclusions.

It has been the business of this chapter to introduce and analyze the phenomenon of money laundering itself. To that purpose, I explained the meaning of the term ‘money laundering’ and, later, explored how ML operates. Most of the explanation was derived from assertions made in international documents and textbooks, and supported by a cross-case analysis of relevant ML cases, which were included in a chart in Appendix I. Subsequently, I evaluated the link between ML and the ‘financing of terrorism’. It is against this background that problems confronted by the implementation of the international legal order against ML must be seen. It is to this issue that this study now turns.

CHAPTER II

Architecture of the International Legal Order against Money Laundering

1. Overview.

The main purpose of this chapter is to put the international crime of ML in context by examining the general legal environment in which this supranational crime has evolved, as well as investigating the interconnection of this treaty-based crime and the whole global legal order against ML.

To do this, the chapter is organized as follows: first, I will develop five good reasons for preventing and countering ML at the international level. This discussion will help us to understand the nature and essence of the international legal order against ML (Section 2). Later, I will examine the evolution of the legal instruments that build-up the international legal order against ML, with a special focus on examining the evolution of the definition of ML offences as drafted in international conventions and EU Directives (hard law instruments). This discussion will help to evaluate the past, so we can imagine the way forward; that is, the future of this global legal order (Section 3). Subsequently, I will explain why it is critical to harmonize and integrate, as much as possible, both the preventive/regulatory AML system and the crime of ML as drafted in hard law instruments (Section 4). Next, I will provide a definition of this preventive/regulatory AML system, as well as a general overview and analysis of this system (Section 5). Finally, I will introduce the treaty-based crime of ML and examine if its drafting facilitates international cooperation between countries (Section 6).

2. Reasons for taking legal actions against money laundering at the international level.

The question to answer here is this: why is it that the international community decided to prohibit and take legal actions against ML, through the creation and development of an international legal order? An understanding of these reasons is a prerequisite to clarify the nature, essence and main aim of this supranational legal order against ML.

To date, there is no consensus in the academic literature about the reasons for prohibiting ML worldwide. First of all, it seems relevant to highlight Bruce Zagaris's opinion. This author believes that 'as politicians struggle to explain their inability to effectively control the growth of transnational crime, the rhetoric and efforts to develop an international money movement enforcement regime have increased'.¹²² One could argue that this is a persuasive assessment; however, a valid objection is that this opinion is based on a subjective and rhetorical argument, and is not supported by legal theoretical foundations.

A second and more positive rationale for preventing and countering ML worldwide is that ML produces a negative influence on the financial sector, and more broadly, on the economy as a whole. This position is explained in several international documents and reports (e.g., the Basel Committee on Banking Supervision, the International Association of Insurance Supervision and the International Organization of Securities Commissions)¹²³ and supported by several scholars (e.g., Hans Geiger and

¹²² Bruce Zagaris, 'The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11, 2001' (2004) 22 *Berkeley Journal on International Law*, 123-158, at. 124.

¹²³ The BCBS adopted in 1988 a 'Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering'. This paper was updated in 2001. In 2003 and 2005, both the IOSCO and the IAIS, conducted an updated version of the BCBS's 2001 paper.

Oliver Wuensch,¹²⁴ Quirk¹²⁵ and Tanzi)¹²⁶ most of whom are experts on the field of the economy. Many other scholars, such as Jean-Francoise Thony,¹²⁷ Angela Veng Mei Leong¹²⁸ and William C. Gilmore,¹²⁹ agree that ML should be prohibited since it contains a negative influence on the financial sector and, more in general, on the socio-economic system; but they add a second reason for taking legal actions against ML at the international level: ML allows criminals and organized crime to consolidate their economic power in the legitimate economy. Guy Stessens¹³⁰ agrees with the above reasons, but he takes a step further, adding a third reason: ML operations also affect the administration of justice. More recently, in particular after the 9/11 attacks, other scholars such as Thomas Biersteker and Sue Eckert,¹³¹ not only stress the interconnection between ML and criminals or organized crime, but also between ML and terrorist groups.¹³²

¹²⁴ Hans Geiger and Oliver Wuensch, 'The fight against money laundering – An economic analysis of a cost-benefit paradoxes' (2007) *Journal of Money Laundering Control*, Vol. 10, No. 1, p. 91-106.

¹²⁵ P. J. Quirk, '*Macroeconomic Implications of Money Laundering*' (WP/96/66, IMF, Washington D.C., 1996).

¹²⁶ V. Tanzi, '*Money laundering and the international financial system*' (WP/96/55-EA, IMF, Washington D.C., 1996).

¹²⁷ Jean-Francois Thony, 'Mécannique et géopolitique du blanchiment de l'argent', *Rapport Annuel Mondial sur le Système Economique et les Stratégies (RAMSES)*, Institut Français des Relations Internationales, Editorial Dunod, 2003. For an English translation and updated version of this article see: 'Money Laundering and Terrorism Financing : an Overview' (French Institute on International Relations, 2005).

¹²⁸ Angela Veng Mei Leong, '*The Disruption of International Organised Crime*' (Ashgate, London 2007) 40.

¹²⁹ William C. Gilmore, '*Dirty Money: the Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism*' (3rd ed., Council of Europe Publishing, 2004) 51-79.

¹³⁰ Guy Stessens (2000) 84-87.

¹³¹ Thomas J. Biersteker and Sue E. Eckert (eds.) '*Countering the Financing of Terrorism*' (Routledge, London 2008).

¹³² Throughout this thesis the terms 'terrorism', 'terrorist groups' and 'terrorist organizations' will be used interchangeably. These words will solely denote acts of political violence aimed at terrorizing civilians for the purpose of influencing a third party.

Based on these different interpretations of this subject matter, I will go one step further, arguing that the creation, legal essence and development of the legal order against ML is justified by five major arguments. The first argument is related to organised crime and crime in general, the second to the socio-economic consequences of ML, the third to moral principles, the fourth to the protection of the administration of justice, and the fifth is related to terrorist organizations. The contribution and originality of this section is that these five reasons for preventing and countering ML worldwide have not been put together before.

The *first reason* for taking legal actions against ML is to identify and get knowledge about criminals and organized crime and undermine their economic power as well as remove their incentives for perpetrating acquisitive crimes. This central goal to achieve can be explained in a number of assessments that are described below. The first assessment is based on the idea that the international efforts to prohibit ML worldwide have been built on strategies aimed at attacking organized criminal enterprises by unraveling the web of their financial networks on the one hand, and laundering methods on the other, to gain knowledge of how to better counter and prevent them.¹³³ By investigating and following the flow of funds derived from a predicate criminal offence, law enforcement authorities gain knowledge regarding the best way to prosecute criminals and criminal enterprises that committed that predicate offence (e.g., identifying the offender, imprisoning them, convicting them and, at the same time, tracing, freezing and confiscating their criminal assets).¹³⁴

A similar argument is that ML should be prohibited, because it provides the means through which criminal(s) and organized crime are able to influence and

¹³³ Jean-Francois Thony (2005).

¹³⁴ Ibid.

consolidate their economic power-base in the legal economy, allowing them to penetrate the formal or legitimate economy and the legal institutional framework, without the fear of legal sanction or confiscation of their criminal assets.¹³⁵ The more efficiently criminal assets are laundered, the lower the criminals' 'overhead' and the greater their productivity and investment power in the legal economy.¹³⁶ Hence, according to this view, the set of legal norms that have been put in place on a supranational level aim to undermine the economic and effective purchasing power of criminals and organized criminal groups.¹³⁷

Finally, it could be said that the international efforts to prevent and counter ML have been built on strategies aimed at disabling the expansion of criminal groups in general and organized crime in particular, by blocking and penalizing one of their main forms of financing: laundering their proceeds of crime. As a result of this legal strategy, the international community expects: first, to deprive criminal(s) and organized crime of the proceeds of their crimes; that is, the financial gains, products or fruits obtained through their criminal activities, sometimes referred to as the *fructum sceleris* or the *productum sceleris*.¹³⁸ Secondly, to undermine organized criminal groups by removing one of their main incentives for continually perpetrating acquisitive crimes.¹³⁹ Thus, in other words, the prohibition of ML operations must be perceived as one of the most efficient ways to combat criminals and organized criminal groups, as it directly attacks crucial functions of criminal activity—the financing and money making itself. In this

¹³⁵ Angela Veng Mei Leong (2007) 40. See also, B. Rider, 'The practical and legal aspects of interdicting the flow of dirty money' [1995-96] *Journal of Financial Crime*, Vol. 3, No. 3; and William C. Gilmore (2004) 11.

¹³⁶ See, Donato Masciandaro, 'Money Laundering – The Economics of Regulation' (1999) *European Journal of Law and Economics*, at. 238. See also, Masciandaro (2007) 2.

¹³⁷ *Ibid.*

¹³⁸ See, Guy Stessens (2000) 9 and 84-85.

¹³⁹ *Ibid.*

sense, the 1988 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the first international treaty against ML, recognizes in its Preamble that serious crimes, such as illicit traffic, ‘generate large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels’.¹⁴⁰ It, therefore, pointed out that the international community is henceforth ‘determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their *main incentive* for so doing’ (emphasis added).¹⁴¹

All these assessments seem to be represented in the opinion advocated by Justice Alito of the Supreme Court of the US in *United States v. Santos*,¹⁴² where he argued that ‘[the money laundering statute] was enacted as an important defence against organized criminal enterprises’.¹⁴³ Simon Farrell, shares this opinion, believing that ‘attacking money laundering is part of a concerted international trend and was seen as being central to the fight against organized crime’.¹⁴⁴

Nevertheless, as explained later in further details, most of the above assessments could be criticised through the argument that depriving criminals and organized crime of the profit of crime as well as removing their incentive for continually perpetrating acquisitive crimes, is by no means self-evident. Moreover, even if these arguments were to be assumed they might be enough to justify the creation and development of the

¹⁴⁰ For further details about the so-called United Nations Vienna Convention see below, section 3.1.

¹⁴¹ Ibid.

¹⁴² *Us v. Santos*, 128 S. Ct. 2044 [2008] (Alito, J. dissenting, Supreme Court of the US).

¹⁴³ See also, Supreme Court – Leading Cases, ‘*Money Laundering*’, (2009) Harvard Law Review Vol. 122:276, p. 479.

¹⁴⁴ Simon Farrell ‘Money Laundering’ in Ian Smith and others (ed.), ‘*Asset Recovery, Criminal Confiscation and Civil Recovery*’ (Lexis Nexis, London 2003) 498.

preventive/regulatory approach against ML composed of civil/administrative procedures, but not to justify the penalization of ML. Criminal laws are special and more difficult to justify than other branches of law. This is especially true, since the tool of criminalization of a conduct should not be taken without an analysis of the probable impact of penalization, its side-effects, its efficacy, and the possibility of addressing the problem with less intrusive forms of control, such as civil, commercial or administrative laws and regulations. Legislators ought to use the tool of criminalization only as a last resort. Later, in chapter III, I will examine the reasons that justify the criminalization of ML activities.

A *second major reason* for the construction of this international legal order stems from the protection of the socio-economic worldwide system. According to academic papers and international documents, the prejudicial influence that flows of criminal funds have on the economy, and in particular on the financial sector, may be illustrated as follows: (i) following a deductive analysis, economic studies explain that launderers may not seek to invest their accumulated ill-gotten assets where it is more economically profitable, but where they can disguise and clean their proceeds of crime more effectively. This may produce movements of assets in the opposite direction that one may expect in accordance with basic and regular economic principles. Thus, the *incorrect and unfair distribution of resources* that takes place may eventually have a negative repercussion on the economy. (ii) Furthermore, the economic market itself is also affected by ML, since the interest of launderers in the investment of assets, again, might not stem from its real value, but rather from the benefits that accrue to them in terms of concealment and recycling. So, based on these incentives, launderers could be willing to pay far more than the true value of the assets. This attitude will artificially drive purchasing prices up and make them unaffordable for honest competitors. (iii)

Another major problem includes *errors in economic policy* resulting from the already explained artificially inflated prices and the resulting demand generated by massive flows of criminal funds into particular areas of the economy. In this context, government decisions would commit errors by adjusting economic policies to follow this false demand. (iv) *Volatility in exchange rates and interest rates* resulting from the disposition of dirty assets, as well as its *corruption* influence on financial markets, can also be counted among the possible negative externalities of ML.¹⁴⁵

A *third argument* that justifies the prevention and prohibition of ML and, therefore, the creation of an international legal order against ML, touches on moral principles. For a long time, lawmakers have agreed that criminals should not be allowed to improve their economic situation with the proceeds of crime. This basic rule was laid down in Roman law: ‘Nobody can improve their condition through their own offence’.¹⁴⁶ This is based on the theory that no offender should benefit from his/her crime, as well as on the idea that it is important to ensure that the money generated by the predicate offence and subject to a process of ML, cannot be used to commit other crimes or enhance the structure of a criminal organization or terrorist group. Imagine for a minute if the victim of a prior acquisitive crime, or even society as a whole, see offenders enjoying, using and investing in the formal economy the income of their committed crimes, without sanction or punishment. Founded on the legal principle that ‘crime should not pay’, this will be unfair for the honest citizen. From this point of view, the non-prohibition of ML operations is particularly unfair to honest people who

¹⁴⁵ See, e.g., P. J. Quirk, (1996) and V. Tanzi (1996), Hans Geiger and Oliver Wuensch (2007). These scholars have compiled macro and microeconomic data and investigated in detail the externalities of ML for the global economy. See also, international documents and reports issued by intergovernmental international groups and organizations (e.g., the Basel Committee in Banking Supervision that issued in 1988 a document entitled ‘Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering’; this document was updated in 2001).

¹⁴⁶ Ulpiano, Digest 50, 17, 134.

do not break the law committing an acquisitive crime and do not break the law twice, by concealing, converting and recycling these proceeds of crime in the legal economy.

But Alexander has gone further, arguing that ‘it is not only morally wrong for crime to pay, but, if it does, it can encourage others to choose a career of crime’.¹⁴⁷ This seems to be correct, given the fact that, from a sociological point of view, a perpetrator of an acquisitive crime who decides to submit the accumulated criminal assets into a process of ML means that whoever commits a crime obtained an economic benefit as a result. So, crime is economically motivated in these cases, and this motivation could encourage more people to either continue or start criminal activities.

A *fourth reason* to prevent and counter ML at the international level, stems from the idea that the process of ML damages the administration of justice (in French, *delit contre la justice*). As explained in previous sections, one of the ultimate goals of any ML operation is to conceal dirty profits derived from a predicate offence. In order to achieve this ultimate goal, launderers usually carry out various transactions attempting to hide the paper trail, that is, to obscure the criminal origin of the proceeds. These concealment transactions displayed by the launderer could hinder prosecutor’s investigations when they try to identify those who committed the predicate offence in order to bring the alleged perpetrators to trial. Hence, taking actions against ML is a useful tool against the obstruction of the investigation of the predicate offence; that is, in favour of the administration of justice.¹⁴⁸

Fifthly, it may be pointed out that taking legal actions against ML can contribute to the undermining of ‘terrorist groups’. As shown in the previous chapter, ML is one of the four ways or forms that terrorist groups can use to finance their activities. In such

¹⁴⁷ R.C.H. Alexander, (2007) 27.

¹⁴⁸ See, in chapter III, section 3, a further analysis of the ‘administration of justice’ as a key social value or right that justifies the prevention and prosecution of ML.

cases, terrorism may demand that dirty funds be subject to a concealment and a cleaning process of ML, in order to lower the probability of being discovered and/or to enjoy, save or re-invest their accumulated criminal assets in the legal economy. The Taliban, for instance, profits from the trafficking of opium and taxing the drug trade in areas under their control.¹⁴⁹ These funds are used, after being submitted to a process of ML, to support terrorist organizations such as Al-Qaeda.¹⁵⁰ As such, countering the advance of ML constitutes the ‘Achille’s heel’ not only of organized criminal groups, but also of terrorist organizations, as most of their ML operations imply contact with the legal or formal economy and therefore expose them to the chance of being detected.¹⁵¹ Hence, given the links between terrorism and the process of ML, the international legal order against ML should be seen as a tool, or even as a new legal strategy, against terrorist organizations.

It should be said, finally, that these five major reasons for taking legal actions against ML may be persuasive enough to justify the creation and development of a preventive/regulatory legal framework against ML, composed of administrative/civil laws and banking regulations; but the key question is whether these five major reasons are enough justifications to penalize ML activities. I will discuss this in the following chapter III. At that opportunity, I will examine the reasons that justify the penalization of ML operations in light of the minimalist approach of criminal law. According to this respectable theory of criminalization, legislators ought to use the tool of penalization only as a last resort; so, to criminalize a conduct should not be taken without an analysis

¹⁴⁹ B. Unger, ‘The Impact of Money Laundering’, in D. Masciandaro and others (eds.) *Black Finance: The Economics of Money Laundering*, (Edward Elgar P., Cheltenham, UK 2007) 178.

¹⁵⁰ Ibid.

¹⁵¹ Amos N. Guiora and Brian J. Field, ‘Using and Abusing the Financial Markets: Money Laundering as the Achilles’s Heel of Terrorism’ [2007-2008] U. Pa. J. Int’l. L., Vol. 29:1.

of the probable impact of penalization, its side-effects, its efficacy, and the possibility of covering the problem by less intrusive forms of regulation and control.¹⁵²

3. Evolution of the international legal order against money laundering: drug trafficking, organized crime, terrorism and, finally, corruption.

This section will show the history, evolution and scope of the international legal order against ML, with a special focus on the development of the international crime of ML in the last three decades. This exposition is essential for the contextual analysis in subsequent chapters, revealing that the global ML legal order, as drafted in international conventions and EU Directives (hard law instruments), represents a significant achievement in the ongoing prevention and prosecution of ML. However, it does not provide a panacea. Although these have been significant efforts to harmonize and model more detailed and longer anti-ML measures, there are still too many lacunae and ambiguities in the global legal order, especially in the definition of the international crime of ML.

Next, I will first describe the evolution of the international conventions and EU Directives (hard law instruments) and, subsequently, I will refer briefly to the international recommendations (soft law instruments).

3.1. Hard Law: International Conventions and EU Directives.

The evolution of the international legal order against ML as drafted in hard law instruments is outstanding, not only for its punitive approach (i.e., the international crime of ML), but also for its preventive/regulatory side (i.e., the so-called anti-ML

¹⁵² A. Ashworth, *Principles of Criminal Law* (5th ed., OUP, Oxford 2006) 64-65.

system). This evolution has gone through clearly defined phases that will be explained in the following lines.

- *First Phase: criminalization and internationalization of ML to combat drug-trafficking groups.*

The criminalization of ML started at the domestic level and then moved to the international level. In 1986, the United States and the United Kingdom were the first countries in the world to introduce a ML criminal offence in their respective domestic systems. In the United States, the *Money Laundering Control Act 1986 (MLCA)* was passed, making it a criminal offence to engage in the laundering of the proceeds of crime, or to handle assets that are the fruits of criminal activities.¹⁵³ In the UK, the *Drug Trafficking Offences Act 1986 (DTOA)* made it a criminal offence to enter an arrangement whereby the proceeds of another's drug trafficking activities are laundered.¹⁵⁴ This incriminated behavior includes entering any arrangement that (i) facilitates the retention of the offender of his/her own proceeds; (ii) secures that funds relating to the criminal proceeds are placed at the offender's disposal; and (iii) secures that the offender's proceeds are placed at the offender's benefit. Of course, intent is the required level of mind or *mens rea* of this crime. The launderer must know or suspect that the owner of the property has been engaged in drug trafficking or has benefited from drug trafficking.

¹⁵³ Codified at 18 USC 1956-1957, published No. 99-570 (1986). The core of this provision consists of three different fronts who actively engage in ML: the crime of using financial transactions in laundering money (section 1956(a)(1)), the crime of transporting laundered funds across the United States borders (section 1956(a)(2)), and crime as a product of ML sting operations (section 1956(a)(3)).

¹⁵⁴ Drug Trafficking Offence Act 1986, s. 24. A similar offence was introduced in Scotland by the Criminal Justice (Scotland) Act 1987, s. 43.

The *1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance (hereinafter the 'Vienna Convention')*¹⁵⁵ was the first international convention to address ML and the most important international commitment on this matter, as all the future treaties rely, in part, on it.¹⁵⁶ One of the main purposes of the Vienna Convention is 'to deprive persons engaged in illicit traffic [in narcotic drugs] of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing' (Preamble). This convention deals only with criminal law provisions. The definition of the crime of ML is limited to drug-related crimes as predicate offences.¹⁵⁷ Article 3 (1) of the Convention calls on States to incriminate three types of ML activities, when committed intentionally. First, the 'conversion or transfer' of drug-derived property 'for the purpose of concealing or disguising the illicit origin of the property' or evading the legal consequences of a person's drug-related activities. Secondly, the 'concealment or disguise' of drug-derived property such as its nature, source, location, dispositions movement, ownership and rights with respect to it. The convention lastly requires the criminalization of the 'acquisition, possession or use' of property, knowing, at the time of the receipt, that such property was derived from offences related to illicit drug trafficking.¹⁵⁸ Almost all the countries of the world—185 countries—have signed and ratified the Vienna Convention.

¹⁵⁵ Signed Vienna, Austria (adopted 19 December 1988, entered into force 11 November 1990).

¹⁵⁶ For a very useful collection of previous work by the United Nations in the area, see online: <www.unodc.org/unodc/en/treaties/index.html>accessed 20 November 2011.

¹⁵⁷ Drugs-related crimes in the Vienna Convention involve the production, manufacture, distribution, sell, purchase, and any other activities in relation to drugs and any psychotropic substances.

¹⁵⁸ It should be noted that the adaptation of this third type of a ML crime is an optional clause for countries, since it is subject to the fundamental/constitutional principles and basic concepts of the country's legal system.

- *Second phase: internationalization of the ML legal order for countering organized crime.*

The 1990s was a decade where the focus was set on fighting organized criminal groups and transnational crimes in general, and not only against drug trafficking groups. Therefore, from 1990 to the new millennium (2000) the international community decided to enlarge the global anti-ML legal order to address other ‘serious crimes’ as predicate offences, beyond simple drug trafficking offences.

On 8 November 1990, the Council of Europe opened for signature the *1990 Council of Europe Convention of laundering, search, seizure and confiscation of the proceeds from crime (hereinafter the ‘Strasbourg Convention’)*,¹⁵⁹ constituting the first internationally binding treaty that focuses exclusively on ML. Like the Vienna Convention, it only deals with criminal law provisions. Article 6 (1) of the convention requires that ML be established as a criminal offence in similar terms to the ones established in the Vienna Convention. This convention differs from the Vienna Convention in that its scope is not limited to drug proceeds, as it includes the proceeds from a wider range of serious offences, beyond simple drug-trafficking offences. Then, it could be said that the focus was set on fighting organized crime and acquisitive-transnational crimes in general, and not just drug-trafficking groups. In particular, article 6 (4) of the Convention led State Parties to consider what type of serious crimes are regarded as predicate offences. At the same time, article 6 (2) provides that, for the purpose of implementing the definition of the crime of ML:

- a) it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party;

¹⁵⁹ Signed Strasbourg, France (adopted 8 November 1990, entered into force 1 September 1993). All 47 member States of the Council of Europe, together with Australia and Monaco, have ratified the Strasbourg Convention. Unlike the Warsaw Convention (see below), the European Union (EU) itself was not a party to the Strasbourg Convention.

- b) it may be provided that the offences set forth in that paragraph do not apply to the persons who committed the predicate offence;
- c) knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances.

At this time, the convention also established several optional clauses for countries concerning the adoption of the crime. In particular, article 6 (3) established that each country *may* adopt, under its domestic law, all or some of the three types of ML criminal offences, in any or all of the following cases where the offender: (a) ought to have assumed that the property was proceeds of crime, (b) acted for the purpose of making profit, (c) acted for the purpose of promoting the carrying on of further criminal activity.¹⁶⁰

In June 1991 the European Union drafted the first *EU Money Laundering Directive 91/308/EEC*. The Directive used a definition of the crime, which closely followed that of the Vienna Convention (article 1), although member States were entitled to extend the scope of the predicate offence to other offences (article 2). On 4 December 2001, an amendment was made to the EU Directive 91/308, the amended EU Directive 2001/97/EEC on prevention of the use of the financial system for the purpose of ML. Among other amendments, this Second EU Directive requires member States to have in place ML legislation that covers all serious crimes as predicate offences of ML.¹⁶¹

¹⁶⁰ For a detailed analysis of the Strasbourg Convention see: W. Gilmore, *'Dirty Money: The evolution of international measures to counter money laundering and the financing of terrorism'* (3rd edn., Council of Europe Publishing, Germany 2004) 159-176.

¹⁶¹ For a general overview and analysis of these EU Directives see, e.g., V. Mitsilegas, *'Money laundering countermeasures in the European Union. A new paradigm of security governance versus fundamental legal principles'* (Kluwer Law International, The Hague/London/New York 2003).

The 2000 *United Nations Convention against Transnational Organized Crime* (hereinafter, the 'Palermo Convention')¹⁶² was adopted by the UN General Assembly in Resolution 55/25 of 15 November 2000.¹⁶³ Article 1 provides that this convention was approved with the aim of 'promoting co-operation to prevent and fight transnational organized crime more effectively'. Then, it could be said that State Parties which have ratified the Convention commit themselves to taking a series of measures against transnational organized crime, including the drafting of anti-ML norms. This convention deals with administrative/civil and criminal provisions against ML. On the *criminal side*, article 6 (1)(a)(b) requires each State Party to adopt, in accordance with fundamental principles of its domestic law, the criminalization of ML activities in almost identical terms to the ones adopted by the Vienna Convention, although including the 'widest range of predicate offences', not just those offences associated with drug trafficking. In particular, article 6 (2) (b) points out that each State Party must include as predicate offences all serious crimes related to organized criminal groups, corruption and the obstruction of justice offences. In relation to jurisdiction, article 6 2 (c) sets forth:

Predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there.

¹⁶² Signed Palermo, Italy (adopted 12 December 2000, entered into force 29 September 2003). As of December 2011, 150 countries signed and more than 85 ratified this Convention.

¹⁶³ For an excellent overview of the drafting and the main lines of the Convention by the Secretary of the Ad-Hoc Committee that elaborated it, see Dimitri Vlassis, 'Drafting the United Nations Convention against Transnational Organized Crime' in Phil Williams and Dimitri Vlassis (eds.), '*Combating Transnational Crime: Concepts, Activities and Responses*' (Routledge, Oregon 2001) 356 -378.

Art. 6 (2) (e) provides that a State Party may refrain from prosecuting a person for ML who has committed the predicate offence if such criminalization is against domestic law principles.¹⁶⁴ On the *preventive/regulatory side*, the convention requires governments to put in place a full range of anti-ML countermeasures, based on international standards and practices, including financial system measures such as customer identification, record keeping, and reporting of suspicious transactions, as well as the creation of a Financial Intelligence Unit (article 7).

The convention includes additional measures in relation to jurisdiction, confiscation, extradition, mutual legal assistance and cooperation between State Parties that are outside the scope of this dissertation.¹⁶⁵

- ***Third phase: after the 9/11 attacks, the ML legal order was strengthened to include the financing of terrorism.***

The *United Nations Convention for the Suppression of the Financing of Terrorism* (hereinafter the '*UN Convention against Financing of Terrorism*')¹⁶⁶ is probably the most important of the international instruments in the prevention and countering of terrorism worldwide. It entered into force in April 2002, a few months after the 9/11 attacks and the US invasion of Afghanistan.¹⁶⁷ It establishes three main obligations for State Parties. First, it obliges States to include the new offences of FT and the so-called

¹⁶⁴ I will refer further to this aspect in Part II, chapter VI.

¹⁶⁵ For a general overview and analysis of the Palermo Convention see: Roger S. Clark, 'The United Nations Convention Against Transnational Organized Crime' (2004) 50 *Wayne L. Rev.* 161 – 184; David McClean, '*Transnational Organized Crime – A Commentary on the UN Convention and its Protocols*' (OUP, Oxford 2007).

¹⁶⁶ Signed in New York, US (adopted 9 December 1999, entered into force 12 April 2002). As of December 2011, 143 States have signed this convention and more than 125 have ratified it.

¹⁶⁷ On the background of this convention see: IMF, 'Suppressing the Financing of Terrorism: A handbook for legislative drafting' (Legal Department: International Monetary Fund) (4 August 2003) 5-7.

crime of ‘terrorism’ or, to be precise, the crime of an ‘act of terrorism’¹⁶⁸ in their national criminal legislation (article 2). Article 2 defines the crime of FT in the following terms:

Any person commits [the offence of FT] if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intent that they should be used, or in the knowledge that they are to be used, in full or in part, in order to carry out: either (a) an act constituting an offence within the scope of one of the UN conventions against terrorism listed in the Annex to the convention;¹⁶⁹ or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Secondly, it enacts requirements concerning the role of financial institutions in the detection and reporting of evidence in financing of terrorism acts (art. 18). Thirdly, beyond the scope of this dissertation, the convention also contains detailed provisions on mutual legal assistance and extradition that go much further than the previous UN anti-terrorism conventions (arts. 11, 18 (2) and 20 to 24).¹⁷⁰

The *United Nations Security Council Resolution 1373* entitled ‘*Threats to International Peace and Security caused by Terrorism Acts*’¹⁷¹ was adopted only seven days after the 9/11 attacks. Like other domestic and international responses, article 1 of the Resolution focused on terrorist financing as the primary target for preventing and

¹⁶⁸ The term ‘terrorism’ has never been defined in international law; but this is not the case of the term ‘act of terrorism’, that was defined, for instance in this international convention.

¹⁶⁹ A complete list of UN conventions against terrorism is available on the web at: www.un.org/law/cod/htm, accessed March 2011.

¹⁷⁰ For more details see: IMF, ‘Suppressing the Financing of Terrorism: A handbook for legislative drafting’ (Legal Department: International Monetary Fund) (4 August 2003) ch. 3 and 4.

¹⁷¹ UN Doc S/RES/1373. (adopted 28 September 2001). Unlike an international convention, which has the effect of law within the ratified countries, Security Council Resolution 1373 passed in response to a threat to international peace and security under Chapter VII of the UN Charter; so this UNSC Resolution is binding upon all UN State members.

suppressing acts of terrorism. In particular, article 1 (b) defines the crime of FT as follows:

The wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or within their territories, where there was an intention that the funds should be used, or in the knowledge that they were to be used, in order to carry out terrorist attacks.

States were also specifically required to extend maximum assistance to other States in their criminal proceedings relating to the FT acts.

At the regional level, the OAS drafted the *2002 Inter-American Convention against Terrorism*.¹⁷² While a detailed analysis of all the measures in this convention is beyond the scope of this dissertation, I will note that the convention obliges State Parties to criminalize ML activities derived from any ‘serious offence’, including, among others, the FT offence (art. 6, entitled ‘Predicate offences to money laundering’). This convention respects the general principles stated by the ‘UN Convention against Financing of Terrorism’.

In May 2005, members of the Council of Europe drafted the *2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (hereinafter the ‘Warsaw Convention’)*.¹⁷³ This convention deals with administrative, civil and criminal measures against ML and FT. On the criminal side, it ratifies the definitions of ‘financing of terrorism’ and ‘act of terrorism’ criminal offences, established in article 2 of the UN Convention against FT (art. 1 (h)); and provides these two criminal offences, among other serious offences, as predicate offences of ML (art. 9 (4)).

¹⁷² Signed in Bridgetown, Barbados (adopted 3 June 2002, entered into force 7 October 2003). As of December 2011, 33 of the 34 Member States of the OAS have signed and more than 25 have ratified this convention.

¹⁷³ Adopted 16 May 2005, entered into force 1 June 2008. As of December 2011, more than 20 States have signed and ratified this convention.

It also defines the crime of ML in terms identical to the definition drafted in article 6 (1) of the Strasbourg convention (art. 9 (1)) and article 6 (1)(a),(b) of the Palermo Convention. The convention, however, also included more detailed and optional clauses for State Parties concerning the adaptation of key physical (*actus reus*) and subjective elements of the ML criminal offence. In particular, article 9 (3) of the convention allows each State Party to adopt a ML offence when the alleged offender ‘suspected’ or ‘ought to have assumed’ that the property was proceeds of crime. Moreover, if required by principles of the domestic law of a State Party, it may be provided that the ML offence does not apply to a person who has committed the predicate offence (art. 9 (2) (b)).¹⁷⁴ The knowledge, intent, aim, and purpose required as an element of the ML offence may be inferred from objective factual circumstances (art. 9 (2) (c)). Article 9 (4), (5), (6) and the appendix of this convention also establish in detail, compared with former international conventions, the characteristics of the predicate offence of ML, in the following terms:

4 Provided that paragraph 1 of this article applies to the categories of predicate offences in the appendix to the Convention,¹⁷⁵ each State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies:

- a) only in so far as the predicate offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year, or for those Parties that have a minimum threshold for offences in their legal system, in so far as the offence is punishable by deprivation of

¹⁷⁴ This element of the international ML offence will be studied further in Part II, chapter VI.

¹⁷⁵ The categories of predicate offences mentioned in the appendix to the convention are: a) participation in an organised criminal group and racketeering; b) terrorism, including financing of terrorism; c) trafficking in human beings and migrant smuggling; d) sexual exploitation, including sexual exploitation of children; e) illicit trafficking in narcotic drugs and psychotropic substances; f) illicit arms trafficking; g) illicit trafficking in stolen and other goods; h) corruption and bribery; i) fraud; j) counterfeiting currency; k) counterfeiting and piracy of products; l) environmental crime; m) murder, grievous bodily injury; n) kidnapping, illegal restraint and hostage-taking; o) robbery or theft; p) smuggling; q) extortion; r) forgery; s) piracy; and, t) insider trading and market manipulation.

- liberty or a detention order for a minimum of more than six months;
and/or,
- b) only to a list of specified predicate offences; and/or,
- c) to a category of serious offences in the national law of the Party.

5 Each Party shall ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering.

6 Each Party shall ensure that a conviction for money laundering under this Article is possible where it is proved that the property was [...] originated from a predicate offence, without it being necessary to establish precisely which offence.

7 Each Party shall ensure that predicate offences for money laundering extend to conduct that occurred in another State, which constitutes an offence in that State, and which would have constituted a predicate offence had it occurred domestically. Each Party may provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically.

Among other administrative/civil/banking provisions, it enacts requirements concerning the role of the FIUs in the prevention of ML, acts of terrorism and the financing of terrorism (arts. 12 and 13). Finally, it calls upon State Parties to use the relevant ‘soft law’ initiatives against ML and FT of multilateral organizations as a guideline (art. 13).¹⁷⁶

On 26 October 2005, a third amendment was done to the Second EU Directive 2001/97/EEC; that is, the so-called *Third Anti-ML EU Directive 2005/60/EC* on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. Among other provisions, this Third EU Directive imposes on Member States the obligation to have in place ML legislation that covers the financing of terrorism and act of terrorism as predicate offences of ML.¹⁷⁷

¹⁷⁶ For more details and analysis of the Warsaw Convention see, e.g., B. Unger, ‘*The Scale and Impacts of Money Laundering*’ (EE Publishers, Massachusetts 2007) 22-25.

¹⁷⁷ For further details about this Third Anti-ML EU Directive 2005/60 see, e.g.: Valsamis Mitsilegas and Bill Gilmore, ‘The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards’ (2007) 56 *Int’l & Comp. L.Q.* 119.

- *Fourth phase: the international legal order against ML was strengthened to counter corruption.*

By Resolution 58/430 of 1 October 2003, the UN opened for signature the so-called *2003 United Nations Convention against Corruption (UNCAC)*.¹⁷⁸ Although the main focus of this convention is on corruption, articles 14 and 23 addresses anti-ML provisions. On the preventive/regulatory side, each State is required to institute, again, a regulatory system against ML in terms similar to the Palermo Convention (art. 14). The convention also defines the offence of ML in identical terms to article 6 of the Palermo Convention; identifying corruption as a serious crime and thus, as a predicate offence to the ML offence (art. 23). Interestingly, the convention calls upon State Parties to use the relevant initiatives of regional, interregional and multilateral organizations as a guideline against ML and FT, such as the FATF 40 + 9 Recommendations (art. 14, par. 4).

Other international conventions that contain general provisions referring to corruption and its relation with ML are: *the Criminal Law Convention on Corruption of the Council of Europe*,¹⁷⁹ and *the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the OECD*.¹⁸⁰

3.2. Soft law: International Recommendations and Resolutions.

The evolution of the international legal order against ML has been deeply influenced not only by the mentioned hard law instruments, but also by a number of non-binding

¹⁷⁸ Signed Mexico DF, Mexico (adopted 1 October 2003, entered into force 14 December 2005). At the present time, 140 States have signed and more than 117 have ratified this convention.

¹⁷⁹ See article 13 (adopted 27 January 1999, entered into force 2000). At the present time 18 countries have ratified this convention.

¹⁸⁰ See article 7 (adopted 17 December 1997, entered into force 15 February 1999). Today thirty-seven countries are parties to the OECD Convention, including the thirty members of the OECD, plus six non-members: Argentina, Brazil, Bulgaria, Chile, Estonia and Slovenia.

recommendations and resolutions issued by intergovernmental anti-ML organizations (i.e., soft law instruments). The so-called soft law international instruments are just statements of intent which do not impose legally binding obligations on signatories, but their influence in shaping domestic law should not be underestimated. In particular, this kind of non-binding international instrument may provide examples or instances of both State practise and *opinion juris* and they usually contribute to clarifying the nature and scope of international conventions and EU Directives (hard law instruments).¹⁸¹ For example, the rather vague treaty-based obligation to take measures to prevent ML has been rendered more precise through a range of soft law instruments that specify, in considerable detail, the minimum steps that are required of a serious effort to prevent ML.

The first international soft law instrument against ML was issued by the *Basel Committee on Banking Supervision* in December 1988. While the Vienna Convention focused on the criminal side, the Basel Principles 1988 concerned the regulatory/preventive side of the international legal order against ML.¹⁸² However, one of the most important set of soft norms are the *40 Recommendations of the FATF*, first published in 1990 and revised in 1996, 2003 and 2004. After 9/11 attacks the FATF published the anti-FT Special 9 Recommendations. The FATF 40 + 9 Recommendations have become the key standards in the global policy against ML and FT. The importance of these recommendations is moreover reflected by the fact that they have expressly been endorsed by the UN Security Council.¹⁸³ The functions of the

¹⁸¹ For further details about soft law instruments in international legal systems see: Chinkin, 'Normative Development in International Legal Systems', in D. Sheldon (ed.), *Commitment and compliance: the role of non-binding norms in the international legal system* (OUP, Oxford 2000) 21.

¹⁸² For further details see *The Basel Committee – Compendium of Documents*, available at: www.bis.org, accessed 19 July 2010.

¹⁸³ UNSC 1617, 29 July 2005; paragraph 7.

FATF are to examine ML and FT techniques and trends, recommend ways of addressing them, review countries' legislative efforts, and, periodically, evaluate the implementation of the standards by members and non-members. So, the political power of the FATF seems to be relevant not only among their member countries but also among non-members.¹⁸⁴

Over the last decade, the United Nations Office on Drugs and Crime (UNODC)¹⁸⁵ introduced model legislation, which tries to facilitate the implementation of international conventions designed for the purpose of ML at the domestic level. In 1999, the UNODC introduced the Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime, which was designed primarily for the use of civil law countries. This was revised with the 2005 Model Legislation on Money Laundering and Terrorism Financing (hereinafter '2005 Model Legislation on Money Laundering').¹⁸⁶ Later, in April 2009, the UNODC issued a new model of law, primarily for the use of common law countries, entitled 'Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime' (hereinafter, '2009 Model Provisions on Money Laundering').¹⁸⁷

These soft law instruments are the product of an internal process involving UN officers, together with IMF and Commonwealth Secretariat officials and a group of

¹⁸⁴ Located in Paris, FATF itself has over thirty-two member countries. The following regional bodies are also part of the FATF: Asia/Pacific Group on Money Laundering (APG), Caribbean Financial Action Task Force (CFATF), Council of Europe (MONEYVAL), Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and the Financial Action Task Force on Money Laundering in South America (GAFISUD).

¹⁸⁵ The United Nations actively operates a program to fight ML: the Global Programme Against Money Laundering (GPML), which is headquartered in Vienna, Austria, and it is part of the UNODC.

¹⁸⁶ The 2005 Model Legislation on ML (Report) (UNODC, IMF, 1 December 2005) is online: <www.imolin.org/imolin/en/model.html> accessed 25 May 2009.

¹⁸⁷ The 2009 Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime' (primary for the use of common law countries) (IMF, UNODC, Commonwealth Secretariat) (Report, April 2009) is available online: <www.imolin.org/imolin/en/model.html> 25 May 2009.

experts. No State had a direct and official input in its drafting. A weakness of these models of law might be that they limit and divide their use and application in common and civil law systems countries, rather than offering integrated suggestions and definitions concerning the adoption of international anti-ML global standards at the domestic level.

In addition to the FATF and the UNODC, there are other international organizations, such as the OAS-CICAD,¹⁸⁸ and the *Egmont Group of Financial Intelligence Units*,¹⁸⁹ that play crucial roles in the construction of a harmonized and coordinated global legal framework against ML and FT. These groups also issue declarations, resolutions, recommendations and ‘action plans’ to their members.

3.3. Examining the evolution of the global legal order against money laundering.

As a result of the above explanation, the following could be deduced. *First*, the tremendous evolution of this international legal order in the last three decades shows the willingness of the international community to prevent and counter ML operations derived from a broad scope of predicate offences. The 1980s constituted a starting phase, which concentrated on combating drug trafficking criminal groups through a new anti-ML worldwide enforcement legal order. As a consequence, during this starting period, the legal definition of ML refers only to the laundering of drug-money. The

¹⁸⁸ In 1986 the Organization of American States (OAS) created the Inter-American Drug Abuse Control Commission (known by its Spanish acronym CICAD) to confront the growing problem of drug-trafficking in the Americas. By 1994, the OAS endorsed the role of the CICAD to include regional efforts against money laundering. CICAD has developed the ‘Model Regulations Concerning Laundering Offences Connected to Illicit Drug-Trafficking and other Serious Offences’ (hereinafter, ‘OAS-CICAD Model Regulations’). This model regulation was modified several times; it was last reviewed in 2005 to include measures against FT.

¹⁸⁹ The Egmont Group is an international association of FIUs from more than 100 countries. The purpose of the group is to provide a forum for FIUs to improve support for each of their national programs against ML and FT.

1990s was a decade where the focus was set on countering organized crime and transnational crimes in general, rather than only against drug trafficking groups.¹⁹⁰ Therefore, the international community decided in this decade to enlarge the international legal order against ML to address an increasing number of other ‘serious crimes’¹⁹¹ as predicate offences of ML, beyond simple drug-trafficking offences. Then, after the 9/11 attacks the international legal order against ML was called upon to provide an apparatus to control terrorist financing in particular and terrorist groups in general. As a result, the scope of the predicate offence of ML was enlarged, again, to include the serious crimes of FT and act of terrorism as predicate offences of ML. In 2003, the supranational legal order against ML was strengthened to address the corruption phenomenon as well. Consequently, the international legal order identified corruption as a serious crime and so, as one of the predicate offences of ML.

Secondly, this tremendous evolution of the international legal order against ML is illustrating that the international community is actually working on improvements in an ongoing way towards longer, more detailed, as well as less ambiguous measures against ML. For instance, the definition of the ML criminal offence as drafted in the Vienna Convention contains many more lacunae than the definition provided by the Warsaw Convention. Moreover, the preventive/regulatory AML system is not even mentioned in the Vienna Convention, but in the Palermo and the Warsaw international conventions, there are several and specified administrative, civil and banking measures against ML.

¹⁹⁰ W. Gilmore, *‘Dirty Money: The evolution of international measures to counter money laundering and the financing of terrorism’* (2004) 16-17.

¹⁹¹ The term ‘serious crime’ as a predicate offence of ML is poorly defined in international hard law instruments. Then, it could be argued that the legal definition of ML as drafted in hard law instruments is implicitly ambiguous in this respect; offering implicit options to State Parties and EU Member States concerning the way they can adopt this relevant physical (*actus reus*) element of the crime. I will further discuss this topic in chapter IV.

Thirdly, the speed and number of countries that signed and ratified the described international conventions (hard law instruments) shows the support of the international community in general and State Parties in particular, in this normal trial-and-error working process looking for the best way forward in the structuring of this global legal order. Almost all the member countries of the UN, the Council of Europe and the OAS, as well as all the EU member States have been supporting the described evolution and way forward of the international legal order against ML. For example, at the present time 186 countries—almost all of the world— have signed and ratified the Vienna Convention. More recently, more than 165 countries have signed and ratified the Palermo Convention.

Nevertheless, in spite of these efforts towards longer and more detailed international legal provisions against ML at the international level, there are still numerous lacunae or what I call explicit and implicit ambiguities/options in its drafting. I refer to *explicit ambiguities/options* when international hard law instruments directly offer to State Parties two or more variants/models about how to adopt a relevant element of the global legal system against ML at the domestic level. This is especially true with the definition of the crime of ML as drafted in hard law instruments, which offers explicit options concerning the adaptation of key physical/objective and subjective elements of the crime. For instance, both article 6 (2) (b) of the Strasbourg Convention and article 6 (2) (f) of the Palermo Convention, provides that each State Party may adopt a ML offence that can apply, or not, to the persons who have committed the predicate offence.¹⁹² Another example of this classification refers to the harmonization problem regarding the crime of ML's subjective element or different degrees of criminal liability. Article 6 (1) of the Strasbourg Convention establishes an

¹⁹² I will refer to this example in chapter VI.

intentional crime of ML, while article 6 (3) (a) of this same convention *allows* State Parties to implement also a negligent ML offence.¹⁹³

In contrast, *implicit ambiguities/options* are when international hard law instruments include many terms of the legal definition of ML that are poorly defined or not even defined at all. In these cases, it could be said that the definition (implicitly) offers to State Parties numerous models about how to adapt the undefined concepts in their own jurisdictions. Again, this is especially true with the definition of the crime of ML as drafted in hard law instruments. For example, article 6 (2) (b) of the Palermo Convention imposes an obligation on all State Parties to apply the Convention's ML offence to 'all serious offences' with a view to including 'the widest range of predicate offences'. However, neither the Palermo Convention nor any other international convention define in detail what constitutes a serious offence and the widest range of predicate offence. This allows for a degree of variations among State Parties with regards to what constitutes a predicate offence of ML.¹⁹⁴

In conclusion, it is clear that the evolution of the international legal order against ML is towards a longer and more detailed definitional provision. But beyond this global trend in favour of more detailed provisions, the international legal order still contains too many moving parts and options that can spread across many different jurisdictions. When this occurs, the international legal order might not be reaching one of its main goals: the creation of a harmonized, coordinated and adequate response to the common and global problem of ML. In the following section we will explain why it is so important to harmonize and integrate, as much as possible, anti-ML measures at both the international and domestic level.

¹⁹³ I will refer to this example in ch. V.

¹⁹⁴ I will refer further to this subject in ch. IV, s. 4.

4. Understanding the relevance in the harmonization and integration of anti-money laundering norms at both the international and national level.

In turn, we will try to answer this question: Why is it relevant to harmonize and integrate the international legal order against ML as much as possible? With the term ‘harmonization’ we refer to a wide variety of methods and techniques which attempt to integrate and to realize an approximation in the adoption of international legal standards, but without insisting on perfect integration or imposing unification.

As explained in previous chapters, the academic literature suggests and assumes that ML is a complex process that usually involves trans-border elements and effects.¹⁹⁵ Thus, any legal strategy that is to deal with this common and global problem needs to have a significant international dimension and coordination. This was stressed, for instance, by the EU Directive 2005/60/EC, noting that:

Money laundering [...] is frequently carried out in an international context. Measures adopted solely at national or even Community level, without taking account of international coordination and cooperation, would have very limited effects. The measures adopted by the Community in this field should therefore be consistent with other action undertaken in other international fora.¹⁹⁶

Similar arguments were offered by Gilmore, who believes that ML is a worldwide problem based, at least, on two main reasons. First, due to the speed with which money or any other asset or economic value can travel around the economy of the countries or territories, changing the form of the proceeds of crime so that they appear to have originated from legitimate sources.¹⁹⁷ Secondly, because any

¹⁹⁵ See above, chapter I, section 3.

¹⁹⁶ Directive 2005/60/EC (Preamble, par. (5)). A similar reference is offered in the EU Directive 91/308/EEC (Preamble).

¹⁹⁷ William C. Gilmore (2004) 11.

discrepancy between national measures to fight ML can be used potentially by launderers, who might be motivated to find and to take advantage of the weakest link in the preventive/regulatory and punitive anti-ML norms of a particular country by shifting flows of dirty assets to that country.¹⁹⁸ Given that ML is a global problem, this scholar concludes that ML requires an international, coordinated and harmonized response.¹⁹⁹

In this vein, the FATF also explains that the nature of ML is transnational assuming, among other reasons, that criminals and organized criminal enterprises can shop around the world trying to find the best legal environment for laundering their accumulated ill-gotten assets.²⁰⁰ Then, having adequate, widespread and harmonized anti-ML norms at the international and national level seems to be critical to structure a coordinated and cohesive legal system in terms of responding to the phenomenon of ML.²⁰¹

Heba Shams believes that the harmonization of global legal orders through international law is critical, since it allows countermeasures to replicate the global character of the conduct they seek to suppress, tending, therefore, to enhance the scope for international cooperation among and within different countries.²⁰² In light of Sham's opinion, it seems reasonable to argue that, by creating and drafting an international legal

¹⁹⁸ Ibid, 31.

¹⁹⁹ Ibid, 51-53.

²⁰⁰ The system of anti-ML measures as designed by the FATF is based on the assumption that: 'any discrepancy between national measures to fight money laundering can be used potentially by traffickers, who would move their laundering channels to the countries and financial systems where no or weak regulations exist on these matters'. FATF, Annual Report 1989-1990 (13 May 1991) 13.

²⁰¹ See FATF 'Global Money Laundering and Terrorist Financing Threats Assessment' (Report) (July 2010) 52. In this sense, see also: A. Veng Mei Leong, *The Disruption of International Organized Crime: an analysis of legal and non-legal strategies* (Ashgate, London 2007) 55.

²⁰² It is outside the scope of this research to investigate and describe the general advantages of the harmonization of domestic norms through international law. For more information about this see: H. Shams (2004) 112-120.

order against ML, the international community hopes to harmonize and integrate anti-ML norms in general, to the point where they can be consistent and adequate, in terms of responding to the global and complex problem of ML. Therefore, harmonization and integration of international norms against ML has the same objectives and modalities as harmonization has in any other comparable subject and context. However, as a result of the way ML operates and its special features (e.g., globalized, organized, a white collar crime, a changeable and hidden process, among others)²⁰³ it seems to be reasonable to argue that the harmonization, as much as possible, of anti-ML measures is even more critical than in other comparable fields.

Inspired on the above mentioned opinions, I will try to go one step further; explaining what might be, in my opinion, the key argument to justify the implementation of an international, coordinated and integrated legal order against the global and complex problem of ML. It should be clear that ML is a complex and transnational problem. The common and global problem of ML cannot be solved by adopting adequate and detailed anti-ML measures in one country or territory; because money or any other criminal asset can be laundered in an inadequate anti-ML regimes' country or territory, and brought in as clean or legal in an adequate anti-ML regimes' country or territory. Therefore, the adoption of adequate, detailed and harmonized anti-ML measures at the international and domestic level is critical to structure a consistent legal order in terms of responding to the phenomenon of ML. Greater consistency in the implementation of international anti-ML norms at the domestic level, might lead towards more consistent and, consequently, more efficient enforcement. But let us illustrate this idea with the following example:

- Countries could have 'adequate' anti-ML regimes, or 'inadequate' regimes.

²⁰³ See *ut supra* chapter I, section 3, where I describe the main characteristics of ML operations.

- If the anti-ML regimes in country A and in country B are ‘adequate’, then the three stages of the process of ML (placement – layering – integration) could be higher in both countries. With adequate regimes in countries A and B, the launderers’ probabilities of being discovered are always higher. In this regard, launderers’ identification may take place when they introduce the proceeds of crime into country A’s financial system (first stage: placement), or when trying to form a ‘shell’ or ‘off-shore’ corporation in country B’s jurisdiction in order to further separate the money from its criminal origin (second stage: layering), or, finally, when trying to re-enter the money into countries B or A’s legal economy (third stage: integration).
- However, if country A is ‘adequate’ and country B is ‘inadequate’, then ML is easier not only in country B but also in country A, because launderers may use country B’s facilities to develop the first, second and third stages of the ML process (placement – layering - integration) and finally, re-investment the assets—already recycled in a legitimate form—in country A’s formal or legal economy.
- Finally, if country A and country B have ‘inadequate’ anti-ML regimes, then the incentive to commit both ML and the predicate offence might be higher in both countries. It was explained in previous chapters, that a primary reason for preventing and countering ML worldwide is to restrain criminals and organized criminal enterprises from perpetrating their criminal activities; thus, when anti-ML rules are ‘inadequate’ in countries A and B, the logical consequence is that the criminal’s incentive to commit not only ML but also its predicate offences is higher in both jurisdictions.

Based on the above discussion and example, it may be reasonably argued that the adoption of an integrated and harmonized global legal order against ML is necessary to propose a more effective regulatory and crime prevention implementation of existing international anti-ML policies against ML. With a better integration and consistency in the adaptation of global anti-ML norms at the domestic level, launderers will have, for instance, fewer chances to shop around the world trying to find inadequate anti-ML jurisdictions to practice ML. However, as discussed below and in future chapters, there is a delicate balance to be struck between the general effectiveness of a system and the respect of human rights. As pointed out by Herlin-Karnell: a system which does not recognize such tension, might have a negative impact in this regard and undermine rights without necessarily serving effectiveness.²⁰⁴

5. Providing a definition and analysis of the international ‘Anti-Money Laundering/Countering Financing of Terrorism’ (AML/CFT) system.

This section provides a general overview and analysis of the preventive/regulatory AML-CFT system that has been put in place at the international level. But, first of all, it is necessary to define the ‘preventive/regulatory AML-CFT system’. This will allow us to make a clear distinction between this preventive legal system and the repressive/criminal approach against ML.

As explained in the previous chapter, a criminal agent, a group of two or more criminals, organized crime or terrorism, can finance their activities through the commission of acquisitive crimes so they can acquire criminal funds, as well as by practising ML operations. However, it was also stressed that a substantial proportion of terrorist financing derives from legitimate origins (for instance, donations, contributions

²⁰⁴ Ester Herlin-Karnell, ‘The Development of EU Precautionary Criminalisation’ *Satzfahne*, (18.07.2011) EU CLR, p. 1.

and legitimate businesses); and, moreover, that terrorism might also use ‘money dirtying’ operations as a way or form of financing. In this line of reasoning, it was demonstrated that the expression ‘financing of terrorism’ means the financing by four possible ways or forms: ML, MD, legal or criminal assets; and, as a result of this conclusion, that ML is just one of these four forms, by which terrorism can use to finance their activities.

On this basis, it could be deduced that the implementation of an international legal order against ML leaves a gap in the legislation against terrorist groups, which can finance themselves through other ways not covered by anti-ML provisions. For that reason, after the 9/11 attacks, the international community decided both to establish the new international crime of FT,²⁰⁵ as well as to merge the preventive/regulatory anti-ML system (AML) with the ‘Countering-Terrorist’ system, creating the so-called preventive/regulatory ‘Anti-Money Laundering and Countering Financing of Terrorism’ (AML-CFT) system.²⁰⁶ In the following lines, I will try to define the ‘AML’ and the ‘CFT’ systems, so I can finally define the ‘preventive/regulatory AML-CFT system’.

For the purpose of this dissertation, the ‘preventive/regulatory AML system’ refers to the legal system that consists in the imposition of many administrative, civil and banking legal obstacles that launderers need to overcome in order to conceal the criminal origin of their accumulated ill-gotten funds as well as to recycle, invest, save or consume these criminal funds in the legal economy so they can look legitimate; and, in doing so, increase the possibility of detecting their evasive, hidden and changeable movements.

²⁰⁵ For a definition of the international crime of FT, see above section 3.1.

²⁰⁶ Tim Bennett, *‘Money Laundering Compliance’* (2 edn, Tottel Publishing, London, 2007) 1.

Founded on the above description, the ‘preventive/regulatory CFT’ system can be defined as the imposition of administrative, civil and banking laws and regulations that a person needs to overcome in order to provide financial support, in any form, of terrorist groups or of those who encourage, plan or engage in acts of terrorism and, in doing so, increase the possibility of detecting their movements. Moreover, as demonstrated in previous chapters, the expression ‘in any form’ means that terrorist groups and those who support acts of terrorism may finance terrorist activities in four different ways or forms: legal funds, criminal funds, money-laundering or money-dirtying operations.²⁰⁷

In order to develop a definition of the ‘preventive/regulatory AML-CFT system’, I will make a kind of fusion or combination between the above mentioned definitions of the AML and the CFT preventive/regulatory systems. For that purpose we should assume that criminals and organized crime, like terrorist groups, can finance their activities in the following four ways: ML, MD, legal and criminal funds. I have not founded any scholarly or empirical evidence to support this assessment, but it seems logical to argue that criminals and organized crime, like terrorist groups, can finance their activities through these four ways or forms. I do not find logical reasons to continue saying, as the literature does, that only terrorist groups can finance their activities in these four ways of financing. Or, to put it differently, we could ask ourselves: why is it that criminals or organized crime cannot finance their activities, for instance, by a process of money dirtying?

Assuming that criminals, organized crime and terrorist groups can finance their activities by legal assets, criminal assets, ML and MD activities, then, the preventive/regulatory AML-CFT system can be defined as the imposition of many

²⁰⁷ See above, chapter 1, section 4.

banking, civil and administrative legal obstacles that criminals, organized criminal groups or terrorist groups, need to overcome in order to finance their activities by ML, MD, legal funds or criminal funds, or all of them; and, in doing so, increase the possibility of detecting their financial movements. In this line of reasoning, it could be said that the ultimate goal of the preventive/regulatory AML-CFT legal framework is to detect and deter criminals, organized crime and terrorist groups for funding their activities and organizations by any, or all, of the above mentioned four ways of financing.

As explained above, the preventive/regulatory AML-CFT system that has been put in place at the international level, is mainly composed of administrative, civil and banking laws and regulations. It should be noted, however, that in some countries such as Argentina, Switzerland and the UK,²⁰⁸ many of the rules that constitute the prevention/regulatory AML-CFT system contain also criminal rules and punishment. Thus, in these jurisdictions the preventive/regulatory AML-CFT system is often described as an ‘administrative-criminal’ system (in Spanish, *derecho penal administrativo*; and, in French, *droit penal administratif*).

The preventive/regulatory AML-CFT system, as drafted in international hard and soft law instruments, is based on the following five pillars: (a) the ‘obliged agents’; (b) ‘Know Your Customer’ obligations (KYC); (c) suspicious activity reports (SARs); (d) Financial Intelligence Units (FIUs); and (e) freezing methods and the list of suspicious people, groups and entities; these are discussed next:

(a) *Obligated agents*: This legal system identifies specific categories of public and private institutions such as banks, financial institutions, casinos, insurance companies,

²⁰⁸ In the UK, for instance, there are related criminal offences for failing to report ‘suspicious activity reports’ to the UK AML/CFT controls (Proceeds of Crime Act (POCA) 2002, sections 330-332).

brokerage corporations, and professionals (e.g., public notaries and accountants) on whom KYC obligations are imposed.²⁰⁹

(b) *KYC obligations*: Most of the new obligations imposed on the obliged agents derive from the general principle of KYC. From this general principle stem the obligations to keep records of customer's information for a period of at least 5 years, giving internal training courses to staff, establishing internal control procedures and reporting suspicious transactions that are likely to be connected to criminal operations, the so-called SARs.²¹⁰

(c) *Suspicious activity reports (SARs)*: Obligated agents are compelled to pay special attention to any suspicious activities that their customers may undertake during their commercial relationship.²¹¹ Suspicious activities could be defined as 'all complex, unusual, large transactions, and/or all unusual patterns of transactions, which have no apparent economic or visible lawful purpose'.²¹² As soon as a suspicious activity is detected, the obliged agent is forced to promptly report their suspicions that funds could stem from a criminal activity to the competent national authorities and/or to the FIUs.²¹³

²⁰⁹ See, e.g., FATF Recommendations 9, 10 and 12. Analogous criteria are contained in the Statement of Principles of the Basle Committee and article 3 of the 91/308/EEC Money Laundering Directive (1991). For more information about KYC obligations imposed to the obliged agents see, e.g., John Howell, *The Prevention of Money Laundering and Terrorism Financing* (ICC Commercial Crime Services, Essex, UK 2006) 55-86 or Doug Hopton, *Money Laundering: A concise Guide for All Business* (Gower Publ., Hampshire, London 2006) 89-97.

²¹⁰ Ibid.

²¹¹ See, e.g., FATF Recommendation 11.

²¹² For a similar definition and further details about a 'suspicious activity' (also called 'unusual transaction') see, e.g.: T. Bennett *Money Laundering Compliance* (2nd ed., Tottel Publishing, West Sussex 2007) 73-74.

²¹³ See, e.g., FATF Recommendations 13, 14, 15, 16: Reporting of Suspicious Transactions and Compliance. For further information about SARs see: Simon Young, *Money Laundering Reporting Officer's Handbook* (Lexis Nexis, London 2005) 91-151.

(d) *Financial Intelligence Units (FIUs)*:²¹⁴ According to the most updated hard law instruments against ML, every State Party is obliged to create an independent and specialized law enforcement agency that is responsible for receiving, analysing and disseminating financial information, particularly the SARs delivered by the obliged agents.²¹⁵ FIUs can be classified by their nature: they may be administrative, or run by the police or a judicial authority. In some jurisdictions such as the UK, Switzerland, Canada, Germany and Austria, the FIUs are under the control of a police force. Other jurisdictions, particularly civil law countries, such as Argentina, France, Italy and Spain, opted for an administrative authority to run the FIUs. Many other countries (e.g., Luxembourg, Denmark, Iceland and Portugal) have chosen a judicial or prosecutor's authority to run the FIUs.²¹⁶

(e) *Freezing*²¹⁷ *methods and lists of suspicious people, groups and entities*: The UN Security Council Committee maintains a list of suspicious individuals and entities associated with the Al-Qaeda organization. More precisely, in accordance with a number of resolutions of the Security Council, all States that are Members of the

²¹⁴ The Egmont Group defines FIUs as follow: 'A central, national agency responsible for receiving (and, as permitted, requested), analyzing 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' (Legal Working Group, Report, 1996).

²¹⁵ See, e.g., article 12 of the Warsaw Convention and article 21 (para. 3) of the Third Anti-ML EU Directive 2005/60. Among soft law instruments, see, for instance, Recommendations 26 and 27. In an effort to address corruption within law enforcement, Recommendation 30 reminds countries to 'have in place processes to ensure that the staff of those authorities are of high integrity'.

²¹⁶ For more information about FIUs nature, see Jean Francois Thony 'Processing Financial Information in Money Laundering Matters: The Financial Intelligence Units' [1996] Eur.JCr., Cr.L and Cr.J 257-282; V. Mitsilegas, 'New forms of transnational policing: the emergence of financial intelligence units in the European Union and the challenges for human rights – Part I', (1999) 3 (2) Journal of Money Laundering Control 147-160. See also, IMF and World Bank, 'Financial Intelligence Units: An Overview' (Report) (IMF Publication Services, Washington D.C., 2004).

²¹⁷ Pursuant to the FATF definition, there is 'freezing' (also named as 'blockage' or 'restriction' measures) whenever a government or a competent legal authority assumes control of assets in question and prevents the original owner thereof to have access to them or transfer them. However, assets continue to belong to the original owner and they may either continue being managed by the 'obliged agent' or they may be subject to a special system of management which shall be previously established by each country.

UN must freeze the funds and other financial resources controlled directly or indirectly by such persons or entities.²¹⁸ In order to give effect to those resolutions within the European Community, the Council adopted a resolution ordering the freezing of the funds and other economic resources of the persons and entities whose names appear in a list annexed to that regulation.²¹⁹ That list is regularly updated in order to take account of changes in the summary list drawn up by the Sanctions Committee, an organ of the Security Council.

It should be said that the current UN procedure for the listing and delisting is particularly problematic. Those subject to this procedure do not have the right to be heard by the Sanctions Committee; there is no direct appeal procedure and the Sanctions Committee is not obliged to provide reasons for its decision. The question of whether this UN list procedure is consistent with human rights principles was considered by the European Court of Justice in the case *Modjahedines du Peuple d'Iran* (12 December 2006). In this case, the European Court criticized the lack of concrete and specific reasons for the listing, the lack of rights of the defence and the lack of a fair court hearing and judicial review. More recently, in the so-called *Kadi* case²²⁰ the European Court of Justice stressed, again, that this system of listing infringes fundamental guarantees. Specifically, in this case the European Court ruled

²¹⁸ By Resolutions 1267 (1999), 1333 (2000), 1390 (2002), as reiterated in Resolutions 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009) and 1989 (2011) the Security Council has obliged all States to freeze without delay the funds and other financial assets or economic resources, including funds derived from property owned or controlled directly or indirectly, with regard to the individuals, groups, undertakings and entities placed on the Al-Qaeda Sanctions List. For more information see online: www.un.org/sc/committees/1267/ accessed March 2012.

²¹⁹ Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 (OJ 2002 L. 139, p. 9).

²²⁰ Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission, 3 September 2008. This judgement was followed by the Court of First Instance in Omar Mohammed Othman v. Council and Commission, Case T-318/01, 11 June 2009. Omar Mohammed Othman is also known as Abu Qatada.

that the Community judicature has jurisdiction to review measures adopted by the Community giving effect to resolutions of the Security Council of the UN. In exercising that jurisdiction, it considered that the regulation infringed Mr. Kadi and Al Barakaat's fundamental rights under Community law.²²¹ The ECJ emphasized that the rights of defense, in particular the right to be heard, as well as the right to effective judicial review of those rights, were 'patently not respected' (para.334). As a consequence, the contested Council Regulation 881/2002 was annulled by the ECJ. The ECJ allowed the effects of the contested regulation to remain in force for a period of three months running from the date of the judgement.²²²

These cases demonstrate the need for human rights enhancements at the UN Security Council level when the Sanctions Committee is considering whether to include a person or bodies on the list or is responding to requests for delisting. This UN listing procedure should therefore be conditioned by the fundamental guarantees of a fair trial, as laid down in article 6 (1) of the European Convention on Human Rights.²²³

In light of the above discussion, it can be seen that the new AML/CFT system that has been put in place at the international level is characterized, in general, by the imposition of obligations on the private sector. This delegation process has been

²²¹ Yassin Abdullah Kadi, a resident of Saudi Arabia, and Al Barakaat International Foundation, established in Sweden, were designated by the Sanctions Committee of the UN as being associated with Usama bin Laden, Al Qaeda or the Taliban. On 19 October 2001 the names of Mr. Kadi and Al Barakaat were added to the summary list, then placed in the list annexed to the Community regulation.

²²² For a recent analysis of the so-called *Kadi* case see: S. Griller, 'International Law, Human Rights and the European Community's Autonomous legal Order: Notes on the European Court of Justice Decision in *Kadi*' (2008) *EUConst* 4:3, 528-533.

²²³ Hereinafter ECHR (entered into force 3 September 1953). Article 6 (1) of the ECHR accords a set of procedural rights fundamental to the rule of law. In particular, it applies to both criminal and civil proceedings, delivering the common set of procedural rights familiar to a legal process: the right to an impartial hearing, the duty to give reasons, the right to test the evidence, and so on. A similar provision is stated in Article 14 (1) of the International Covenant on Civil and Political Rights, hereinafter ICCPR (entered into force 23 May 1976).

described and criticised by several scholars as a ‘privatization of law’ process, where the private sector acts as a real ‘policeman’ of their customers.²²⁴ An example of this delegation process consists on burdening the private sector (e.g., private organizations, professionals and individuals) with the obligation to undertake various reporting duties (i.e., SARs) with respect to ‘suspicious’ financial movements coming from the commercial relation between them and their customers or clients.

From the defendant’s point of view, someone could argue that this delegation process (e.g., the obligation to undertake SARs) is unconstitutional, since it might erode the procedural safeguards of the ‘right to privacy’. The ‘right to privacy’ has been recognized, for instance, by article 11 (2) and (3) of the American Convention on Human Rights,²²⁵ which provides: ‘2. No one may be the object of arbitrary or abusive interference with his or her private life, family, home, or his or her correspondence, or of unlawful attacks on his or her honor or reputation’. It also provides: ‘3. Everyone has the right to the protection of the law against such interference or attacks’. In turn, article 17 of the International Covenant on Civil and Political Rights asserts that everyone has the right to the protection of the law against any arbitrary or unlawful interference with his or her privacy, home or correspondence. Article 8 of the ECHR provides the same principle with similar wording.²²⁶ Thus, the key question to answer here is whether or not the obligation to report suspicious transactions of clients or customers challenges or, moreover, violates the ‘right to privacy’. To do this, we should evaluate the correct, fair and balanced interpretation and extension of the right to privacy.

²²⁴ See, e.g., Stessens (2000) 179 and Heba Shams (2004) 80.

²²⁵ The Inter-American Convention on Human Rights (also known as the Pact of San Jose de Costa Rica) was adopted on 22 November 1969, and it became into force on 18 July 1978.

²²⁶ Article 8 (2) of the European Convention on Human Rights allows interferences with the exercise of the right to privacy if this is ‘in accordance with the law and is necessary in a democratic society [...] for the prevention of disorder or crime [...]’.

But the answer to this question is not *that* simple. The right to privacy is a significant and relevant constitutional guarantee, but it is not—nor could it ever be—an absolute right. The right to privacy, in this context, might yield to the legitimate right that the society has to control crime and prevent the advance of criminal enterprises (e.g., organized crime and terrorism) that deal with ML and terrorists or other agents that finance terrorist activities. This is the opinion of Stessens, who believes that ‘these reporting obligations are [...] compatible with Article 8 (2) of the European Convention on Human Rights as they are stipulated by law with a view to combating [serious forms of] criminality and can be considered necessary in a democratic society’.²²⁷

But the opinion of Stessens is incomplete. The imposition of a legal measure loses practical meaning for the society when its protective mission can be reached through less intrusive measures or controls. So, in order to complete Stessens’s opinion, the question to answer here is if society, represented by the State, is able to prevent, in practice, the laundering of proceeds of crime and the FT with no imposition on the obliged agents that are required, for instance, to undertake various reporting duties with respect to suspicious financial movements.

A balance and proper answer to this last question is that burdening the private sector with tasks and legal obligations that the State traditionally carried out seems to be necessary and acceptable under a constitutional point of view. The obliged agents (generally professionals or private organizations) share a profound experience and knowledge in the management of their respective economic sectors and businesses. Therefore, they are more effective than the State in identifying and isolating transactions suspect of ML and FT. This argument could be more clearly understood if we assume that the chance of identifying, for instance, a ML operation is at its highest

²²⁷ Guy Stessens (2000) 145.

probability during the preliminary stage of placement, when the criminal assets could be entering the financial system and when the obliged private agent (not the State) usually has physical and direct contact with the customer or client. This assertion seems to be correct, bearing in mind that, when the proceeds of crime are totally converted and invested or consumed in the legal economy, then, the opportunities of law enforcement authorities to detect the criminal assets are extremely difficult. These assertions might be founded on statistical data on reports made by financial institutions, which show that most SARs relate to transactions in the placement stage (rather than in the conversion or integration stages).²²⁸ Furthermore, it seems logical to say that, in this context, the State is unable to follow suspicious funds in a globalized world where financial funds flow at great speeds and, sometimes, through anonymous economic channels. Based on these assertions, it could be deduced that the State itself is often incapable of detecting and following suspicious financial transactions. As a consequence, the cooperation and interconnection between the private and the public sector is critical.

6. The punitive approach: the transnational crime of ML.

In turn, the study will provide a general overview and analysis of the crime of ML, as drafted in hard law instruments.

6.1. Towards a 'core' international crime of money laundering?

A distinction is quite rightly made in the literature between 'international crimes' *strictu sensu* and 'transnational crimes' or 'treaty crimes'.²²⁹ The former refers to the so-called

²²⁸ See, for example, the reports filed with the Belgian Financial Intelligence Unit: Petrus C. van Duyne, 'Criminal finances and state of the art. Case for concern?' in Petrus C. van Duyne and others (eds) *Crime Business and Crime Money in Europe*, (Wolf Legal Publishers, Nijmegen, Netherlands 2007) 69-96.

²²⁹ See, e.g., N. Boister, 'Transnational Criminal Law?' (2003) *European Journal of International Law* 953, 957. See also, G. Goodwin-Gill, 'Crime in International Law' in G Goodwin-Gil and S. Talmon

‘core’ international crimes, namely war crimes, genocide, crimes against humanity and crimes of aggression; whereas the later concerns the so-called ‘treaty/treaty-based’ crimes, such as the crimes of financing of terrorism, drug-trafficking and money laundering. According to Antonio Cassese, international crimes *strictu sensu* result from the cumulative presence of the following elements: (i) they consist of violations of international customary rules as well as treaty provisions where such crimes are defined; (ii) such rules are intended to protect social values or interests considered important by the whole international community; (iii) as a consequence, there exists a universal interest in repressing these crimes.²³⁰

Based on this definition, it is clear that the notion of ‘core’ international crimes, such as the crimes of genocide or crimes against humanity, does not include money laundering offences. This is because the crime of ML is only provided for in international treaties or resolutions of international organizations, but not in customary law. As I have pointed out in previous sections, the first two countries to criminalize ML were the US and the UK, and that was not very long ago.²³¹ Therefore, it is clear that ML is not a violation of international customary rules, so it cannot be classified as an international crime *strictu sensu*.

However, someone could argue that the international community has been working in the last three decades towards this title and legal status. The international conventions that have addressed the issue indicate that there have been multiple attempts from countries and the international community in general to codify and penalize ML conduct. In this sense, we have seen above how the international

(eds.), *The Reality of International Law* (Clarendon, Oxford 1999) 199, 205-208; T. Meron, ‘Is International Law Moving Towards Criminalization?’ (1988) 9 *Journal of International Law* 18.

²³⁰ A. Cassese, *International Criminal Law* (2nd edn., OUP, Oxford 2008) 12.

²³¹ See above, in section 3, the evolution of the international legal order against ML.

community is actually working on improvements in an ongoing way towards longer and more detailed provisional measures against ML, including, of course, the definition of the crime of ML.²³² Therefore, in conclusion, it could be said that, at least at the moment, there is not a ‘core’ international crime of ML, such as the crime of genocide.

Despite the fact that differences in the words ‘transnational crimes’, ‘international crimes’ or ‘treaty-based crimes’ may be more than mere semantics, in this work these terms will be used interchangeably. Throughout this dissertation, by ‘transnational’, ‘international’ or ‘treaty’ crimes, I mean such conducts universally recognized as criminal, which are considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over them under ordinary circumstances.²³³

6.2. The (too ambiguous) crime of money laundering as drafted in hard law instruments.

The international crime of ML has been taken up in many international conventions and EU Directives on the subject (i.e., hard law instruments). Consequently, key elements of its definition are spread out across different hard law instruments. To facilitate the analysis of the international crime of ML, I will transcribe the definition contained in articles 1.3 and 5.2 (1),(2),(3),(4) of the 2005 Model Legislation on ML. This definition has been drafted in accordance with the definition of the crime as drafted in the Vienna

²³² See above, section 3.

²³³ A similar definition of ‘international crimes’ was provided in the case *Hostage* case (1953) 15 Ann Dig 632, 636.

convention and subsequent hard law instruments.²³⁴ The definition provides the following:

- (1) For the purpose of this law, money laundering is defined as follows:
 - (a) The conversion or transfer of property,
 - Variant 1:* by any person who knows or should have known
 - Variant 2:* by any person who knows or suspects
 - Variant 3:* by any person who knows, should have known or suspects that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of such property or of assisting any person who is involved in the commission of the predicate offence to evade the consequences of his or her actions.
 - (b) The concealment or disguise of the true nature, source, location, disposition movement or ownership of or rights with respect to property,
 - Variant 1:* by any person who knows or should have known
 - Variant 2:* by any person who knows or suspects
 - Variant 3:* by any person who knows, should have known or suspects that such property is the proceeds of crime.
 - (c) The acquisition, possession or use of property,
 - Variant 1:* by any person who knows or should have known
 - Variant 2:* by any person who knows or suspects
 - Variant 3:* by any person who knows, should have known or suspects [option: at the time of receipt] that such property is the proceeds of crime.
- (2) Knowledge, intent, or purpose required as constituent elements of the offence may be inferred from objective factual circumstances. In order to prove the illicit origin of the proceeds it shall not be required to obtain the conviction of the predicate offence.
- (3) The predicate offence also includes offences committed outside the national territory if they constitute in the State where they were committed and would have constituted an offence if committed within the territory of *[name of the country adopting the law]*. [Option: the predicate offence also includes actions committed outside national territory if they would have constituted offences if they had been committed within the territory of *(name of country adopting this law)*].

²³⁴ Article 1 of the 2005 Model Legislation on ML was drafted in accordance to article 6 (4) of the Palermo Convention, article 9 (4), (5), (6) and the appendix of the Warsaw Convention, and many other hard law instruments. In addition, article 5.2 (1) was mainly drafted in accordance to articles 3 (1)(b) and (c) of the Vienna Convention, articles 6 (1) and 6 (1)(a)(b) of the Palermo Convention, as well as many subsequent hard law international instruments against ML. Finally, articles 5.2 (2), (3) and (4) were adopted in accordance with article 6 (2) (e) of the Palermo Convention and many other subsequent hard law instruments.

- (4) *Variant 1*: The offence of money laundering shall also apply to persons who have committed the predicate offence.
Variant 2: The offence of money laundering shall not apply to persons who have committed the predicate offence.

Furthermore, for the purpose of this definition, the term ‘proceeds of crime’ is defined in article 1.3 as follows:

any funds or property derived from or obtained, directly or indirectly:
Variant 1: from any offence / *Variant 2*: from an offence punishable by a maximum penalty or imprisonment for more than one year / *Variant 3*: from an offence punishable by a minimum penalty of imprisonment for more than six months / *Variant 4*: offences defined at articles [in specified legislation, e.g., criminal code].

The definition of the international crime of ML as drafted in hard law instruments is too ambiguous. It is dominated by many moving parts, options and variants that can spread across many different jurisdictions. Through the inclusion of implicit and explicit ambiguous terms and optional clauses, the definition allows for a wide degree of variations in the adaptation of key elements of the ML offence at the domestic level.²³⁵

But, why does the definition of this treaty crime include these explicit and implicit optional clauses for State Parties? A possible and prudent answer could be founded on the following major argument. Criminal law is the ultimate expression of State sovereignty and it is closely tied to domestic systems’ values. Then, the perfect integration or unification of international criminal norms could hardly be achieved in practice, given the cultural, historical and doctrinal differences alleged by State Parties, when they try to find consensus about how to shape and draft criminal offences at the international level. Consequently, a cost/benefit analysis of this matter could be based on the following idea: ‘if there are more options in the definition of an international

²³⁵ For a definition of the terms ‘implicit’ and ‘explicit’ ambiguities/options in the definition of the international crime of ML, see above, section 3.3.

crime, then, more countries will be more willing to sign and ratify international conventions'. This seems to be the opinion of Ilias Bantekas and Susan Nash, when they indicate that: 'in order to get more States on board a well-signed convention is more important than a 'strong' convention; in this sense, specificity, depth, or other elements that were initially envisaged to be included in the convention may have to be sacrificed'.²³⁶

I agree that the above is a valid reason for including tolerable options and ambiguous legal clauses in international treaties in general. However, in the particular area of the international crime of ML, there should be a limit to the number of implicit and explicit ambiguities and options; that is to say, there should be a move towards convergence and further integration, at least, in some particular elements of the international crime of ML. As explained in further detail in Part II of this study, this move towards convergence might be reached, in particular, in three main elements of this international crime, where legal problems and substantial differences in its integration and adaptation process usually arise: (i) the scope of the predicate offence;²³⁷ (ii) the subjective or mental element of the crime;²³⁸ (iii) the legal debates concerning the criminalization of 'self-laundering'.²³⁹

I imagine *four* main arguments that could be invoked, in general, to support the drafting of a new definition of the international crime of ML, which contains longer and less ambiguous clauses, so the definition moves towards convergence, at least in these three main elements of the crime. *First*, fundamental rights of suspects or accused persons are at stake in the specific area of international criminal law. Then, the need of

²³⁶ Ilias Bantekas and Susan Nash, '*International Criminal Law*' (Routledge, London 2007) 9.

²³⁷ See below, ch. IV, s. 4.

²³⁸ See below, ch. V.

²³⁹ See below, ch. VI.

more detailed, integrated and less ambiguous (*'un-ambiguous'*) definitions is more important in the area of international criminal law, rather than, for instance, in the sphere of international public law. This is the opinion of Antonio Cassese, who observes:

Often even treaties lay down ambiguous, or at any rate not well-determined provisions; this happens whenever the need to reconcile conflicting state interests makes it necessary to agree upon vague formulas. In short, the need for detailed, clear and unambiguous legal regulation is less strong in the general area of public international law than in the specific area of international criminal law, where this need becomes of crucial relevance, given that the fundamental rights of suspects or accused persons are at stake.²⁴⁰

Secondly, a more detailed and less ambiguous definition of this international crime is important to understand whatever commitment States may believe they have to prevent and prosecute ML offences at their respective domestic level. The more ambiguous and poorly defined the definition, the less responsibility States will be prepared to assume.²⁴¹

Thirdly, a move towards a convergence and a better harmonization of this international crime at both the international and national level, would benefit the investigation and prosecution efforts among countries. This move to convergence might increase the chances that the dual criminality requirement would be satisfied; and this should lead to a better international cooperation between countries. I will further explain this topic in the next section.

Finally, I agree that criminal law is conventionally conceived as the last bastion of national sovereignty. Thus, State Parties that negotiate the definition of the international crime of ML could invoke cultural and historical based differences in order

²⁴⁰A. Cassese (2008) 9.

²⁴¹ A similar argument is offered in: William A. Schabas, *'Genocide in International Law'* (2nd ed., CUP, 2009) 10.

to keep some variants at the international level. However, national sovereignty of countries is neither an absolute nor an unconditional right or concept. Then, there could be a limit in the number of implicit and explicit ambiguities in the definition of this international crime, based on the idea that usual sovereignty claims that might shape some of these ambiguities and options should yield in view of the need for effective and consistent international cooperation in ML criminal matters. ML is a complex and global problem, so its legal treatment requires an international approach, which pays due respect to the importance of international cooperation by excluding as much as possible chauvinistic obstacles.

And this last reasoning seems to be specially true and correct, bearing in mind that differences in the implementation of the mentioned three main elements of this global crime of ML is not related with strong differences in legal culture or history of countries. For reasons that will become clearer as the thesis goes on, it could be said that the above mentioned particular options offered by the international crime of ML might be implemented by any country of the world, regardless of the general characteristics of their legal system (e.g., common law, civil law). Consequently, a better harmonization and convergence within these particular models or variants offered by the international crime in question will appear to be more attainable than perhaps previously thought.²⁴²

But let me illustrate why I believe that this move towards convergence in the above mentioned three main elements of the international crime of ML is *possible*. A first reason is because the international community is actually working on improvements—through regional/international conventions and soft law instruments issued by regional and international organizations like the UN, OAS or FATF—towards

²⁴² See below, ch. IV, s. 4.4.4 entitled ‘some final thoughts’; as well as ch. V, s. 7 and ch. VI s. 5.

a longer, more detailed and less ambiguous definition of the crime.²⁴³ This is in line, moreover, with the global trend in international criminal law, which is towards longer and more detailed definitional provisions.²⁴⁴ So, it could be said that my proposal towards convergence is in line with the natural working process looking for the best way forward that the international community is developing at the international level. This working process, moreover, has been supported by almost all the countries of the world.²⁴⁵

A second reason is because this move towards convergence that I am proposing to implement in this work is consistent with sound principles of criminal law and criminal procedure, namely the principle of legality and the presumption of innocence, among other points of fairness. I will refer to this analysis, mainly, in Part II of this work.

6.3. The condition of ‘dual criminality’ in the context of international cooperation between countries.

My claim in this sub-section will be that a consistent and more integrated definition of this international criminal offence is essential, among other important reasons, to improve international cooperation between countries. Inconsistencies and substantial differences in the adaptation of the international crime of ML could produce difficulties for prosecutors when seeking international cooperation. If the act for which the international cooperation is sought does not constitute the same offence of ML under

²⁴³ See above, section 3.

²⁴⁴ W. Schabas (2009) 84.

²⁴⁵ See above, section 3.3.

the law of the requested State, then, a mutual legal assistance²⁴⁶ or extradition²⁴⁷ request could be refused on the basis of absence of ‘double criminality’ (also known as ‘dual criminality’).

This condition of dual criminality allows the requesting country to refuse cooperation in respect of a conduct which it considers not blameworthy or not sufficiently blameworthy to incriminate. Then, in light of the principle of dual criminality, the crime in the country asking for mutual legal assistance and/or extradition has to be also a crime in the country where a suspect is being held. But a broad interpretation of the requirement of dual criminality means that it is not essential that the two statutes be perfectly harmonious. Dual criminality exists if the necessary character or the criminal acts of each country are the same and if the laws are ‘substantially’ similar (regardless of whether both countries place the offence within the same category of offence or denominate the offence by the same terminology). Then, the decisive point is the coincidence in the ‘substance of the offence’.²⁴⁸ This requirement ensures reciprocity between countries and its rationale is closely related to sovereign jurisdiction. This condition, moreover, flows from a point of fairness. It would be unacceptable and *unfair* for the requested State A to investigate and, moreover, order the arrest and extradition of someone for a conduct in a foreign State B, if that conduct is perfectly lawful under the law of the requested State A.²⁴⁹

²⁴⁶ For this work, ‘mutual legal assistance’ request, means the formal request by one State to another concerning certain investigatory or provisional measures.

²⁴⁷ For the purposes of this thesis, ‘extradition’ means a modality of interstate cooperation in criminal matters through which a person is surrendered by one State to another for the purpose of a standing trial or serving a sentence.

²⁴⁸ On the principle of ‘double criminality’, see: M.C. Bassiouni, *‘International Criminal Law’* (2nd edn, Transnational Publishers, New York 1999) Vol. 2, *Procedural and Enforcement Mechanisms*; J. Sambei and J.R.W.D. Jones, *‘Extradition Law Handbook’* (OUP, Oxford 2005). See also, Hebe Shams (2004) 147-153.

²⁴⁹ *Ibid.*

Extensive requirements for dual criminality is a common practice in many international conventions (hard law instruments). This is the case, for instance, of article 18 (4) of the Strasbourg Convention, which allows a requested country to refuse cooperation when ‘the offence to which the request relates would not be an offence under the law of the requested Party if committed within its jurisdiction’. Another example is article 18 (9) of the Palermo Convention, which establishes: ‘States Parties may decline to render mutual legal assistance on the ground of absence or dual criminality’. Among soft law instruments, the last part of the FATF Forty Recommendations addresses international cooperation. First, countries should provide as much assistance to other countries’ anti-ML efforts as possible.²⁵⁰ Such assistance includes, among other aspects, responding promptly to a country’s request for mutual legal assistance and/or extradition. But, where dual criminality is required for international cooperation, that requirement should be deemed to be satisfied regardless of whether both countries place the offence within the same category of offence or denominate the offence by the same terminology, provided that both countries criminalise the conduct underlying the offence.²⁵¹

Countries also recognise dual criminality requirements. For example, Argentina uses its Law on International Cooperation in Criminal Matter, Law 24,767 of 1997, to regulate mutual legal assistance and extradition procedures with which this country does not have a specific bilateral/multilateral treaty and in the cases where the treaties do not sufficiently cover mutual legal assistance/extradition matters. In other words, where there is such a treaty, its provisions shall govern the assistance procedure, and the provisions of Law 24,767 shall serve to interpret the text of treaties and to provide for

²⁵⁰ These are Recommendations 36-40.

²⁵¹ This is Recommendation 37.

aspects not covered by it.²⁵² It should be noted that under article 68 of Law 24,767, assistance is provided even when the conduct giving rise to an assistance request is not deemed an offence in Argentina. Only if the assistance requested relates to seizure of property, searching of premises, surveillance of persons, interception of mail or telephone tapping is dual criminality necessary.²⁵³

Guy Stessens is in favour of completely removing the dual criminality requirements in the context of international cooperation between countries.²⁵⁴ In summary, Stessens argues that the removal of this principle will facilitate mutual legal assistance and extradition requests between countries.²⁵⁵ Then, it could be said that, from Stessens's point of view, the convenience of prosecutors seem to be his main consideration for proposing the removal of this key principle of criminal procedure. However, the goal of maximum effectiveness in the prosecution of a crime should not subordinate and undermine points of fairness and due process, which are intended to protect the principle of dual criminality, as explained above. For that reason, I believe it is important to continue respecting the right that each country has to define the extension and limits of the principle of 'dual criminality' in the context of international cooperation between countries.

Of course, I agree on harmonizing and establishing exceptions to this principle or requirement at the international level; but the complete abolition of dual criminality requirements in the context of international cooperation between countries is, pure and simple, an exaggeration. A mitigation or exception to this requirement seems to be

²⁵² Art. 2 of Law 24,767.

²⁵³ For further details about Law 24,767 in the context of international cooperation see: FATF Third Evaluation on Argentina and Second joint FATF/GAFI-SUD, 'Mutual Evaluation Report on Argentina' (Report) (22 October 2010) 188-191.

²⁵⁴ Stessens (2000) 292-295.

²⁵⁵ Ibid.

reasonable and justified, bearing in mind that the civil guarantees protected by the principle of dual criminality are neither absolute nor unconditional. Therefore, a balanced and prudent position could be that the partial and limited abolition of dual criminality requirements in some particular circumstances might be fair and justified. For instance, the rights protected by this requirement could yield to the legitimate and ‘common interest’ that all States have in investigating, prosecuting and convicting those who perpetrate ‘serious’ and/or ‘trans-border’ crimes, such as child sexual abuse and drug trafficking offences.²⁵⁶ But the existence of a ‘serious’ crime in the cooperation request is not the only element to justify an exception to this requirement. The other element to take into account is the kind of cooperation required by the foreign country. If the assistance requested relates to the arrest, interception of mail or telephone tapping, among other highly ‘intrusive’ measures, then, dual criminality requirements are necessary. Thus, it is not only the seriousness of the crime, but also the seriousness and intrusive level of the assistance request that should be evaluated to justify the partial and limited abolition of dual criminality requirements in the context of international cooperation between countries.

A similar position seems to be adopted in several international treaties, where there is an exception to the principle of dual criminality. For example, the so-called European Arrest Warrant (EAW)²⁵⁷ eliminated the check regarding the double criminality in the matter of terrorism, participation in a criminal organization, racketeering, illicit trafficking in narcotic drugs, trafficking in human beings, illicit trafficking in weapons, child sexual abuse, laundering of the proceeds of crime, among

²⁵⁶ For further details about the so-called ‘common interest rationale’ (*repression internationale*) see below chapter VII, section 5.2.

²⁵⁷ Established by a EU Framework Decision in 2002, the EAW Framework Decision came into force on 1 January 2004; and, at the present, all Member States had implemented the Legislation.

other (serious) criminal offences. The weakness of this provision is that it does not evaluate the level of challenge to fundamental civil guarantees (e.g., the right to privacy) that the assistance request could contain in order to justify the partial elimination of dual criminality requirements. A second example is the text of the European Evidence Warrant (EEW),²⁵⁸ which do not provide any requirement of double criminality in the context of mutual legal assistance, unless it is necessary to carry out a search or seizure;²⁵⁹ and the execution of the EEW do not involve a serious crime, such as corruption, laundering the proceeds of crime and terrorism, among other crimes subject to a custodial sentence or a detention order for a maximum period of at least three years.²⁶⁰

Then, the complete removal of the condition of dual criminality is not a positive and prudent proposal to improve international cooperation between countries. Instead, to facilitate international cooperation, I propose that efforts should be concentrated in drafting a new, more detailed and integrated definition of this supranational crime—one model law—that can be universally adopted by every country. The adoption of this new, more detailed and better integrated definition at both the international and domestic level may increase the chances that the dual criminality requirements are satisfied, and this should lead to a better international cooperation between countries. As Brigitte Unger observes, a move towards convergence, in particular concerning differences in the scope of the predicate offence of ML, would benefit investigation and prosecution

²⁵⁸ The EEW replaces the system of mutual assistance in criminal matters between Member States for obtaining objects, documents and data for use in criminal proceedings.

²⁵⁹ Article 14 (1) of the EEW (Established by a Council Framework Decision 2008/978/JHA of 18 December 2008; it came into force on 19 January 2009).

²⁶⁰ Article 14 (2) of the EEW.

efforts and lead to efficiency in international co-operation on criminal matters connected to money laundering.²⁶¹

7. Concluding comments.

By studying the general context and evolution of the international crime of ML I have concluded that longer, more detailed and less ambiguous definitions of ML offences as drafted in hard law instruments are key to drawing up a consistent and adequate response to the global problem of ML. Greater consistency in the implementation of ML offences may lead to more consistent and consequently more efficient enforcement. Of course, this move towards a convergence and a more detailed definition of the international crime of ML should be consistent with sound principles of criminal law and procedure. This is, in fact, the main purpose of the following chapters: to determine whether or not the implementation of ML offences is consistent with human rights guaranties and points of fairness.

²⁶¹ B. Unger, *The Scale and Impacts of Money Laundering* (2007) 25.

PART II

A RIGHTS-BASED ANALYSIS OF MONEY LAUNDERING OFFENCES: A GLOBAL COMPARATIVE PERSPECTIVE

CHAPTER III

Analysis of the social values protected by money laundering offences

1. Overview.

In light of any respectable theory of criminalization, the State should only penalize those conducts causing direct and serious harm to a social value or community interest.²⁶² On this basis, this chapter focuses on two main questions: (1) Do ML operations cause a direct and serious harm to fundamental social values or public interests, in such an extent as to justify its penalization? And, in that case (2) what are the main social values that ML behaviour directly and seriously harms? It should be noted that there is no consensus between scholars and lawmakers over these issues. Then, in a debate marked by polarization, this chapter offers a critical account that negotiates the contrasting perspectives. This analysis will be undertaken from a global-comparative perspective.

The discussion regarding protected social value(s) will help us to open and answer some of the planned debates and questions. For reasons, which will become clearer as the chapter goes on, it could be said that the debate regarding the social values

²⁶² For more details about the process of criminalization, see below section 2.

protected by this crime will help us to determine, for instance, the autonomy of ML offences with respect to other crimes such as the predicate offence of ML and the traditional crime of concealment (also called, in some jurisdictions, the crime of ‘handling stolen goods’). Crimes are autonomous when they protect legal interests or social values different from the rest. My claim in this work is that the crime of ML is not only an autonomous offence, but also a multi-offensive one, because this serious crime simultaneously safeguards several social values, beyond those protected by the predicate offence of ML, the concealment criminal offence, and any other crime.

2. Preliminary comments: the criminalization process and the principle of *ultima ratio* of criminal law.

In order to evaluate the social values protected by ML offences we first need to understand the process of criminalization and the minimalist theory of criminalization (in Latin, the *ultima ratio* of criminal law). This is the main purpose of this section.

The criminalization of a conduct is the response of the State to that conduct’s negative effect on an individual or the society. This penalization occurs if a State and its legal system declare that type of conduct to be a crime. Therefore, the expression ‘criminalization’ could be described as the process of categorizing conducts as criminal offences; so that the perpetrator of this penalized conduct can be subject to criminal prosecution and punishment.

This explanation begs the question: which kinds of conduct should be criminalized? Generally, scholars agree that criminal law should penalize, most essentially, those forms of human behaviour that cause direct (and serious) harm to

relevant legal rights, social values or community interests.²⁶³ The social values protected by criminal law are defined as ‘those vital interests indispensable for human coexistence in societies that expect and are worthy to be protected through the punitive power of the State represented by public prosecution and punishment’.²⁶⁴ Such exclusive specification of legally protected interests or social values constitutes a crucial limit to the *ius puniendi* of the State.²⁶⁵ The general rule stipulates that the State should only penalize those conducts causing direct and serious harm to others. Put differently, penal statutes are unjustified unless they proscribe conducts that constitute a serious and irreversible harm to a social value. The absence of a protected community interest or social value deprives criminal law of all ethical content and, thus, of all legitimacy and justification.

However, most scholars believe that, as an exception to the above explained general rule, the State might criminalize conducts resulting in remote and indirect harm. The criminalization of conducts resulting in remote harm can be justified, for instance, for the protection of democratic societies and systems.²⁶⁶ The guiding rationale for this exceptional rule is usually that the more important the social interest, the more protection it should receive.

A criminal offence generally protects one main social value or interest; but, in some exceptional cases, it simultaneously protects two or more values. The former case

²⁶³ See e.g., Günther Jakobs, ‘*Derecho Penal, Parte General – Fundamentos y teoría de la imputación*’ (Translated from German to Spanish by Joaquín Cuello Contreras and José Luis Serrano Gonzalez de Murillo) (Marcial Pons, Madrid 1995) 44-52.

²⁶⁴ H. H. Jescheck, ‘*Tratado de derecho penal. Parte General*’ (Translated from German to Spanish by S. Mir Puig and F. Muñoz Conde), (Bosch Editors, Barcelona, Spain 1999) 9.

²⁶⁵ Ibid.

²⁶⁶ See, e.g., Jesús María Silva Sanchez, ‘*Reflexiones sobre la base de la política criminal*’ (Reflections about the basis of criminal policy’) (Editora Jurídica Grijley, Lima, Perú, 2000) 184-212; S. Wallerstein, ‘Remote Harm and the case of Anti-democratic ideologies’ (2007) 28(6) *Cardozo Law Review* (volume of symposium in Honour of George Fletcher) 2697-2737. See also, A. Ashworth, ‘*Human Rights, Serious Crime and Criminal Procedure*’ (Sweet & Maxwell, London 2002) 70-71.

is termed *uni-offensive*, and the later *multi-offensive*. A criminal offence is ‘uni-offensive’ where the legislator justifies the criminalization of a conduct in the protection of one main social value. Whereas, a crime is ‘multi-offensive’ where the legislator justifies the penalization of a conduct in the protection of two or more social values or community interests. As mentioned earlier, one of the main purposes of this chapter is to examine within which category the crime of ML falls and to locate which are the social values it protects.

Rarely does the definition of a criminal offence explicitly mention the social values that it protects.²⁶⁷ When the value is not explicitly mentioned in the text of the criminal rule, that should be identified or deduced by a process of interpretation. For this purpose, it is important to see, first, the title, heading and chapter chosen by the legislator to include the crime. Legislators usually gather all crimes that affect a certain legally protected interest into groups under different headings, which are further divided into several categories. This may not be enough though, when a criminal norm protects a different social value from the one specifically mentioned in a title.²⁶⁸

Another key issue is which criterion should be used by the legislator in establishing the criminalization of a conduct. In this regard, the legislator ought to use the tool of criminalization only as a last resort, in accordance with the theory of minimum criminalization. Also known as the principle of *ultima ratio* of criminal law, this is a principle of legislative ethics deeply discussed in German legal literature. Claus Roxin, for instance, argues that criminal law should be reserved for protecting the most

²⁶⁷ J. Bustos Ramirez, ‘Bienes jurídicos protegidos’, *Revista de la Facultad Complutense de Madrid*, Vol. 11, 1994, p. 150.

²⁶⁸ *Ibid.*

serious of social values (*Rechtsgüter*).²⁶⁹ Minor values deserve less intrusive norms (e.g., private law litigation, administrative solutions, non-criminal sanctions). Andrew Ashworth explains the matter as follows:

This principle of minimum criminalization is that the ambit of the criminal law should be kept to a minimum [...]. The point is not so much to reduce criminal law to its absolute minimum, as to ensure that resort is had to criminalization only in order to protect individual autonomy or to protect those social arrangements necessary to ensure that individuals have the capacity and facilities to exercise their autonomy [...]. Even if it appears to be justifiable in theory to criminalize certain conduct, the decision should not be taken without an assessment of the probable impact of criminalization, its efficacy, its side-effects and the possibility of tackling the problem by other forms of regulation and control.²⁷⁰

Put simply, the minimalist or *ultima ratio* principle of criminal law, expressed in the *de minimus* limitation, means that criminal law should not be used, in principle, for minor or negligent wrongs, nor when an invoked civil-administrative measure is appropriate to cover and protect the expected social value. In other words, criminal law can be used when an invoked civil or administrative rule is inappropriate or ineffective to safeguard the expected social value. This is because, legislative bodies should not penalize conducts without an analysis of the probable impact of that criminalization, and its efficacy, and without seeking less intrusive ways of addressing these conducts.

The principle of *ultima ratio* is often mentioned in connection with the ‘fragmentary character’ of criminal law (i.e., protecting only some social values or legal goods) and its ‘subsidiary’ nature (i.e., providing merely secondary protection for interests recognised by the law).²⁷¹ In this respect, it is often claimed that, in practice,

²⁶⁹ See, Claus Roxin, ‘*Derecho Penal – Parte General*’ (Translated from German into the Spanish language by Diego-Manuel Luzón Peña and others) (Editorial Civitas S.A., Madrid 1997) 52-55.

²⁷⁰ A. Ashworth, ‘*Principles of Criminal Law*’ (5th ed. OUP, Oxford 2006) 64-65.

²⁷¹ Other principles, such as proportionality also have a role in the process of criminalization and are connected, therefore, with these two characters of criminal law; but those other principles are not relevant to the current discussion; so their analysis is outside the scope of this dissertation. For a critical assessment of these other principles of criminal law see: A. Ashworth (2006) 19.

the principle of *ultima ratio* is not always respected but, instead, criminalization is used initially, as a first resort (in Latin, *sola ratio*). Generally, this occurs because a new penalization does not involve obvious, immediate costs that have to be taken into consideration in the budget proposals of criminal justice authorities.²⁷² When the principle of *ultima ratio* is violated, we live with an ‘over-criminalization’ of human behaviours²⁷³ and experience an unjustified ‘inflation’ and ‘expansion’ of criminal law and punitive norms.²⁷⁴

3. The crime of money laundering: a ‘uni-offensive’ crime, a ‘multi-offensive’ crime or none of them?

Often, it is much easier to identify the social value(s) protected by a crime than it is to decide whether to protect that value(s) by means of criminal law, rather than by civil-administrative law and banking regulations, among other non-criminal measures. This is probably the reason why, to date, there has been no consensus among scholars in determining whether the criminalization of ML is justified.

A few scholars, such as Peter Alldridge, have the temerity to suggest that there is no justification for an independent crime of laundering.²⁷⁵ In light to the harm principle, together with its accompanying minimalist principle, only conducts causing direct and

²⁷² Nils Jarebourg, ‘Criminalization as Last Resort (Ultima Ratio)?’ (2004) *Ohio State Journal of Criminal Law*, Volume 2, 523-530.

²⁷³ For a nice discussion of the effects of ‘overcriminalization’ see: Douglas Husak, ‘*Overcriminalization – The Limits of the Criminal Law*’ (OUP, Oxford 2009). See also A. Ashworth (2006) 35.

²⁷⁴ Jesús María Silva Sanchez, ‘*La expansión del derecho penal*’ (‘The expansion of criminal law’) (BdF, Montevideo, Uruguay 2006).

²⁷⁵ Peter Alldridge, ‘The Moral Limits of the Crime of Money Laundering’ (2001-2002) *Buffalo Criminal Law Review*, Vol. 5:279, p. 315.

serious harm to other (interests or social values) should be penalized. So, following the requirements of these principles of criminal law, those who defend the non-penalization of an independent crime of ML usually conclude that ML conducts do not seriously and directly harm a clear social interest, so the criminal punishment of ML is arbitrary and unjustified.²⁷⁶

Thus, it seems to be critical to our discussion to examine and identify *which* are the social values seriously and directly harmed by ML operations. In this regard, the opinion of scholars and lawmakers can be divided among those who believe that ML operations seriously harm (or threaten) one or at most two of the following social values: (a) the social value protected by the predicate offence; (b) the administration of justice; (c) the socio-economic system; and (d) finally, the stability, sovereignty and security of States. As explained below in detail, a first group of scholars and legislative bodies believe that the penalization of ML is justified, since this conduct seriously and directly harms one of these four social values or community interests. So, on this line of reasoning this first group usually concludes that ML is a uni-offensive criminal offence that should safeguard one main social interest. But a second group of scholars and domestic legislative bodies support the penalization of ML, concluding that this conduct usually harms more than one of these four social values. Then, on this basis, they conclude that ML is a multi-offensive crime. Each one of them is analyzed and criticized below:

(a) *ML conducts seriously harm the social value safeguarded by the predicate offence of ML.*

Those who propose that ML behaviours directly harm the same social value protected by the predicate offence often assume that ML is just a ‘natural consequence’, a

²⁷⁶ Ibid.

‘necessary’ and ‘complicity act’ of the predicate offence or, at most, an aggravated and ‘continued’ conduct of the prior crime. As a consequence of this interconnection between the predicate offence and the subsequent laundering, advocates of this view generally conclude that ML conducts are ‘absorbed’ by the predicate offence. This absorption and interconnection implies that one punishable act (the predicate offence) should include another simultaneous and derived act (the concealment, conversion and recycling of property items that derive from that predicate offence); so the social value harmed by the predicate offence is the same as the one affected by the subsequent ML conduct.

This is the view, for instance, of Heba Shams, who believes that ‘money laundering in essence is not but an after-the-fact act of complicity in a previous criminal conduct’, the so-called predicate offence.²⁷⁷ Then, on this basis, she concludes that ‘money laundering is a *derivative offence* in the sense that its harm is derived from the harm of the “predicate offence” that generated the money involved in it’.²⁷⁸ Other scholars such as Norman Abrams²⁷⁹ and Douglas Husak²⁸⁰ offered a similar argument. They argue that the crime of ML is a derivative offence in the sense that it involves proof that a primary harm offence was committed. Thus, ML acts as an ‘aid-like’ conduct that occurs after the commission of a core and underlined criminal offence, safeguarding, then, the value of this core and predicate offence.

In chapter VI, I will refer to the adoption of ML offences that may apply or not to the perpetrator of the predicate offence. However, for the present, it is sufficient to say that those who believe that the forms of criminal activity resulting from primary

²⁷⁷ Heba Shams (2004) 7.

²⁷⁸ Ibid.

²⁷⁹ N. Abrams, ‘The New Ancillary Offenses’ (1989) 1 Criminal Law Forum: 1, at. 7.

²⁸⁰ Douglas Husak, ‘Overcriminalization – *The Limits of the Criminal Law*’ (OUP, Oxford 2008) 40-41.

offences are a continuation of that initial criminal behaviour (such as stealing credit cards and using them later with a forged signature, or purchasing counterfeited money and subsequently using it) usually conclude that ML offences cannot apply to the perpetrator(s) of the predicate offence. Within this view, the penalty set forth for the punishable act (the predicate offence) is deemed to cover the entire unlawfulness of the predicate offender's act. Then, on this basis, this position argues that a person who has been prosecuted or convicted for the commission of the predicate offence cannot be prosecuted or convicted for ML as well, in order to avoid multiple punishment for the commission of a single criminal offence (the predicate offence and the continued act of laundering).

At the domestic level, this line of reasoning was adopted, for instance, by the Chinese legislative body. The FATF Mutual Evaluation Report on the People's Republic of China explains that:

Chinese judicial and legislative authorities always hold the view that self-laundering is a natural continuity of the predicate behaviour or that the predicate offence is a condition *sine qua non* for money laundering as far as self-launderers are concerned. As such the predicate offence is used to convict the whole process of criminal activities, and the continuous behaviour [laundering] is absorbed by the predicate offence. They also state that in Chinese legal practice, the court will use the predicate offence to convict the self-launderers and that the sanctions pursued by the criminal [predicate] offences are sufficient to punish the offender and achieve the dissuasive objective.²⁸¹

It is worth to note that scholars such as Miguel Acosta Romero, Eduardo Lopez Betancourt²⁸² and Zaragoza Aguado²⁸³ also believe that ML is a natural consequence

²⁸¹ FATF, 'First Mutual Evaluation Report on Anti-ML and Combating the FT' (People's Republic of China) (Report, 29 June 2007) 26-27.

²⁸² Miguel Acosta Romero and Eduardo Lopez Betancourt, '*Delitos especiales*' (Porrúa, Mexico D.F. 1994) 226.

²⁸³ J. Zaragoza Aguado, '*El blanqueo de capitales. Aspectos sustantivos: su investigación*', (Cuadernos de Derecho Judicial, Madrid 1994) 114. More recently, this scholar changed his mind, alleging that the crime

and a *sine qua non* condition of the predicate offence; and, on this basis, they conclude that ML conducts seriously harm the same social value of the predicate offence. Specifically, they argue that the crime of ML, as drafted in the Vienna Convention, was addressed to safeguard the social value of drug-trafficking offences (the predicate offence), which for them is the public health. Therefore, under this point of view, laundering the proceeds of drug-trafficking is, at most, an aggravated activity that simply continues damaging the same social value of drug-trafficking: the public health.

Nevertheless, this idea that ML is a natural consequence or just a continuous part of the prior offence so the laundering is ‘absorbed’ by the predicate offence, is incorrect. As described in chapter I, section 3, ML behaviours are renewed and usually complex and trans-border conducts; separate from the predicate offence.²⁸⁴ Following a drug-trafficking example, it could be said that: one thing is to supply and deal with prohibited drugs such as cannabis (which is a drug-trafficking offence) and a different thing is to conceal and launder the proceeds of drug-trafficking activities (which is a ML criminal offence). Two separate conducts and different wrongs and criminal offences.

This last position was held, for instance, in the case *R. v. Roger Brian Alexander and others*,²⁸⁵ where the defendant was convicted for conspiracy to the supply and import of cannabis and for a separate and distinct conspiracy for laundering and concealing the proceeds of the described drug-trafficking activities. The defendant challenged this conviction alleging that, in the context of this case ‘the mere fact that the

of ML is a multi-offensive crime, which protects the socio-economic system and the democracy of the nations. See, Javier Zaragoza Aguado, ‘El blanqueo de bienes de origen criminal’, in Eduardo Fabian Caparros, Isidoro Blanco Cordero and Javier Alberto Zaragoza Aguado (eds.), ‘*Combate del Lavado de Activos desde el Sistema Judicial*’, (CeCPLA, Montevideo 2003) 199-201.

²⁸⁴ See above, in chapter I, when we described how ML operates and its main features. To support this description I invoked eleven examples of ML cases, which were included in Appendix 1.

²⁸⁵ (2011) 2 Cr. App. R. (S.) 297-305.

conduct in concealing the proceeds or in laundering them was the inevitable consequence of the original offence did not lead to the conclusion that further punishment should be ordered'.²⁸⁶ On this basis, the defendant concluded that, passing two consecutive sentences, in the context of this case, is merely to punish the offender twice for the same conduct. The Appeal Court refused this argument alleging, among other arguments, that in this particular case, a 'sophisticated machinery was put in place and carried out for concealing/laundrying the very large reward from these massive importations and supply of cannabis'.²⁸⁷ Thus, in this case, money and drugs were hidden separately and money funnelled away to be laundered separate from the drugs.

The case described the predicate offender's conduct as follows:

Large consignments of skunk cannabis, hundreds of kilograms at a time, were smuggled from Holland concealed in individual units. The cover was a wholesale flower importation business, with the lorries driving into the United Kingdom and delivering flowers boxes to United Kingdom warehouses amongst which the bags of cannabis were concealed. [...] ²⁸⁸

On the other hand, the case in question described the separate and renewed ML and concealment conducts as follows:

The onward supply consisted of regular and large-scale of between 20 and 50kg. The wholesale price at that time was some £3,400 per kg of skunk cannabis, and regional distributors distributed those amounts making a turn of between £100 and between £125 per kg. Understandably, that huge supply of kgs. gave rise to what the prosecution describes as a mountain of cash. Each 100kg supplied in the United Kingdom gave a return of some £340,000. Thus, the cash needed to be concealed and utilised, both so that the conspirators could obtain their reward and so that the conspiracies could continue without fear of detection. [...] As part of the method of concealment many bags containing loads of cash were taken to a money transfer bureau called the World Currency Exchange, and different participants were seen making numbers of visits to and from, enabling the daily cash

²⁸⁶ Ibid, 298.

²⁸⁷ Ibid.

²⁸⁸ Ibid. 299.

taking to be laundered through a legitimate banking system. Holdalls containing about £200,000 in £20 notes were seen and subsequently recovered.²⁸⁹

Hence, given that drug-dealing conducts and laundering of the proceeds of these drug-trafficking activities were distinct wrongs and conducts, separate sentences were justified in the context of this case.

It should be stressed that other scholars offer different arguments to deny the idea of a ML criminal offence absorbed by the predicate offence, so that ML offences only protect the predicate offence's social value. Aranguez Sanchez,²⁹⁰ for instance, believes that this idea has become outdated. This opinion was reasonable when, according to the Vienna Convention, the scope of the predicate offence of ML was limited to drug-trafficking criminal offences. The main goal for addressing ML, according to this convention, was to prevent the advance of drug-trafficking groups. However, since the Palermo Convention, there is no longer any distinction between drug-trafficking offences and any other serious crime that acts as a predicate offence of ML. This is expressly covered, he adds, in article 1 of the Palermo Convention; as it says that this international instrument was approved with the aim of 'promoting co-operation to prevent and fight transnational organized crime more effectively'. He believes that this evolution on the definition and scope of ML offences shows a change and evolution in the social value protected by the crime of ML. Hence, in summary, Aranguez Sanchez believes, not only that ML is a separate and independent wrong and crime, but also that, after the Palermo Convention, the crime of ML should mainly protect the socio-economic system, which is a social value that goes beyond the value protected by the predicate offence of ML.

²⁸⁹ Ibid.

²⁹⁰ Carlos Aranguez Sanchez, '*El delito de blanqueo de capitales*' (Marcial Pons, Madrid 2000) 83.

Similar conclusions have been reached by Pilar Gomez Pavón,²⁹¹ José Manuel Palma Herrera²⁹² and Fabian Caparrós,²⁹³ who also argued that the definition of ML offences has evolved to protect other social values that go beyond the community interests protected by the predicate offence. Later on, we will further explain the opinion of these authors.

Other scholars such as Guy Stessens²⁹⁴ and Silva Sanchez²⁹⁵ have, yet, another interpretation. They agree that ML is correctly identified as a derivative from predicate (usually organized) crime activities and, as such, it often harms the same social value of the predicate offence. But they go one step further adding that the penalization of ML aims to undermine crime in general, and organized crime in particular, by taking away the motivation for committing (often organized and transnational) acquisitive criminal activities; and, as such, ML offences should protect the same social value of the predicate offence. According to Silva Sanchez, this idea emerges in the Preamble of the Vienna Convention, when it provides that the main aim in addressing ML was ‘to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing’.²⁹⁶

Trevor Millington and Mark Sutherland Williams share similar arguments. For them, the penalization of ML is justified since ‘there would be less financially

²⁹¹ P. Gomez Pavon, ‘*El bien jurídico protegido en la receptación, blanqueo de dinero y encubrimiento*’ (Cuadernos de Derecho Judicial, Madrid, No. 53, 1994) 211.

²⁹² José Manuel Palma Herrera, ‘*Los delitos de blanqueo de capitales*’ (Edersa, Madrid 2000) 243. This author believes that the crime of ML protects mainly the administration of justice.

²⁹³ Eduardo Fabián Caparrós, ‘Antecedentes: Evolución de las Iniciativas internacionales. Efectos del Lavado de Dinero. Bien Jurídico Tutelado’, in ‘*Combate del Lavado de Activos desde el Sistema Judicial*’, (CeCPLA, Montevideo 2003) 30-46.

²⁹⁴ Guy Stessens (2000) 85-86.

²⁹⁵ Jesús María Silva Sanchez, ‘*La receptación específica. El artículo 546 bis (f) del Código Penal [Español]*’, (Edersa, Madrid 1990) 481.

²⁹⁶ *Ibid.*

motivated crime committed if the criminal does not have at his disposal the means of concealing the origin of the proceeds of such [predicate] offences by money laundering'.²⁹⁷

Peter Alldridge, however, proposed two major sets of objections to this last assessment.²⁹⁸ First, he says, it is frequently taken for granted that if laundering were to be more difficult, through its penalization, there would be substantially fewer predicate offences. This assumption, however, is by no means self-evident. Moreover, he adds, even if this argument were able to be assumed, the idea that a person 'should not be permitted to benefit from crime' and, in particular, that penalizing laundering removes the 'incentive or motivation' to commit other predicate offences do not necessarily justify the criminalization of dealing with proceeds of crime. This argument, he says, might be a reason for improving civil-administrative confiscation measures, but not for penalization. The second objection, connected with the first, is founded on the following idea: if the predicate offence is already a crime and there exists power to confiscate the profits of the (predicate) offence, what additional force do provisions have to criminalize the disposal of the money?

Allardridge's first objection seems to be a logical argument to deny the penalization of ML. I agree with this author that the slogan 'crime should not pay', as well as the assertion that the penalization of ML will remove the incentive of criminals to continue perpetrating acquisitive crimes, is not self-evident; and, if this assessment is assumed, this would be enough to justify the adoption of civil and administrative norms against ML (i.e., the preventive/regulatory AML-CFT system), but not for its criminalization. As explained previously, legislators ought to use the legislative tool of

²⁹⁷ T. Millington and M. Sutherland Williams, *The Proceeds of Crime* (3rd ed., OUP, Oxford 2009) 528.

²⁹⁸ Peter Alldridge, 'The Moral Limits of the Crime of Money Laundering' (2001-2002) *Buffalo Criminal Law Review*, Vol. 5:279.

penalization as a last resort, when it is clear that less intrusive norms, such as administrative or civil laws or regulations, are ineffective to capture the expected social value.

Nevertheless, the second objection of Peter Alldridge is not convincing. It is clear that the predicate offence is already a crime, so there are powers to confiscate the profits of this criminal offence. However, the penalization of using, concealing or laundering the proceeds of a predicate offence, seems to be justified assuming that classic civil and administrative legal strategies adopted to confiscate and recover assets derived from a predicate offence, are inappropriate and inefficient to reach their main goal—that is, to prevent and counter the advance of acquisitive crimes in general and organized criminal enterprises in particular. This idea is in line with the spirit of the principle of criminalization as a last resort. As explained in previous sections, the minimalist approach means that criminal law is the most cost-effective means of controlling conduct; so, legislative bodies should only invoke criminal law if civil-administrative measures are inappropriate to cover the expected social value. Guy Stessens highlights the significance of this argument in the following terms:

Because the classic tools of criminal [and civil-administrative] law(s) were perceived to have failed in the fight against organised crime, legislators [...] considered the [...] incrimination of money laundering as new, more effective tools for tackling the problem of organised crime. [...]. These instruments are part of a new strategy against organized crime which is aimed at the structures of organized crime, rather than at deterring individuals from taking part in organized crime.²⁹⁹

In conclusion, it seems reasonable to say that ML should not be seen as a *sine qua non* condition or a ‘natural and necessary’ consequence of the predicate offence, in the sense that a punishable act (the predicate offence) absorbs the subsequent and

²⁹⁹ G. Stessens, (2000) 9.

continued act of laundering. In contrast, ML operations should be seen as renewed and separate wrongs, distinct to the predicate offence. Having said this, the penalization of ML activities could be justified on the defence and protection of the social value protected by the predicate offence of ML. I do not find a sound reasoning to deny this assessment, as other colleagues have. This is especially true, bearing in mind that the renewed conduct of ML may usually harm, among others, the social value protected by the predicate offence. ML is a separate and aggravating conduct that makes things even worse, in the sense that it allows the offender(s) of the predicate offence to continue increasing their economic power in the legal and underground economy, with impunity.

(b) ML operations seriously and directly harm the administration of justice.

This position is influenced by the idea that retaining, concealing and laundering the proceeds of a predicate offence is an independent wrong, which frustrates the investigation of the predicate offence, and therefore it harms the administration of justice, as a relevant social value. This social value is, of course, distinct from the predicate offence's social value.³⁰⁰

Moreover, according to this view, ML offences should be seen and modelled as a special type of the traditional crime of concealment (also called the crime of 'handling stolen goods' or the crime of 'hiding proceeds of crime').³⁰¹ In chapter VI, I will refer to the persons that might be prosecuted and convicted for the crime of ML. For now, it is

³⁰⁰ See, P. Gomez Pavón '*El bien jurídico protegido en la receptación, blanqueo de dinero y encubrimiento*' (Cuadernos de Derecho Judicial, Madrid, No. 53, 1994) 211-212; and Jose Manuel Palma Herrera (Edersa, Madrid 2000) 284.

³⁰¹ In some jurisdictions the crime of concealment is usually called the crime of 'hiding another offence' or the crime of 'handling stolen goods'. For the purpose of this work, these denominations will be used interchangeably.

sufficient to say that, in most jurisdictions, the crime of concealment does not apply to the perpetrators of the predicate offence, and this same rule was expanded to model the crime of ML as well. In this line of reasoning, this position concludes that the penalization of ML should be seen as a punitive legal tool for prosecuting and punishing only *third parties* who assisted offenders to retain or conceal the benefits of their crimes. Guy Stessens emphasises this same idea in the following terms:

The criminalization of money laundering is essentially aimed at third persons who laundered the proceeds; that is who render proceeds of crime unrecognisable as such and therefore frustrate the law enforcement goal of proceeds-hunting. In this repressive perspective, the paper trail leads from the predicate offence to the laundered proceeds.³⁰²

Let us clarify this idea with this example: person *X* robs one million US dollars from a bank; subsequently, person *Y* retains and hides the proceeds of the crime of robbery committed by *X*; and, therefore, person *Y* commits a separate wrong and crime: the crime of ML that, according to this point of view, must be seen and modelled as an aggravated or a special kind of a concealment criminal offence.

This view was reflected in a number of domestic definitions of the crime of ML, the application of which excluded the perpetrators of the predicate offence. One example is article 278 (1) (a) of the Argentine Penal Code, which penalizes: ‘Any person who converts, transfers, manages, sells, disposes or in any other manner makes use of money or any other type of asset proceeds from a crime *by a person who did not take part in such crime*, in order to make the original or subrogated acquire assets appear to be obtained from a legitimate source, [...]’ (emphases added). Another example is article 165 of the Austrian StGB, which limits the scope of the ML criminal offence to assets ‘that derive from the crime of *another person*’. A third example is

³⁰² Guy Stessens (2000) 111.

article 648 *bis* and *ter* of the Italian Penal Code, where the crime of ML ‘does not extend to the author of the predicate offence’. A final example is article 261 (9) of the German Penal Code (StGB), which explicitly provides that ML offences cannot apply to the person who committed the predicate offence.

Scholars such as Stessens believe that the primary aim for adopting a ML criminal offence, which does not apply to the person who commits the predicate offence, is to ensure that the so-called ‘gatekeepers’³⁰³ (e.g. bankers, attorneys, accountants, among other economic agents) do not allow the proceeds of a number of predicate offences to be used, concealed, converted, recycled and finally invested or consumed in the legal or formal economy.³⁰⁴ I agree with Stessens that in these jurisdictions (e.g., Austria, Germany, Italy) the crime of ML is structured, of course, as a law enforcement tool for prosecuting and punishing only a *third party* who assisted offenders to retain or conceal the benefits of their crimes. So, founded on this view, in these jurisdictions, the crime of ML does not apply to the perpetrator of the predicate offence. However, Stessens’s opinion seems to be incomplete, since he does not invoke in his reasoning the legal foundations for assimilating the crime of ML to the crime of concealment or handling stolen goods. This last explanation was offered, for instance, by Palma Herrera,³⁰⁵ Bacigalupo Zapater³⁰⁶ and Harro Otto,³⁰⁷ who believe that the key

³⁰³ By ‘gatekeepers’ we mean those professionals whose specialised expertise needs to be accessed by ML in order to create certain complex laundering schemes designed to minimise the possibilities of detection. See, William Gilmore, ‘*Prevention of Money Laundering: The International Legal Framework*’. Article available online: <http://www.cicad.oas.org/Lavado_Activos/esp/Abogados/bluestar_gilmore.htm> accessed 20 May 2009.

³⁰⁴ Stessens (2000) 121.

³⁰⁵ See, e.g., J P. Gomez Pavón ‘*El bien jurídico protegido en la receptación, blanqueo de dinero y encubrimiento*’ (Cuadernos de Derecho Judicial, Madrid, No. 53, 1994) 211-212; and José Manuel Palma Herrera, ‘*Los delitos de Blanqueo de Capitales*’ (Edersa, Madrid 2000) 284.

³⁰⁶ Enrique Bacigalupo Zapater, ‘Estudio comparativo del Derecho Penal de los Estados miembros de la UE sobre represión del reciclaje o blanqueo de dinero ilícitamente obtenido’, in Bacigalupo Zapater (ed.) ‘*Curso de Derecho penal económico*’ (Marcial Pons, Madrid, 1998) 199.

similarity between the crimes of ML and the traditional crime of concealment is that both, in essence, safeguard the same social value: the administration of justice.

This view was also shared by the Supreme Court of Argentina in the case ‘*Geosur S.A.*’, judgement dated 4 November 2003, which confirmed that the crime of ML in this country (i.e., article 278 (1) of the Argentine Penal Code) was structured as an aggravated crime of concealment, since both offences contain the same protected social value: the administration of justice. According to this case law this idea was reflected in the way that the legislator modelled the crime of ML in article 278 of the Argentine Penal Code, the application of which excluded the perpetrators of the predicate offence.³⁰⁸

Finally, this viewpoint was also shared by the German legislative body. This country criminalized ML, by virtue of Article 1 (19) of the Act on ‘Suppression of Illegal Trafficking and other Manifestations of Organized Crime’, which included the crime of ML in article 261 of the StGB.³⁰⁹ According to the introduction of this Act, the main aim of article 261 StGB is to improve the legal means for depriving criminals and organized crime of the proceeds of criminal offences, as well as to safeguard the ‘administration of justice’—affected by the various laundering transactions attempting

³⁰⁷ Harro Otto, ‘*Geldwäsche, 261 St GB*’ (Juristische Ausbildung 1993) 331. This author believes that both ML and concealment offences seek to protect the administration of justice; since the penalized conducts in both crimes are, in essence, concealment activities that intent to disguise the link between the proceeds and the predicate offence.

³⁰⁸ The ML offence in Argentina was established in 1989 (article 25 of Law 23,737) and modified in the year 2000 by Law 25,246, to include a new chapter XIII of Title XI called ‘Concealment and Laundering of Proceeds of Crime’, which included three articles pertinent to ML; that is: articles 277, 278 and 279. In June 2011, the definition of the crime of ML was amended and relocated in article 303 of the Argentine Penal Code, within the new chapter ‘Crimes against the financial and economic system’.

³⁰⁹ This German law against organized crime, is entitled ‘*Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität*’ (OrgKG) (dated 15 July 1992 and entered into force on 22 September 1992) (Verhandlungen des Deutschen Bundestagen, 12. Wahlperiode, Drucksachen, Band 431, No. 12/898, page 26 ss.). Since then, article 261 StGB, has been subject to a number of amendments. The last amendment took place in August 2009, through the Act on the Prosecution of the Preparation of Serious Violent Acts Endangering the State (*Gesetz zur Verfolgung der Vorbereitung von Schwerer staatsgefährdender Gewalttaten*, GVVG).

to obscure the criminal origin of the proceeds. Based on the idea that the legal nature of the crime of ML is identical to the crime of concealment, article 261 (9) StGB explicitly provides that a person who has been punished for the commission of the predicate offence may not be punished for ML as well.

Nevertheless, the above explained opinion, which seeks to punish only third-party laundering since ML and concealment offences are in essence the same type of crimes, is incorrect. The crime of ML cannot be assimilated in its structure and legal nature to the crime of concealment, as supported by the above mentioned legislations and scholars. The supporters of this last position are misunderstanding the legal nature and specificities of ML offences with those of the concealment criminal offence. The key differences between these two crimes lies in the following two main arguments:

- *Differences in both the mental (mens rea) and the physical (actus reus) elements:* The mental and the physical elements of the concealment offence, in most cases, do not trespass the ‘pre-laundering stage’ or first stage of placement. Whereas, both the mental and the physical elements of a crime of ML usually includes, according to the terminology of the UNODC, the three stages/phases of a full ML process: that is, the placement, layering and integration stages.³¹⁰ Let me illustrate this idea with this example: a person X who stole cash money from a bank and hides the money in the domicile of a third party Y, who then retains and disguises these ill-gotten assets in the garage of his house, will not subsequently convert, transfer, invest, save or use the proceeds of crime in the legal economy, as usually occurs in the renewed and complex process of ML. Consequently, it could be said that the elements of a

³¹⁰ See *ut supra* chapter I, section 3.

ML offence must be more complex and active than it is in the traditional crime of concealment.

- *Differences in the social values protected by each crime:* the conduct of concealing, hiding or retaining stolen goods or any kind of property derived from a prior crime committed by another person is a behaviour usually punished by the traditional crime of concealment. This conduct seriously and directly harms the administration of justice as a social value. Based on this reasoning, it is usually argued that the traditional crime of concealment mainly protects the administration of justice. However, for reasons that will become clearer as the chapter goes on, ML should be seen as a separate and renewed wrong and crime that usually harms other social interests that go beyond the administration of justice. These additional social interests might be the social interest protected by the predicate offence (as explained above) and the socio-economic system (as explained below). In this line of reasoning, Carlos Aranguéz Sánchez³¹¹ recognizes that ML usually harms the administration of justice; but he concludes that ML also harms the socio-economic system and the fair competition of the economic market. So, under the view of this scholar, ML should be seen as an autonomous and uni-offensive crime that should safeguard the socio-economic system; which is a social value that goes beyond the social interest protected by the traditional crime of concealment or handling stolen goods. In similar terms, Blanco Cordero³¹² believes that ML *always* harms the administration of justice, but it *usually* affects the socio-economic system. According to his view, ML

³¹¹ Carlos Aranguéz Sánchez, *‘El delito de blanqueo de capitales’* (Marcial Pons, Madrid 2000) 94.

³¹² Isidoro Blanco Cordero, *‘El delito de blanqueo de capitales’* (Aranzadi, Pamplona, Spain 1997) 164.

conducts do not seriously and directly harm the socio-economic system when the criminal assets involved in the process of ML contain a low or insignificant monetary value. Yet, given that ML might seriously harm social values that go beyond the administration of justice, then, this author concludes that the crime of ML shall be seen as a multi-offensive and independent crime, different to the concealment crime. I will further explain the opinion of these authors in due course.

In conclusion, it could be argued that the penalization of ML activities might be justified by the defence and protection of the administration of justice as a key social value. I do not find strong arguments to deny this point of view. At the same time, though, I do not find compelling reasons to deny that other social values that go beyond the administration of justice can also be harmed by ML operations; so the penalization of ML should also be founded on the protection of these other social values. As concluded above, ML operations might seriously harm the value protected by predicate offences; and, as explained below, high-scale ML operations might also affect, in particular, the fair competition of the economic market.

(c) The socio-economic and financial system as the main social value.

This position is based on the assumption that ML is a separate wrong that seriously harms the socio-economic and financial system and/or generates unfair competition. More precisely, it follows that, the justification for the penalization of ML should be founded on the protection of the stability of the socio-economic/financial system as well as the fair and free competition of the economic market. The ‘stability of the financial

system’,³¹³ the order of the ‘legal economy’,³¹⁴ the ‘social and economic order or system’,³¹⁵ the ‘public economic order’³¹⁶ and the ‘free and fair competition’,³¹⁷ are the expressions usually invoked by scholars and legislators to define and explain, in this context, the social value seriously harmed by ML conducts.

A set of macro-economic assessments about how ML can damage the socio-economic and financial system have been described above, in chapter I, section 4. The result of important academic studies shows how ML itself can harm the socio-economic system, generating corruption and inflation, especially in the financial or economic system, as well as affecting, among other variables, world growth rates and fair competition.

Moreover, according to these studies, the credibility and transparency of the financial system, as well as the stability of the socio-economic order, can be seriously affected by ML operations. This activity makes potential investors and the general public lose their trust and confidence in the economic and financial systems.³¹⁸ Then, from a macroeconomic point of view, ML might threaten or damage the stability of the financial system, when substantial and massive proceeds of crime or assets derived from serious crimes (e.g., corruption, drug or human trafficking, fraud) are invested, deposited or introduced in financial institutions. Following the terminology of the

³¹³ See the EU Directive 1991/308/CEE (Preamble).

³¹⁴ The Vienna Convention (Preamble).

³¹⁵ I. Blanco Cordero (1997) 185.

³¹⁶ This expression is used, for instance, by Martos Nuñez, ‘*Derecho penal económico*’ (Montecorvo, Madrid 1987) 271.

³¹⁷ C. Arangué Sanchez (2000) 84.

³¹⁸ See, e.g.: P. J. Quirk, ‘*Macroeconomic Implications of Money Laundering*’ (WP/96/66, IMF, Washington D.C., 1996); V. Tanzi, ‘*Money laundering and the international financial system*’ (WP/96/55-EA, IMF, Washington D.C., 1996); Guy Stessens (2000) 86-87. See also, Hans Geiger and Oliver Wuensch, ‘The fight against money laundering – An economic analysis of a cost-benefit paradox’ (2007) *Journal of Money Laundering Control*, Vol. 10, No. 1, 2007 p. 91-106.

UNODC, the placement of ill-gotten assets into the economic system, usually through financial institutions, generally occurs during the first stage of concealment of a ML process.³¹⁹

At the international level, this position seems to be supported by the EU Directive 91/308/EEC about Money Laundering (a hard law instrument). The Preamble of this Directive asserted that ‘the stability of the financial system as a whole could be seriously jeopardised’ as a consequence of money laundering activities. In this vein, the Preamble of the EU Directive 2005/60/EC provides that ‘massive flows of dirty money can damage the stability and reputation of the financial sector and threaten the single market [...]’. Later, it emphasis: ‘The soundness, integrity and stability of credit and financial institutions and confidence in the financial system as a whole could be seriously jeopardised by the efforts of criminals and their associates [...] to disguise the origin of criminal proceeds’.

At the domestic level, this theory is supported, for instance, by the Spanish legislation. The Spanish Penal Code drafted the crime of ML in article 301, which was included in Chapter XIV, entitled ‘Offences against Property and the Socioeconomic Order’. In this vein, many Spanish scholars, such as Blanco Cordero,³²⁰ Juana Del Carpio Delgado,³²¹ Diego Gómez Iniesta³²² and Javier Zaragoza Aguado³²³ interpreted

³¹⁹ See above, chapter I, section 1.

³²⁰ I. Blanco Cordero (1997) 171.

³²¹ Juana Del Carpio Delgado, ‘*El delito de blanqueo de bienes en el nuevo Código penal*’ (Tirant lo Blanch, Valencia, Spain 1997) 81-86.

³²² Diego J. Gómez Iniesta, ‘*El Delito de Blanqueo de Capitales en Derecho Español*’ (Cedecs Publishers, Barcelona 1996) 33-36.

³²³ Javier Alberto Zaragoza Aguado, ‘El blanqueo de bienes de origen delictivo’, in Eduardo Fabian Caparros, and others (eds.), ‘*Combate del Lavado de Activos desde el Sistema Judicial*’, (CeCPLA, Montevideo 2003) 199-202. This author believes that ML is a multi-offensive crime that protects both the socio-economic system and the stability and security of the nations as the main social values.

that, at least, one of the social values protected by the crime of ML is the socio-economic and financial system.

Other scholars such as Carlos Aranguéz Sanchez,³²⁴ Palma Herrera,³²⁵ and Eduardo Fabian Caparrós³²⁶ went one step further in saying that ML not only affects the financial or economic system but also the ‘fair and free competition’. According to this view, it is clear that economic agents and legal entities that use income and administer funds derived from crime, can obtain a substantial competitive advantage, as opposed to economic agents or corporations that only possess, use or dispose of legitimate funds or legal assets to develop their businesses. In other words, economic agents that recycle, use, administer and finally invest proceeds of crime in the formal economy and in their legal businesses might obtain an unfair competitive advantage in comparison with other honest competitors who only use or invest in their businesses legally-obtained assets. This harm to ‘fair and free competition’ might be classified as a ‘micro-economic’ or a direct and obvious consequence of ML operations. Following the terminology of the UNODC, the investment of criminal assets into the formal economy usually occurs during the last stage of reinvestment or integration.

But Blanco Cordero³²⁷ has a different interpretation, alleging that ML conducts not only seriously harm the socio-economic system, but also the administration of justice. So, he concludes that the crime of ML should be seen as a multi-offensive crime, since both the socio-economic system and the administration of justice are the two main social values that this offence should safeguard. However, Blanco Cordero

³²⁴ C. Aranguéz Sanchez (2000) 98.

³²⁵ José Manuel Palma Herrera, ‘*Los delitos de Blanqueo de Capitales*’ (Edersa, Madrid 2000) 284-290.

³²⁶ Eduardo F. Caparrós, ‘Antecedentes: Evolución de las Iniciativas internacionales. Efectos del Lavado de Dinero. Bien Jurídico Tutelado’, in ‘*Combate del Lavado de Activos desde el Sistema Judicial*’, (CeCPLA, Montevideo 2003) 30-46.

³²⁷ I. Blanco Cordero (1997) 171-172.

pointed out that the socio-economic system is not affected in all circumstances. For instance, the socio-economic system might not be damaged when ML is on a small scale; that is, when the assets involved in the laundering have a low or insignificant economic value. As explained below, it is clear that small scale ML operations cannot seriously harm, in practice, the socio-economic system or fair competition of the market.

Other authors offer a different argument to deny the idea of a ML offence addressed to safeguard the economic and financial system. For example, Peter Alldridge believes that the arguments given by experts in the area of economics (e.g., Quirk or Tanzi) to support the proposition that laundering is harmful for the socio-economic system 'seem to rest upon empirical foundations, which require clear supporting evidence'.³²⁸ This author also believes that, even if these claims or arguments were able to be assumed, the damage to the socio-economic or financial system produced by laundering activities is enough to support greater efforts to improve the rate at which the profits of crime are confiscated. But this is not enough, without more, to argue for criminalization.³²⁹ Then, according to Alldridge, ML 'is a reason for "reparative" confiscation, but not for criminalization'.³³⁰ Criminal liability is morally justified only when a sufficiently serious harm is inflicted. This is in line, he adds, with any liberal theory of criminalization, which means that every imposition of criminal liability requires sufficient justification.³³¹

³²⁸ Peter Alldridge, 'The Moral Limits of the Crime of Money Laundering' (2001-2002) *Buffalo Criminal Law Review*, Vol. 5:279, p. 315.

³²⁹ *Ibid.*, 316.

³³⁰ Peter Alldridge *'Money Laundering Law'* (Hart Publishing, Oxford 2003) 25.

³³¹ *Ibid.*

I agree with Alldridge that the use of penalization is unjustified unless it punishes conducts that are a serious harm to a social value. In this vein, less serious misconducts shall be covered by less intrusive reparative legal measures, such as civil asset recovery measures, confiscation, fiscal or civil-administrative recovery remedies, among other non-criminal measures. However, I also believe that Alldridge's argument is incomplete, since he ignores a key ingredient when analyzing this subject. The key assessment that he omitted in his analysis concerns the *monetary value* of the criminal assets involved in the process of ML. If a particular ML operation includes criminal assets that do not contain substantial monetary values, then, I agree that all this talk about damaging the economic and financial system is just an exaggeration. However, if it is a major or high-scale ML operation, including criminal assets with significant economic/monetary values, then there may be compelling grounds for claiming wider negative effects to the socio-economic system or, to be precise, to the fair and transparent competition of the market.

It seems to be clear that the conduct of laundering and investing substantial monetary values derived from crime (i.e., high-scale ML operations) in a specific economic market is a serious wrong and conduct, which may produce negative and unfair effects on this particular market. The competitive advantage that could be obtained by certain economic agents (e.g., corporations), which use, convert, reinvest and administer substantial funds derived from crime, as opposed to honest economic agents or corporations that only dispose of legal assets or incomes to develop their businesses is enormous. And this is a serious, tangible and direct harm (rather than a remote or intangible harm). On this basis, it could be argued that high-scale ML operations may seriously and directly harm the fair and free competition of a particular economic market (as a key social value). These consequences are intrinsic: honest

economic agents that only use and invest legitimate incomes in their respective businesses cannot compete with those competitors and businessmen that manage, invest and use substantial or significant proceeds of crime to support and develop their businesses.³³²

Along this line of reasoning, we can also say that laundering *low* or *minor* economic values derived from crime do not cause a serious and direct harm to the socio-economic system or to the fair competition of the economic market. According to the minimalist theory of criminalization, criminal law is the last resort; so it should not be used to penalize minor wrongs that do not cause a serious and grave harm to others.³³³ For minor misconducts domestic legislative bodies might use less intrusive measures, such as civil-administrative recovery measures.³³⁴ Nevertheless, when the criminal sums involved in ML conducts represent a significant or substantial monetary value, the criminalization of ML is justified by the liberal theory of criminal law, or by any other respectable theory of criminalization that requires a sufficiently serious and direct harm to others in order to impose a criminal punishment.

Based on the above explanation and looking for a prudent position, this dissertation is proposing the criminalization of ML activities, but only when the amount or economic value of the criminal assets involved in the process of ML exceeds a

³³² For instance, one Colombian cocaine drug dealer, Rodriguez Gacha, is reputed to have laundered and invested around USD 130 million using eighty-two companies and other accounts in sixteen different countries. For more details about this case see: W. Gilmore (2004) 30. See also the examples of ML cases that we included in Appendix I of this dissertation, where the amounts of criminal assets involved in ML could be classified in all those cases as substantial or significant amounts. In particular, see cases No. 10 and 11, where the substantial criminal assets were invested for the purchase and management of several and important companies.

³³³ See A. Ashworth (2006) 47-48.

³³⁴ For more details about asset recovery, civil-administrative recovery and criminal confiscation measures see, e.g.: Ian Smith and other (editors), *Asset Recovery, Criminal Confiscation and Civil Recovery* (Lexis Nexis, UK 2003).

specific and substantial monetary limit.³³⁵ This monetary value works as a key objective and quantitative limitation; drawing the line between ML operations that should be penalized and punished and ML operations that should not. Naturally, legislators must determine this specific monetary limitation according to the amounts and monetary values of criminal assets that have the power to seriously harm the free and fair competition of the market, as a relevant social value.

Having said the above, I should recognize that this proposal of setting a monetary limit may be problematic and objected in two ways. *First*, someone could argue that this proposal will ignore the criminal response to ‘*smurfing*’; that is, where the sums involved are necessarily much smaller because they are structured to avoid law enforcement anti-ML controls.³³⁶ *Secondly*, someone could argue that this proposal of including a monetary limit in ML offences would appear to be inconsistent with some types of terrorist financial movements. For example, estimates of the financing of the 7/7 bombings in London, suggested that they cost no more than USD 1,000 to carry out (but cost up to USD 500 millions in lost revenue to tourism—quite apart from the terrible loss of life involved).³³⁷ In such cases, this second objection might conclude that there is a clear disjuncture between the minor sums involved in this kind of financial operations and the proposal of only penalizing high-scale ML conducts.

I may recognize that the first mentioned objection is valid. To avoid this type of valid and reasonable problem, this work is proposing to penalize also the conduct of *smurfing*. More precisely, this work is proposing to criminalize ML conducts but only when the criminal assets involved exceed a limited monetary value, *in a single act or*

³³⁵ See below, chapter IV, section 4.1.3.

³³⁶ For further details about ‘*smurfing*’ maneuvers, see above, ch. I, s. 3.

³³⁷ The 7 July 2005 London bombing (often referred to as 7/7) were a series of coordinated suicide attacks in the UK, targeting civilians using London’s public transport system during the morning rush hour.

through the repetition of different related acts. I will further refer to this topic in the next chapter. The second objection, however, finally fails; simply because the described financing in low sums is punishable by the crime of FT. The crime of FT penalizes the financing of terrorist purposes, *in any way*, and regardless of the monetary value of the assets involved. More precisely, as concluded elsewhere in this thesis, the financing of terrorist activities ‘in any way’, means that the terrorist financing can be performed in four different ways: ML, MD, criminal assets and legitimate assets. All these forms of financing are penalized by FT criminal offences; regardless of the monetary value of the assets involved in these four ways of financing.³³⁸

Based on the above analysis, it is logical to conclude that ML conducts usually harm the socio-economic system in general and the fair competition of the market in particular; but only when the process of ML includes criminal assets with substantial or high monetary value (i.e., high-scale ML operations). And, moreover, it could be said that this serious and direct harm to this social value might be inflicted, regardless of the number or quality of the persons that participated or committed the predicate offence (e.g., organized crime, terrorism or a group of criminals). The key issue to consider and evaluate the seriousness and wrongness of ML is, again, the monetary value of the assets involved in the process of ML, rather than the conditions and number of persons that committed the predicate offence of ML. I will further refer to this topic in due course.

³³⁸ See above, in ch. I, s. 4 when we referred to the nexus between ML and FT; as well as the definition of the international crime of FT addressed in ch. II, s. 3.1.

(d) Stability, sovereignty and security of States as the main social value.

The argument in favour of criminalizing ML, in order to safeguard the stability, sovereignty and security of States, is inspired by the idea that ML allows organized criminal enterprises (e.g., organized crime and terrorism) to consolidate their criminal power in the legal economy and expand their criminal enterprises. So, in this way, they can continue affecting and damaging the democracy, security and stability of the nations. In other words, according to this view, ML is a derivative from predicate (often serious and organized) crime activities and, as such, it may spread the negative consequences of those predicate offences to the security and stability of the nations.

This is the opinion, for instance, of Stephan Barton, who believes that one of the main objectives of criminals in general and organized crime in particular, is to perpetrate acquisitive crimes in order to accrue profits for the financing of their legal or criminal activities and, thereby, accumulate wealth and power. According to Barton, the accumulated proceeds of crime, most of them subject to ML operations, can be used to perpetrate other crimes or enhance the structure of their criminal enterprise, so they can continue threatening the stability, sovereignty and security of nations.³³⁹

In this same vein, Hinterseer argues that the criminalization of ML is supported by the idea that ‘money laundering threatens to undermine the principles associated with a free, fair and transparent democratic society because money laundering enables criminals to operate with legal impunity’.³⁴⁰ This is because ML allows criminals and

³³⁹ Stephan Barton, ‘Tatobjekt der Geldwäsche: Wann rührt ein Gegenstand aus einer de rim Katalog des art. 261, I No. 1-3 StGB bezeichneten Straftaten her?’, in *NStZ* (Neue Zeitschrift für Strafrecht) 1993, p. 160.

³⁴⁰ Kris Hinterseer, ‘*Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context*’ (Kluwer Law International, Netherlands 2002) 23.

organized crime to protect their criminal assets from seizure, confiscation and forfeiture by the State, so they can operate and construct economic power in the legal economy with impunity.³⁴¹

Zaragoza Aguado also concluded that ML operations can seriously and gravely threaten the stability and security of the nations; thus, the democratic system should be one of the main social values protected by the crime of ML. However, he adds that the socio-economic system or stability of the economy is another social value protected by this crime.³⁴² To support his view, Zaragoza Aguado highlights the spirit and structure of the international conventions and the EU Directives that oblige State Parties to penalize ML. As an example, he referred to the Preamble of the Vienna Convention, when it says: ‘Aware that illicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels’. He then referred to the Preamble of the EU Directive 91/308/EEC:

money laundering has an evident influence on the rise of organized crime in general and drug trafficking in particular; whereas there is more and more awareness that combating money laundering is one of the most effective means of opposing this form of criminal activity, which constitutes a particular threat to Member State’s societies.

As a result, this author concludes that the crime of ML is a multi-offensive crime that fosters and preserves both the socio-economic system and the democracy and stability of the nations.

Although I recognize that the above arguments might be persuasive for some scholars, I do not find this alternative convincing. The idea that ML seriously harms or

³⁴¹ Ibid.

³⁴² Javier Alberto Zaragoza Aguado, ‘El blanqueo de bienes de origen delictivo’ in *Combate del Lavado de activos desde el sistema judicial*, (CeCPLA, Uruguay 2003) 198-201.

threatens the stability, security and democracy of nations, since ML allows organized criminal enterprises (e.g., organized crime and terrorism) to construct economic power in the legal economy is an exaggeration, pure and simple.

One argument against this grandiose claim is that the predicate offence of ML is not always constrained by organized criminal enterprises. Although predicate offences and ML operations are most likely to be transnational and complex conducts, usually committed by three or more criminals organized in criminal enterprises, such as organized crime,³⁴³ both the predicate offence and ML may be also committed by a single criminal agent. Then, on this basis, it could be argued that ML cannot seriously threaten the remote and indirect value of ‘democracy’ or ‘security’ of the nations, when the predicate offence of ML is committed by one or two criminal agent(s), which do not form part of an organized criminal enterprise, such as organized crime or terrorism.

In opposition to the above argument, one could conclude that the total monetary value of the criminal assets involved in the process of ML is the key ingredient to evaluate the damage/threat of ML to the stability and security of the nations; rather than the quality and number of persons that perpetrated the predicate offence. Then, in other words, a different interpretation of this matter could be that it is irrelevant how many criminals participated in the commission of the predicate offence to evaluate the negative implications of ML to the stability and security of the nations. And this is because the key element to examine the nexus of ML with the stability and security of the nations is the monetary value of the criminal assets involved.

However, this argument also fails. A prudent and balanced opinion means that ML operations that include substantial monetary values (i.e., high-scale ML operations) seriously and directly harm, in particular, the fair competition of the market. But also

³⁴³ See above, chapter I, section 2, when we explain the way ML operates.

saying that high-scale ML operations seriously harm/threaten both the fair competition of the economic market and the stability, sovereignty and security of nations is, again, an exaggeration. We may recognize that ML is a serious and complex conduct that often includes international effects and ramifications. We may also recognize that ML allows criminals and organized criminal enterprises to continue consolidating their economic power in the legal economy. But, are these arguments enough to conclude that ML can seriously threaten the democratic system of the countries and, on this basis, justify its criminalization? Moreover, if someone believes that the answer to this last question is 'yes', then: Is it convincing to say that all serious and major economic crimes, such as the crime of fraud, also threaten the 'security of States'? The crime of fraud is a serious offence against a direct victim, which can also include property with substantial monetary value that can finally threaten the financial/economic system. However, I do not think this implies that the major crime of fraud is an offence against fundamental institutions or against a developed and democratic society.

In addition, and more important to our discussion: What is the point in adding these even more grandiose claims? The penalization of ML conducts founded on the protection of the security, stability of the nations and, therefore, the democratic system, is like the fifth wheel of a car: totally unnecessary. It is clear, as explained above, that ML often harms the value protected by the predicate offence, as well as the administration of justice and the socio-economic system. On this basis, the question that arises is: Why should we identify a fourth social value (i.e., the democracy and security of the nations) to justify the penalization of ML? This is especially true, bearing in mind that the stability, security or democratic system of the nations seems to be an indirect, remote and intangible social value. And, in light of the minimalist theory of criminalization, the State should only penalize those conducts causing direct and serious

harm to a specific social value; and the stability and security of a nation is, again, an indirect and remote value. No respectable theory of criminalization, such as the minimalist approach, would allow this conclusion.

4. Towards an autonomous and multi-offensive crime of money laundering?

In the previous section, we have explained that a first group of scholars (e.g., Heba Shams and Silva Sanchez)³⁴⁴ and legislative bodies (e.g. China) justified the penalization of ML conducts, because ML should be seen as a *sine qua non* condition of the predicate offence; since the second conduct (the subsequent ML conduct) is totally absorbed by the first act (the predicate offence). Then, this first group concludes that ML is a derivate offence in the sense that its harm derives from the harm of the predicate offence.

Other scholars (e.g., Bacigalupo Zapater)³⁴⁵ and domestic legislative bodies (e.g., Germany) seem to justify the penalization of ML operations, alleging that recycling behaviours seriously and directly harm the administration of justice; so ML offences should be considered and modelled, at most, as an aggravated crime of concealment. A third group of scholars (e.g., Aranguel Sanchez, Gomez Iniesta and Hans Geiger)³⁴⁶ and legislative bodies (e.g., Spain) justified the penalization of ML conducts because this conduct seriously and directly harms the socio-economic system.

³⁴⁴ Heba Shams (2004) and Silva Sanchez (1990).

³⁴⁵ Bacigalupo Zapater (1998).

³⁴⁶ See, C. Aranguel Sanchez (2000), Diego Gomez Iniesta (1996), as well as the opinion of the economists Hans Geiger and Oliver (2007), Quirk (1996) and Tanzi (1996).

A final group of scholars have a different interpretation, alleging that the penalization of ML could be founded on the idea that ML conducts seriously and directly harm at least two of the four social values that we have analyzed in the previous section. For example, Javier Zaragoza Aguado considers that ML mainly harms two social values: the socio-economic/financial system and the stability of the democratic system.³⁴⁷ In this vein, other scholars such as Palma Herrero and Blanco Cordero believe that ML often harms both the administration of justice and the socio-economic system, so they conclude that the crime of ML is a multi-offensive crime that safeguards the administration of justice and the socio-economic and financial system.³⁴⁸

Inspired by the opinion of these colleagues and legislative bodies, I tried to go one step further, reaching to the following *four* main conclusions, that will follow and support most of the future discussions in this work.

The *first conclusion* that we reached in this chapter is that ML operations are separate and renewed wrongs and crimes, distinct from the behaviours usually covered and penalized by the predicate offence. One thing is the conduct that involves the predicate offence (e.g., drug-trafficking) and a distinct and renewed conduct is the concealment and laundering of the proceeds of a prior crime. Two different wrongs and crimes. Moreover, it was explained above that ML behaviours are more complex and active conducts, comparing with the conducts usually covered and penalized by the traditional crime of concealment (also known as ‘handling of stolen goods’ offences). The *mens rea* and *actus reus* elements of the traditional crime of concealment usually do not trespass on the so-called ‘pre-washing stage’; whereas the *mens rea* and *actus reus* of ML offences must involve more complex and active elements; according to the

³⁴⁷ Javier Zaragoza Aguado (2003).

³⁴⁸ Palma Herrero (2000) and Blanco Cordero (1997).

terminology of the UNODC ML is perpetrated in three stages (e.g., placement, conversion and reinvestment).

The *second conclusion* is that high-scale ML operations may seriously and directly harm the following three main social interests: (i) the social value protected by the predicate offence of ML; (ii) the administration of justice; and, finally (iii) the fair and loyal competition of the economic market. This thinking is supported in the following main assessments. It is clear that ML is a derivative offence, in the sense that this conduct is strongly connected with the predicate offence. There is no doubt that a criminal agent, a group of criminals or any kind of criminal enterprises, including organized crime and terrorist groups, can recycle proceeds of crime, to continue financing their legal or criminal activities, and thereby consolidate their economic power in the legal economy. Then, ML is a subsequent, derived and renewed conduct and its harm is derived in the social value harmed by the predicate offence. However, it is also clear that laundering proceeds of a predicate offence can also affect the administration of justice of the prosecutor's investigation when they intend to identify those who perpetrated the predicate offence. Then, it was deduced above that ML operations may also harm a second social interest: the administration of justice.

But, high-scale ML operations may seriously harm a third social value: the socio-economic system in general and the fair and loyal competition of the economic market in particular. One of the key ingredients to establish and evaluate which is (or are) the social value(s) seriously and directly harmed by ML operations is determining the amount and monetary value of criminal assets involved in ML, rather than ascertaining how many criminals committed the predicate offence. Hence, when launderers in general recycle substantial amounts of criminal assets, a third and final social value may be directly and seriously harmed; that is, in particular, the fair

competition of the economic market. It is clear that honest businessmen that manage and handle legal assets to develop their businesses cannot compete in a fair and loyal way with other competitors and businessmen that use, invest and manage substantial or significant criminal assets.

The *third conclusion* that we reached in this section is that the crime of ML should be seen and modelled as an autonomous crime, since it should protect independent social interests that go beyond the values and rights protected by the predicate offence, the concealment offence and any other offence. Remember that a crime is, in practice, an independent or autonomous crime, when it safeguards social values or interests that are different to the values protected by any other criminal offence. And, as concluded above, the penalization of ML is founded on the protection of the above explained three main social values, which should be protected by criminal law.

The *fourth and last conclusion* is that ML should be seen and modelled as a multi-offensive crime, since it protects more than one social interest. In fact, why should ML offences be limited to the protection of only one or two of these three social values? Why is it that it cannot be argued that this ‘serious’ (and often transnational and organized) offence simultaneously protects these three social values? I do not find any provision in international hard law instruments proposing the implementation of a uni-offensive crime of ML or a crime of ML that only protects two of the three described social values. Moreover, as explained in the previous section, the position in favour of penalizing high-scale ML offences that seriously harm these three main social interests is in line with the minimalist theory of criminalization: only high-scale ML operations should be punished and penalized.

All these conclusions, and more, should be taken into account to draft and structure the new definition of ML offences that this work is proposing to implement and include at the international level.

CHAPTER IV

The physical element or *actus reus* of money laundering

1. Overview.

In criminal law an offence is analysed through a basic distinction between the physical element (the *actus reus*) and the mental element (the *mens rea*). Later, in chapter V, we will address the subjective or mental element of the criminal offence called ‘money laundering’ or ‘laundering the proceeds of crime’. This chapter will try to determine whether or not the implementation of basic physical or *actus reus* elements of this international criminal offence at the domestic level might undermine the guarantee of due process and the adequate protection of human rights. And, if the adaptation of any physical element of the international crime proves to be inconsistent with human rights principles I will propose how the deficiencies can be remedied.

The discussion is organized as follows: first, I will focus the debate on the actions of laundering, such as the conversion, transferring, possession and use of proceeds of crime (Section 2). Then, I will examine the word ‘property’ that represents the ‘proceeds of crime’ (Section 3). Finally, I will analyze several key aspects related to the ‘predicate offence’ of ML offences, that means the criminal offence as a result of which funds or ‘property’ have been generated or derived. (Section 4). All these are essential physical or *actus reus* elements of ML criminal offences that will be critically analyzed in this chapter, from a global-comparative perspective.

2. The actions of laundering.

The already described international treaties and EU Directives (hard law instruments) oblige State Parties to establish, as a criminal offence, the following acts of laundering. First, the conversion or transfer of proceeds of crime for the purpose of concealing or disguising the criminal origin of such property or of assisting any person who is involved in the commission of the predicate offence to evade the consequences of his or her actions (i.e., the first type of ML criminalization).³⁴⁹ Secondly, the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to proceeds (i.e., the second type of ML criminalization).³⁵⁰ Thirdly, the acquisition, possession or use of proceeds of crime (i.e., the third type of ML criminalization).³⁵¹ This last definition of the crime is an ‘optional’ clause for State Parties in that its adaptation is subject to the fundamental/constitutional principles and basic concepts of the country’s legal system.³⁵²

But let us study each of these penalized conducts of laundering, from a global comparative perspective. This is the main purpose of the following sub-sections.

³⁴⁹ See, e.g., article 3 (1) (b) of the Vienna Convention and article 6 (1) (a) (i) of the Palermo Convention, as well as, article 1 (a) of the Third EU Directive (2005/60/EC).

³⁵⁰ See, e.g., article 3(1)(b)(ii) of the Vienna Convention and article 6 1 (a)(ii) of the Palermo Convention, as well as, article 1 (b) of the Third EU Directive (2005/60/EC). In the Vienna text the reference to ‘ownership’ follows rather than precedes the more general ‘rights with respect to’ property.

³⁵¹ See, e.g., article 3(1)(b)(i)-(ii) of the Vienna Convention, and (c)(i); and, article 6(1)(a)(ii) and (b)(i) of the Palermo Convention. See also, article 1 (c) of the Third EU Directive (2005/60/EC).

³⁵² See, e.g., article 2 (1) of the Vienna Convention and article 6 (1) of the Palermo Convention.

2.1. Conversion or transfer of proceeds of crime.

The term *conversion* is defined as ‘the act of changing from one form to another; the process of being exchanged’.³⁵³ A process of substitution or transformation of the nature of the asset consequently occurs.³⁵⁴ This transformation process could be simply defined as turning one thing into another. A drug-trafficking example of converting proceeds of crime is changing the form and shape of drug cash money through the purchase of bank notes, among other financial instruments. According to the UNODC terminology, this is a typical behaviour of the second and third stages of layering and integrating in a ML process.³⁵⁵

In the Canadian case *R v Tejani*,³⁵⁶ the defendant was charged with ML under section 19 (2) of the Narcotic Control Act of Canada, which required proof of the intent to ‘convert’ or ‘conceal’. This court held that the words ‘convert’ and ‘conceal’ are not synonymous. Convert has a broader meaning, signifying to change or to transform, and it does not necessarily include an intent to conceal or disguise. More recently, in the Canadian case *R v. Daoust*,³⁵⁷ the Supreme Court of Canada again held that the word ‘convert’ had to be given its ordinary, literal meaning; thus, this court confirmed that ‘convert’ does not necessarily include an intent to ‘disguise’, ‘hide’ or ‘conceal’.

At the same time, the definition of *transfer* is: ‘to convey or remove from one place or one person to another; to pass or hand over from one to another’, or, moreover, ‘to change over the possession or control’ or ‘to sell or give’ from one person or place

³⁵³ Black’s Law Dictionary (7th ed., West Group, St. Paul, Minn, USA 1999) 333.

³⁵⁴ See, Aranguéz Sanchez (2000) 226.

³⁵⁵ See above, ch. 1, s. 2.

³⁵⁶ (1999) 138 CCC (3d) 366.

³⁵⁷ (2004) 235 DLR (4th) 216.

to another.³⁵⁸ Electronic transfers of money from one bank account to another are typical examples of this action. The act of transfer could imply also the exchange of rights from one person to another, while the asset maintains its identity. Another meaning could be the remittance of criminal funds from one account to another, either to oneself or to other persons. It could be said, therefore, that transferring proceeds of crime is a typology that can appear at any stage throughout the ML process.

An example of both acts of converting and transferring proceeds of crime is the change to larger denominations of street-level drug cash money to reduce the bulk and enhance portability; and the subsequent transfer of the accumulated street-level drug cash money from one place or jurisdiction to another. According to the UNODC, these conducts are often perpetrated during the so-called first stage of placement or pre-washing of a ML process.³⁵⁹

The text of the international crime of ML also establishes that this conversion or transfer of proceeds of crime, must be carried out in order to conceal or disguise the criminal origin or to help any person who is involved in the commission of such an offence or offences evade the legal consequences of these actions. This means that the first type of laundering criminalization requires proof of an ulterior (specific) intent; that is, the purpose *either* of concealing or disguising the illicit origin of the proceeds *or* of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his/her actions. We will refer to the ‘concealment or disguise’ of proceeds of crime in the next sub-section. For now it is sufficient to note that the effect of that ‘concealing or disguising’ includes the prevention of the discovery of the criminal origin of assets involved in the process of laundering.

³⁵⁸ Black’s Law Dictionary (7th ed., West Group, St. Paul, Minn, USA 1999) 1504.

³⁵⁹ See above, ch. I, s. 3.

Notwithstanding the international obligation to penalize this first type of ML criminalization, there are large differences in how this ML conduct has been criminalized in various countries. For example, although this specific and ulterior intent is a requirement of this first type of ML criminalization, it should be noted that international recommendations such as the OAS-CICAD Model Regulations³⁶⁰ and several countries such as Luxembourg,³⁶¹ have done away with this requirement.³⁶² At the same time, other countries decided to include this ulterior intent requirement, but they adopted a different and shorter text. For instance, the crime of ML in Brazil does not extend to circumstances where the conversion/transfer is performed for the purpose of helping or assisting any person who is involved in the commission of the predicate offence to evade legal consequences of his/her action, as drafted in the international crime of ML. Instead, this country adopted a shorter definition of the crime, only covering the conversion/transfer of proceeds for the purpose of concealing or disguising their use.³⁶³ I will further refer to this ‘ulterior and specific intent’ requirement in chapter V, section 3.3.

2.2. Concealment or disguise of proceeds of crime.

The second type of laundering criminalization refers to the concealment or disguise of the true nature, source, location, disposition, movement or ownership of rights with

³⁶⁰Article 2 (1) of the OAS-CICAD ‘Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and other Serious Offences’ sets forth: ‘A (money laundering) criminal offence is committed by any person who converts, transfers or transports property and knows, should have known or is intentionally ignorant that such property is proceeds or an instrumentality of a serious criminal activity’.

³⁶¹ See article 504 (4) of the Luxembourg Penal Code.

³⁶² We will expand upon the *mens rea* element of specific and ulterior intent in the following chapter V, section 3.2.

³⁶³ See article 1 (i) of the Brazilian anti-ML Act No. 9613.

respect to proceeds. To *conceal* implies ‘the act of refraining from disclosure; an act by which one prevents or hinders the discovery of something’.³⁶⁴ In addition, concealing refers to the act of removing or covering from sight or notice of one asset, and placing it where no one knows where it is. To hide it in some way. At the same time, the term *disguise* means ‘to conceal something or not to show it’, ‘to prevent something from being known’, or also, ‘to conceal the identity, to cover up’.³⁶⁵

It would seem that ‘conceal’ and ‘disguise’ are synonymous, although it might be that the word ‘conceal’ would be more apt for cases where the offender conceals his own proceeds of crime (i.e., when the offender practises self-laundering). Meanwhile, the word ‘disguise’ is more appropriate for cases where the offender that disguises the proceeds of crime did not participate in the commission of the predicate offence (i.e., a third party laundering conduct).³⁶⁶ Despite this minimum possible difference in the use of these terms, it is clear that both ‘concealment and disguise’ include preventing the discovery of the criminal origin of property. The provision deals with the intentional deception of others. This includes, of course, the intentional deception of law enforcement authorities. According to the terminology of the UNODC, the concealment or disguise of proceeds is a typical ML conduct that might occur throughout the entire process of ML.³⁶⁷

When the definition includes the expression ‘true nature’, that means the essential quality of the assets having been derived from criminal activities. When the definition refers to the words ‘source’, ‘location’, ‘disposition’ or ‘movement’ that may

³⁶⁴ Black’s Law Dictionary (1999) 282.

³⁶⁵ Ibid, 481.

³⁶⁶ R. Pinto and O. Chevalier, ‘Money Laundering as an Autonomous Offence’ (OAS-CICAD, Inter-American Drug Abuse Control Commission, Washington D.C. 2000) 15-16.

³⁶⁷ For details about the stages throughout a ML process see above, ch. 1, s. 3..

indicates the physical origin of the assets derived from crime.³⁶⁸ Finally, when it uses the word ‘ownership of or rights’ that signifies the legal nature of the proceeds of crime. For example, if goods are covered by a false invoice, without ever actually being moved from one place to another, there ownership may be concealed.

It should be noted that the act of concealment or disguising proceeds of crime can also imply the conversion or transformation of the property involved in the process of laundering. For example, the disguise of proceeds of crime can include the conversion of criminal cash money into financial instruments, such as money orders, shares or cheques. Through this conduct, launderers are expected to conceal and cover up the criminal origin, true nature, source, location, disposition, movement or ownership of or right of assets involved in the process of laundering.

The knowledge of the property’s criminal origin is the same as in the first type of ML penalization, but in this second definition there is no reference to the ‘purpose’ with which the offender acted. Thus, for this second definition, there should not be a requirement of proof that the purpose of the concealment or disguise is to frustrate the tracing of the assets or to conceal their true origin. Although generally this will be the purpose of the concealing, the applicable international conventions and EU Directives require that there be criminalization that does not depend on showing this purpose.³⁶⁹

To criminalize ML, countries such as Brazil³⁷⁰ and Spain³⁷¹ used the same language of this second definition. However, other countries adopted this second type of

³⁶⁸ See ‘2009 Model Provisions on Money Laundering’ (UNODC, Commonwealth Secretariat and IMF) (Report, April 2009) 11.

³⁶⁹ Ibid.

³⁷⁰ Article 1 (ii) of the Federal Law 9,613/1998 of Brazil has criminalized the situation in which the defendant concealed or disguised the true nature, origin, location, disposition or ownership, of the assets, rights or valuables, resulting directly or indirectly from certain listed criminal offences.

ML criminal offence but with different wording. For example, article 174 of the Russian Code penalizes the concealment or disguising of proceeds of crime ‘for the purpose of bringing the appearance of legality’. It could be said, therefore, that the Russian statute implies a kind of active engagement not only in the predicate offence, but also in the ulterior intent of making criminal assets appear legal. It could be said, moreover, that Russia included this ulterior intent requirement, even though this specific intent is not an element of the second definition of the crime of ML as drafted in hard law instruments.

2.3. Acquisition, possession or use of proceeds of crime.

The third type of laundering penalization refers to the ‘acquisition’, ‘possession’ or ‘use’ of property, knowing, at the time of receipt, that such property is the proceeds of crime. The expression ‘at the time of receipt’ means that the crime of ML is committed at the same time the agent acquires, possesses or uses the proceeds and he or she knows its criminal origin and is aware of the result of his/her actions.

The word *acquisition* means ‘the gaining of possession or control over something’.³⁷² An acquisition can be obtained from another by sale, gift, purchase, donation or in any other way. The acquisition of proceeds of crime is a typical laundering behaviour. This ML conduct involves, for instance, the purchase—with accumulated criminal incomes—of financial instruments such as money orders or cheques. In the UNODC terminology this conduct of purchasing financial instruments

³⁷¹ See article 301 of the Spanish Penal Code, which criminalizes the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of the property constituting the proceeds of crime.

³⁷² Black’s Law Dictionary (1999) 24.

with criminal cash money might appear, mainly, in the second or third phase of a ML process (i.e., the layering and the integration stages of a ML process).³⁷³

The word *possession* means ‘the fact of having or holding property in one’s power; the exercise of dominion over property’.³⁷⁴ Put differently, ‘possession’ is the *de facto* and the *de jure* right upon an object, constituted by the intentional element or *animus* (the belief and purpose of holding the asset or object) and the physical element or *corpus* (the effective control of a material asset or object).³⁷⁵ Meanwhile, to *use* consists in ‘the application or employment of something’, ‘to employ, to utilize’.³⁷⁶ Carrying in a suitcase cash money derived from drug-trafficking or any other crime is an example of possessing or using proceeds of crime. In the terminology of the UNODC, this is a typical laundering mechanism of the first ML stage of placement.³⁷⁷

This third type of ML criminal offence is subject to a ‘safeguard clause’, since its adaptation depends on the constitutional principles and the basic concepts of the legal system of the concerned State Party.³⁷⁸ As a consequence, countries such as Brazil,³⁷⁹ Canada,³⁸⁰ Russia³⁸¹ and the UK³⁸² penalized the acquisition, use or

³⁷³ See above, chapter I, section 3 for a further discussion of the three-stages of a ML process.

³⁷⁴ Black’s Law Dictionary (1999) 1183.

³⁷⁵ See, R. Pinto and O. Chevalier, ‘Money Laundering as an Autonomous Offence’ (OAS-CICAD, Inter-American Drug Abuse Control Commission, Washington D.C. 2000) 17.

³⁷⁶ Black’s Law Dictionary (1999) 1540.

³⁷⁷ See above, ch. I, s. 3.

³⁷⁸ See the Vienna Convention, the Palermo Convention (paragraph 1 (b)), and the rest of the international conventions and EU Directives on this subject matter, where there is a similar ‘safeguard clause’.

³⁷⁹ Article 1 of the Federal Law 9613/1998 penalizes the act of acquiring and reception as a guarantee, kept or stored and use of proceeds of certain listed criminal offences.

³⁸⁰ Article 462.31 of the Canadian Penal Code encompasses acts of using, transferring the possession of, sending or delivering to any person or place, transporting, altering, disposing or otherwise dealing with, in any manner and by any means any property or any proceeds of crimes.

³⁸¹ Article 174, 174 (1) and 175 of the Russian Penal Code.

possession of proceeds of crime; while some other countries did not penalize all these three acts of laundering. For instance, possession is not specifically criminalized in countries such as Argentina,³⁸³ Spain,³⁸⁴ Turkey³⁸⁵ and the US.³⁸⁶

I imagine four main arguments that a legislator or a scholar may invoke in order to argue against the criminalization of all or any of these three conducts covered by this third definition. The *first argument* is based on the idea that this definition of the crime is dominated by imprecision, uncertainty and instability, so it is incompatible with the basic principle of legality of criminal law.

The principle of legality means that there is no crime or punishment without law (in Latin, the *nullum crimen sine lege*). This aspect of the principle is stressed in article 15 of the International Covenant on Civil and Political Rights, which provides that:

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.

Article 7 (1) of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), provides the same principle using identical wording.

³⁸² Article 329 of the Proceeds of Crime Act (POCA) 2002, defines different ways of committing the ML offence namely by ‘acquiring’, ‘using’ (section 329 (1) (b)) and having ‘possession’ of criminal property (section 329 (1) (c)).

³⁸³ Article 278 (1) (a) of the Argentine Penal Code penalizes whoever ‘converts, transfers, manages, sells, encumbers or applies in any other way’ proceeds of crime (the amendment of 2011 does not penalize ‘possession’ of proceeds as well).

³⁸⁴ The wording in Article 301 of the Spanish Penal Code (SPC) does not cover ‘possession or use’. This is true, notwithstanding the Supreme Court of Spain in its sentence No. 1595/2003 of 29 November 2003, suggests that Article 301 SPC could, in practice, be given a fairly broad interpretation as regards what actions the perpetrator is required to have carried out in respect of the proceeds. More recently, Organic Law 5/2010 amended article 301 SPC, covering ‘possession’ but not the ‘use’ of proceeds of crime.

³⁸⁵ Article 282 of the Turkish Penal Code does not explicitly cover the ‘possession’ of proceeds of crime.

³⁸⁶ Section 1956 (a) (1) does not criminalize ML through the possession of proceeds.

The *nullum crimen sine lege* principle not only imposes a ban on the retroactive introduction of the penal norm, but also implies that the law should be sufficiently clear and precise so that citizens can know beforehand what type of conduct is considered criminal, and this will be the focus of the discussion here. In *Hashman and Harrup v. United Kingdom*³⁸⁷ the European Court of Human Rights held that any such criminal offence must satisfy the ‘quality of law’ test; meaning that the punishable conduct must be clearly ‘described by reference to its effect’. This qualitative requirement of the legality principle is usually called the principle of maximum certainty of criminal law (in Latin, *nullum crimen sine lege stricta*). This aspect of the principle is one of *fairness*. Criminal law poses a substantial threat to the basic rights and liberties of citizens and fairness requires that citizens should be sufficiently informed of the law and warned of its precepts before they can suffer a loss of basic rights for violating it.³⁸⁸ They may thus foresee the consequences of their action and freely choose either to comply with, or instead, breach legal standards of behaviours. In addition, the more accurate and specific the criminal rule, the greater is the protection accorded to the agent from arbitrary action of either enforcement officials or courts of law.³⁸⁹

In accordance with the view of Heba Shams, not only this third type of ML criminal offence, but also the first and second definitions of the crime as drafted in the Conventions, leaves much to be desired in terms of the requirement of certainty or the legality principle of criminal law.³⁹⁰ This author argues, specifically, that the *actus reus*

³⁸⁷ *Hashman and Harrup v. United Kingdom* (2000) 30 EHRR 241.

³⁸⁸ A. Ashworth ‘*Principles of Criminal Law*’ (2006) 70.

³⁸⁹ This aspect of the principle can be found, for instance, in the case law of the European Court of Human Rights, relating to Article 7 of the European Convention on Human Rights that states: ‘[the principle of legality] provides effective safeguards against arbitrary prosecution, conviction and punishment’ European Court of Human Rights, judgement of 22 November 1995, *SW v. United Kingdom*, Series-A, No. 335-A, para. 34-35.

³⁹⁰ Heba Shams (2004) 6.

of the three types of ML offences as drafted in the international conventions are particularly crafted to encompass any possible transaction involving criminal proceeds. In this vein, Shams also emphasizes that ‘the vagueness of money laundering offences is inherent in the fact that such offences aim at capturing activities that are ordinary and commercial in nature’.³⁹¹ Finally, she adds that similar vague and uncertain approaches are adopted in national ML offences as well;³⁹² although she does not provide examples for this assertion.

Nevertheless, Sham’s opinion is incorrect. This scholar is confusing the clarity and certainty of the definition of the crime with its narrowness. In practice, a crime passes the test of certainty/vagueness when it is sufficiently clearly defined so that it allows citizens to know before hand what type of conduct is considered a crime. That is to say, a definition of a crime might be too broad so it expands the criminal law beyond its recognised boundaries; but, at the same time, it can be clearly defined so it respects the legality principle. Therefore, simply to say, as Heba Shams does, that the vagueness is inherent, in the sense that ML offences are designed to catch countless commercial activities, is not enough to conclude that definitions of the crime in question are challenging the legality principle.

So, the question to answer now is: whether or not this third definition of the crime in question is clear enough to be understood by individuals. My claim is that this third definition of the crime (as well as the first and second definitions) does not violate the principle of maximum certainty, because it leaves little room for other interpretations or misunderstandings by the general public. It is clearly enough to be understood by individuals that the subject of criminal punishment is, at bottom, the

³⁹¹ Ibid.

³⁹² Ibid.

criminal knowledge of the participants involved in these laundering conducts (i.e., the ‘acquisition’, possession’ or ‘use’ of proceeds of crime); and the fact, as required under the domestic statute, that the object involved has been generated by a predicate offence. In this line of reasoning, the Swiss Supreme Court has ruled that ML offences in this country do not violate the legality principle, since they allow individuals to understand the consequences of their actions.³⁹³

In conclusion, my claim is that this third type of ML penalization is consistent with the principle of legality, but it is a broadly drafted offence that generates an unjustified inflation and expansion of criminal law and punishment. Therefore, it is necessary to limit the application field of this definition to be consistent with the minimalist theory of criminalization. This theory of penalization is needed in this case, since it provides the limits under which the power of the State is permitted to resort to criminal law and punishment. To reduce the scope and size of ML offences in general, I propose in this work the inclusion of a ‘monetary limitation’ clause. I will return to this matter in due course.

A *second argument* against the adoption of this definition of the crime concerns the idea that it is a passive form of criminalization, which can encompass too many ‘normal’ economic transactions. According to Stessens, for instance, the acquisition, possession and use of proceeds of crime are passive forms of collaboration with the perpetrator of the predicate offence. Then, the idea that these behaviours may encompass a ‘broad array of “normal” economic activities’ could be one reason against its penalization.³⁹⁴ I will argue against Guy Stessens’s opinion. Those who acquire, possess or use proceeds of crime are, in essence, practising a typical behaviour of ML,

³⁹³ Swiss Supreme Court, ATF 119 IV 242.

³⁹⁴ Stessens (2000) 116.

rather than 'normal' economic activities. A normal economic activity means a legal activity; and, any of these conducts of laundering cannot be classified as a legal economic activity. In fact, a typical example of acquisition, use or possession of proceeds of crime is when an individual acts as an 'intermediary' throughout the phases of a ML process. A person could act as an 'intermediary' between the perpetrator of the predicate offence and the person who will conceal and convert ill-gotten assets so that they appear to have originated from legitimate sources (first/second phase); and, alternatively, as an intermediary between those who will finally introduce, invest or consume the proceeds of crime in the legal or formal economy (third phase). On this basis, it could be said that the international community, through the penalization of those recipients who acquire, possess or use an object derived from crime, intends to criminalize, for instance, the role of 'intermediaries' between the different stages of a ML process. It is, therefore, all about penalizing the person that acts as an 'intermediary' throughout the process of laundering.

The *third argument* against the adoption of these conducts in question was offered by David McClean. He believes that, in some States, a wide understanding of the freedom of expression, the right to privacy and the right to self-determination might put that freedom and privacy in conflict with the penalization of these passive and broad conducts of acquiring, possessing or using proceeds of crime.³⁹⁵ In this line of reasoning, someone could argue that this is especially true with the 'possession' of proceeds of crime, when one knows, of course, that the possessed assets are derived from crime. This seems to be the most passive behaviour penalized in this third definition. In ordinary language, one might agree that it is possible to possess proceeds of crime without any additional act on one's part. However, the related question is: Are

³⁹⁵ David Mc Clean *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (OUP, Oxford 2007) 80.

offences of this passive kind contrary to the above mentioned rights or principles? This possession offence is committed before criminal assets are converted, transferred, concealed, disguised, acquired or used; thus, one basis to question this possession offence is that it penalizes people at a point too remote from these ultimate harms.³⁹⁶ In this regard, this passive and widely drafted offence of possession is targeted at earlier points in time, remote from the commission of the actual infliction of harm or result. Someone could argue that this is another example of the so-called ‘war against organized crime, terrorism and money laundering’ resulting in the distortion of proper legal standards.

Having said the above, I should recognize that I am in favour of this kind of possession offence. It is true that theorists who aspire to maintain the trend towards overcriminalization will scrutinize crimes of possession. These crimes are more controversial since harm is risked rather than caused. However, no reasonable theorist believes that all possession offences are questionable. No existing scholar or legislator has called for the abolition of all such crimes. The theoretical challenge is to provide a sophisticated taxonomy of offences of this kind in order to separate the wheat from the chaff. Then, the first argument to justify the penalization of the possession of criminal assets is the same legal argument generally found in academic literature justifying the adoption of other serious crimes of possession, such as the illegal possession or storing of war weapons, or the possession of elements needed to process cocaine or any other prohibited drug. The justification is as follows: there are some conducts that create an unacceptable and serious risk of harm to other individuals, so the State is justified in

³⁹⁶ According to some commentators possessive offences are examples of *inchoate offences* or also termed crimes of risk prevention (or risk creation). Roughly speaking, an offence is inchoate when not all of its instances cause harm. These offences do not prohibit harm itself but, rather, the possibility of harm. For further details about offences of risk prevention see: Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP, Oxford 2009) 38. See also, the analysis of possession offences in Andrew Ashworth (2006) 108.

criminalizing these kinds of conducts before the ultimate harm. In other words, penalizing activities remote from the actual commission of an act is justified by the need to furnish the legal grounds for action against individuals before addressing the harm caused by the crime.³⁹⁷

In our case, the reason for criminalization is not the mere possession of proceeds of crime, so much as what the recipient who possesses might do with *substantial* or high sums of criminal money or other assets. It is important to flag up, here and elsewhere that this dissertation is proposing to confine the ML offence only to significant sums of criminal money or other economic values. With this in mind, the penalization of the possession of high scale proceeds of crime is to reduce the risk that an ulterior harm will be caused. As explained in the previous chapter, substantial amounts of criminal assets subject to a process of ML allows criminals and organized criminal enterprises (e.g., organized crime and terrorism) to consolidate their economic power in the legal or formal economy, with impunity; that is, without the fear of legal sanctions and confiscation. Perhaps more importantly, criminals could practise ML to continue financing their criminal or legal activities, so they can continue damaging the socio-economic system, among other key social values usually harmed by high scale ML operations.³⁹⁸

An additional reason for enacting this offence of possession could be to enable law enforcement authorities and the police to intervene before substantial criminal assets are already invested in the legal economy, with impunity. This assessment is more clearly understood and valid assuming that the best chance to identify a ML operation is during the process of laundering, not when the criminal assets have been

³⁹⁷ Put differently, it is concerned more with the prevention of harm than with the punishment of those who have caused harm to others.

³⁹⁸ See above, chapter III, sections 3 and 4.

already recycled, invested or consumed in the legal economy. Put differently, the detection of ML operations is extremely difficult or impossible when criminal assets are already recycled; that is, mixed and reinvested in the legal economy.³⁹⁹

There is a *fourth and final argument* against the penalization of recipients who acquire, possess or use criminal assets, knowing ‘at the time of receipt’ that they are proceeds of crime. Aranguéz Sánchez⁴⁰⁰ and Gómez Iniesta⁴⁰¹ believe that the criminalization of the acquisition of proceeds of crime is justified since this activity seriously affects the social value protected by the crime of ML; which, for them, is the socio-economic system or fair competition of the economic market. However, they also suggest that the penalization of mere possession or use of proceeds of crime is unjustified, since these are too passive conducts, so they do not seriously harm the socio-economic system. Hence, in light of a reasonable theory of criminalization, such as the minimalist approach, these authors conclude that the penalization of possessing or using proceeds of crime generates an unjustified inflation and expansion of criminal law and punishment. Criminal law should be the last resort; thus, in order to avoid tensions with the minimalist approach, Gómez Iniesta adds that the possession or use of criminal assets with knowledge of their criminal origin should be covered by less intrusive laws, such as administrative-civil law.⁴⁰²

The opinion of these scholars is, at least, incomplete. It is clear that a proper test of criminalization requires a grave and irreversible damage to others or, in other words, a serious and direct harm to an identified and tangible social value. But, again, it should

³⁹⁹ See above, in ch. II, s. 5, where we explained that the detection of ML operations is extremely difficult when criminal assets are already mixed in the formal economy.

⁴⁰⁰ Carlos Aranguéz Sánchez (2000) 244.

⁴⁰¹ Diego J. Gómez Iniesta (1996) 52.

⁴⁰² Gómez Iniesta (1996) 52.

be stressed that the key ingredient to analyze this subject matter is the *monetary value* of criminal assets involved, rather than the far-reaching character of the act of possession or use of criminal assets. It is clear that those defendants who possess or use, for instance, more than USD 200,000 knowing that this sum derives from drug-trafficking activities, may create a serious risk of harm to others and/or seriously harm, in particular, the fair competition of the economic market, as well as the administration of justice, and, finally, the social value protected by the predicate offence of ML. Therefore, in conclusion, the criminal prosecution of those who possess or use large scales of criminal assets is justified and legitimate, in light of any respectable theory of criminalization. This is the conclusion that I reached in the previous chapter.⁴⁰³

2.4. Some final thoughts: criminalizing the process of ML, but not the result of this process.

The activities of conversion or transferring of proceeds of crime (the first type of laundering criminalization) are behaviours that could appear at the first, second or third stage of a ML process, which are the stages of placement, layering and integration. In addition, the acts of concealing or disguising proceeds of crime (the second type of laundering penalization) are typical behaviours of ML, which might also appear at any or all of the stages of a ML process. Finally, the acquisition, possession or use of proceeds of crime (the third type of laundering criminalization) are usually intermediary activities between one stage and the other; that is to say, conducts that may appear at any stage throughout a ML process.

⁴⁰³ See above, chapter III, sections 3 and 4.

As a consequence, it could be said that the definition of the treaty- based crime of ML punishes conducts that are part of the ML process, but not the result of the process. The result of a ML process, as explained in previous chapters, is the integration, legalization or reinvestment of proceeds of crime in the formal economy so they appear as derived from a legal activity; or, to put it differently, when the criminal assets have been already converted and mixed in the legal economy so that they look legitimate. Then, on this basis, it might be deduced that the final result of a ML process is not a necessary result for a conviction of ML. This final result goes beyond the result required by the definition of the crime of ML as drafted in hard law instruments.

3. Examining the word ‘property’ that represents the ‘proceeds of crime’.

In this section I will focus on the examination of the word ‘property’ that represents the ‘proceeds of crime’.

3.1. A global comparative perspective.

In the drafting of the Vienna Convention, the word ‘property’ was originally the description of the term ‘proceeds’ or ‘proceeds of crime’, but it became clear that two definitions were needed, one (that of ‘property’) serving to emphasize that assets of every possible kind were included in the second (‘proceeds’ or ‘proceeds of crime’), addressing the criminal derivation of the property.⁴⁰⁴

Then, article 1 (p) of the Vienna Convention defined the word ‘proceeds’ or ‘proceeds of crime’ as ‘any property derived from or obtained, directly or indirectly,

⁴⁰⁴ David Mc Clean (2007) 44.

through the commission of an offence'. This same definition was adopted by article 2 (e) of the Palermo Convention and other international hard law instruments on the matter.⁴⁰⁵ At the same time, Article 1 (q) of the Vienna Convention defines the word 'property' as 'assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets'. A similar definition of property was adopted by article 2 (d) of the Palermo Convention; and by the rest of the international conventions⁴⁰⁶ and EU Directives concerning ML.⁴⁰⁷

According to soft law instruments such as the 2009 Model Provisions on Money Laundering, the word 'property' means:

Assets of every kind, whether tangible or intangible, corporeal or incorporeal, moveable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interests in, such assets, including but not limited to currency, bank credits, deposits and other financial resources, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, whether situated in [insert name of State] or elsewhere, and includes a legal or equitable interest, whether full or partial, in any such property.⁴⁰⁸

The definition of the word 'property' in hard law instruments and in the above mentioned soft law instrument is broad enough to include any object or asset of any kind, either money or property, right, among other corporeal or incorporeal objects. At the domestic level, countries such as Argentina,⁴⁰⁹ Canada⁴¹⁰ and Germany⁴¹¹ also

⁴⁰⁵ See, e.g., article 1 (a) of the Warsaw Convention.

⁴⁰⁶ See, e.g., article 1 (b) of the Warsaw Convention.

⁴⁰⁷ See article 2 (3) of the Third EU Directive (2005/60/EC).

⁴⁰⁸ The '2009 Model Provisions on Money Laundering' (Report, April 2009) 14.

⁴⁰⁹ The crime of ML under article 278 (1) (a) of the Argentine Penal Code refers to 'money, assets or effects' proceeding from a crime and 'money or any other kind of assets' arising from a crime. Articles 2311 and 2312 of the Argentine Civil Code define 'assets' as any object which could have a value and 'property' as immaterial object or thing that has a value. While these provisions do not specifically mention legal documents or legal instruments evidencing title to or interest in property, the provisions seem broad enough to cover these categories.

adopted a broad definition of the word ‘property’. Broad definitions of the term ‘property’ seem to be necessary considering that ML is, often, a changeable and hidden process. Its degree of mutability is clear, as the process could include several and successive stages that cover different types of assets, which can assume a wide variety of forms. Consequently, the use of a broad definition of the term in question is required to cover all the possible conditions and forms of property involved in a process of ML.

3.2. The problem of ‘originated’ or ‘surrogated’ proceeds of crime and the so-called ‘chain ML processes’.

As described above, ‘proceeds of crime’ refers to any property derived from or obtained, directly or indirectly, as a result of a predicate offence. It is necessary to examine, in turn, the terms ‘directly’ or ‘indirectly’ included in this definition.

In this context, ‘direct’ proceeds of crime can be defined as those assets which are derived originally from a predicate offence; while ‘indirect’, ‘substitute’ or ‘surrogate’ proceeds of crime are those objects, which have been transformed or converted, in part or in full, into other assets, so they indirectly derive from a predicate offence. For instance, cash money obtained from drug-trafficking activities are assets directly derived from a predicate offence. On the contrary, cheques or bank notes

⁴¹⁰ The crime of ML under article 462 (31) of the Canadian Penal Code extends to ‘property’ or ‘proceeds’ that were obtained or derived directly or indirectly as a result of committing a designated crime. Pursuant to article 2 of the Canadian Penal Code, the concept of ‘property’ is defined broadly: ‘(a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods, and (b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange’.

⁴¹¹ The crime of ML under article 261 (1) StGB does not refer to the term ‘property’. Instead, it refers to the word ‘object’ (*Gegenstand*), which covers a broad range of ‘things involving some kind of economic value’.

purchased or acquired with cash money obtained from drug-trafficking activities are substituted or surrogated property or assets derived indirectly from a predicate offence.

I agree with this fairly broad description of the term ‘proceeds of crime’, which includes those assets derived both directly and indirectly from a predicate offence. The conducts of laundering proceeds of crime often include both types of assets. As discussed in the beginning of this dissertation, when specifying the different phases of the ML process, proceeds initially obtained from the predicate offence can be converted into different assets in order to be concealed or disguised, before completing the process of laundering. For example, cash money obtained from drug trafficking could be transferred to a bank account opened in a tax haven jurisdiction, and then the form and shape of this cash money could be converted into financial instruments, such as money orders, and finally into cheques or bank notes.

This process of transformation of proceeds into different assets could occur in successive laundering opportunities or in more than one complete process of ML. The activity of laundering proceeds of crime in successive opportunities is also known as a ‘chain money laundering process’.⁴¹² A chain ML process means that criminal assets, which have been already recycled or legitimized in the legal economy as a result of a previous first process of ML, are subject to a new and second ML process. Thus, a chain ML process occurs, for instance, when the person who laundered the proceeds of a crime decides to submit the already recycled and cleaned assets to a second process of ML, in order to continue separating and disguising the criminal origin of the assets. A second example of a chain ML process could be when a drug trafficker, who appoints a third party for laundering his/her accumulated criminal assets, decides to pay the launderer with recycled assets derived from the previously completed ML process. A

⁴¹² The word ‘chain ML process’ (in Spanish, ‘*blanqueo en cadena*’) is used, for instance, by Carlos Aranguéz Sánchez (2000) 192.

final example of a chain ML process could be when the proceeds of a crime are integrated and reinvested in the legal economy by the purchase of a hotel but, later, the economic benefits derived from the management of the hotel are subject to successive processes of ML.

According to scholars such as Blanco Cordero⁴¹³ and Palma Herrera,⁴¹⁴ the laundering of assets coming from a previous process of laundering (i.e., a chain ML process or a successive laundering process) cannot be prosecuted. This is because in a successive laundering process criminal assets have been already legitimized, recycled or decontaminated. Then, according to these authors, the already recycled assets should be seen and classified, in practice, as ‘clean’ or legal assets that no longer derive from a crime; they derive, instead, from a legal activity. Assuming that criminal assets subject to more than one complete process of ML must be seen, in fact, as derived from a legal activity (rather than coming from a crime), then, these assets cannot be classified anymore as ‘proceeds of crime’; which is, of course, one of the key physical or *actus reus* elements of the ML criminal offence. If one key element of the crime is not established, as it is in this case, the accused is entitled to an acquittal.

Nevertheless, a different interpretation could be inspired by the following idea: it is irrelevant how many times the criminal assets have been converted, recycled and subject to a process of laundering, provided that the prosecution is able to prove, beyond reasonable doubt, that the converted assets derived, in fact, from a predicate offence; or, moreover, that the property involved represents, beyond a reasonable doubt, the proceeds of crime.⁴¹⁵ So, criminal assets may change their form and shape or,

⁴¹³ I. Blanco Cordero, *‘El delito de blanqueo de capitales’* (Aranzadi, Pamplona, Spain 1997) 266.

⁴¹⁴ José Manuel Palma Herrera, *‘Los delitos del blanqueo de capitales’* (Edersa, Madrid 2000) 314.

⁴¹⁵ For further details about the necessary standard of evidence that represents the existence of proceeds of crime with no challenge to the right against the presumption of innocence, see below section 4.6.

moreover, they may be subject to a chain ML process, but, in the mentioned context, they never lose their condition as ‘proceeds of crime’. This is the opinion of the High Federal Criminal Courts of the City of Buenos Aires, Argentina, in the case ‘*Mendez and others*’, which pointed out that: ‘property involved in the process of laundering, notwithstanding their transformations, exchanges and conversions always preserved their criminal origin; so, they can be prosecuted and punished’.⁴¹⁶

As a result of the above discussion it could be argued that, it is irrelevant if property that represents the proceeds of crime derived ‘directly’ or ‘indirectly’ from the predicate offence, or, moreover, if that property was subject to a successive or a ‘chain ML process’. This is because the converted, recycled or cleaned property is derived, in practice and in its origins, from a predicate offence, so these assets do not lose their condition and nature of criminal assets or proceeds of crime.

4. Key aspects related to the predicate offence of money laundering.

An essentially physical or *actus reus* element of the ML criminal offence involves the existence of a predicate offence. The main purpose of this section will be to examine several key aspects related to the expression ‘predicate offence’, which means the criminal offence from which property has been derived.

The discussion is organized as follows: first, I will examine the scope of the predicate offence of ML (Section 4.1.). Then, I will critically analyze the problem of including tax crimes as predicate offences of ML (Section 4.2.); and, subsequently, I will evaluate the key reasons against the penalization of administrative/civil non-criminal offences as predicate offences of ML (Section 4.3). Afterwards, I will discuss

⁴¹⁶ ‘*Mendez and others*’ (1995) (High Federal Criminal Courts of the City of Buenos Aires, Room 1), case No. 26.339, Register No. 26, dated 31 January 1995.

whether or not a prior prosecution or conviction for the predicate offence is necessary as a prerequisite for a conviction of ML (Section 4.4). Next, I will explore the different levels of evidence necessary to prove, beyond a reasonable doubt, that the property involved in ML represents the proceeds of crime (Section 4.5); and, later, the possible tension between the activity of establishing the existence of a predicate offence and the presumption of innocence as a point of fairness (Section 4.6). Finally, I will refer to the importance of indicative, indirect or circumstantial evidence to prove the existence of a predicate offence of ML (Section 4.7).

4.1. Defining the scope of the predicate offence.

In turn, I will examine the consistency of the different models of law, options or variants offered by the international crime of ML, when defining the scope and size of the predicate offences. My claim here will be that the main goal of effectiveness in the adaptation of this key *actus reus* element of the treaty-based crime of ML at the domestic level, might generate an unjustified expansion of criminal law and punishment; that is, an overcriminalization. In order to reduce the scope and size of predicate offences, I will propose to punish the laundering of assets derived from any crime, but only when the property involved exceeds a substantial monetary value (in a single act or through the repetition of related acts). This uniform and integrated proposal is consistent with the minimalist theory of penalization of criminal law.

4.1.1. Critical analysis of the legislative models to define predicate offences.

The designation of crimes as predicate offences of ML has increasingly become more inclusive as international hard law standards developed. As explained in previous chapters, the 1980s constituted a starting point with the signature of the Vienna Convention, which provides the first definition of the ML offence, although limited to the laundering derived from drug-trafficking.⁴¹⁷ Later, with the Palermo Convention the definition of this crime was enlarged to address the proceeds of many other serious crimes.⁴¹⁸ In 2003, the UN Convention against Corruption identified corruption offences as one of the predicate offences of ML.⁴¹⁹ Finally, the Warsaw Convention and the Third EU Directive (2005/60/EEC) once again enhanced the scope of the predicate offence, establishing the crimes of FT and act of terrorism as predicate offences of ML.⁴²⁰ This tremendous evolution might be showing the willingness of the international community to penalize all types of laundering proceeds of crime.⁴²¹

At the domestic level, I identify three clear legislative models adopted by countries to define the categories of predicate offences. These three models are: (a) a catalogue model or list of predicate offences; (b) a model that refers to a category of ‘serious crimes’ as predicate offences; and (c) a model that refers to ‘all offences’ as predicate offences. Each of them is analysed and expanded on below.

(a) Catalogue model or list of predicate offences.

⁴¹⁷ Vienna Convention, article 3.

⁴¹⁸ Palermo Convention, article 6 (2) (a).

⁴¹⁹ Article 32 of the UNCAC.

⁴²⁰ Warsaw Convention, article 9 (4). In this vein, article 3 (5) of the Third EU Directive (2005/60/EC).

⁴²¹ See above, ch. II, section 3.3.

Some countries opt to enumerate the predicate offences in lists or catalogues that are attached to or included in the definition of the domestic ML offence. This category includes the legislations of Brazil,⁴²² Chile,⁴²³ Colombia,⁴²⁴ the United States⁴²⁵ and Uruguay.⁴²⁶

This approach presents two disadvantages. Firstly, there could be criminal offences that are relevant, as they can generate a significant amount of profits, but they are not included in the list of predicate offences. For instance, the Brazilian and Uruguayan ML offences do not include the crimes of fraud and tax offence in the list of predicate offences. Secondly, this approach has made countries such as the United States modify the ML offence several times to extend and adapt the list of predicate offences. Each time the ML offence is modified, the Congress or Parliament has to convene and vote on new measures, as new criminal offences are enacted; and leads this approach in producing a late and slow response.⁴²⁷

(b) Model that refers to a category of 'serious offences' to the predicate offence (the so-called threshold approach).

⁴²² Brazilian anti-ML Act No. 9,613 (refers to + - 10 crimes).

⁴²³ Article 12 of Chilean anti-ML Act No. 19,366 (+ - 10 crimes).

⁴²⁴ Colombian anti-ML Act No. 599, passed on 24 July 2000.

⁴²⁵ The US criminalized ML on 27 October 1989 (Title 18 USC 1956 and 1957, Money Laundering Control Act of 1986, Pub. L. 99-570). There are approximately 250 predicate offences for ML. For more details see: Bruce Zagaris, 'Trends in international money laundering from a US perspective', [2001] 35, Int'l Law, p. 839-65.

⁴²⁶ Uruguayan anti-ML Act No. 17,343, passed on June 2001 (+ - 15 crimes).

⁴²⁷ This disadvantage is mentioned in the '2009 Model Provisions on Money Laundering' (Report, April 2009) 13: 'Use of the list approach has the disadvantage of requiring frequent changes in legislation as new offences are enacted'.

Where countries apply a threshold approach, predicate offences cover all those linked to a category of ‘serious offences’. Examples of these categories include: (i) intentional offences (as opposed to negligent offences); (ii) serious offences when the amount of the acquisitive offence is over a monetary value; (iii) felonies (as opposed to misdemeanors); (iv) those offences that may be tried in a higher court because of the penalty of imprisonment applicable to the predicate offence (generally a maximum period of imprisonment not exceeding one or three years). Examples are the legislations of Argentina,⁴²⁸ Austria,⁴²⁹ Germany,⁴³⁰ Italy,⁴³¹ Spain,⁴³² Switzerland,⁴³³ Turkey⁴³⁴ and Venezuela.⁴³⁵ The main disadvantage this approach presents is that the offences, which are not deemed ‘serious’ by national courts or law, but are equally likely to generate significant amounts of criminal profits, will not be defined as predicate offences. For example, the predicate offenses to ML in Germany covers all ‘serious offences’; thus, the crimes of ‘insider trading’ and ‘market manipulation’ are not

⁴²⁸ Article 278 (1) (a) of the Argentine Penal Code, provides that funds to be laundered must derive from a ‘crime’ and only when the value of the assets ‘exceeds the amount of fifty thousand [Argentine] pesos’. In June 2011, this monetary value was elevated to three hundred thousand Argentine pesos.

⁴²⁹ Article 165 of the Austrian Penal Code (StGB) punishes the laundering of assets derived from ‘serious offences’. Pursuant to article 17 of the Austrian Penal Code, ‘serious offences’ are intentional crimes punished with imprisonment of over three years.

⁴³⁰ Article 261 of the German Penal Code (StGB) defines predicate offences of ML to include any serious criminal offence (*Verbrechen*) and a listed number of less serious criminal offences (*Vergehen*).

⁴³¹ Article 648 *bis* of the Italian Penal Code refers to the assets derived from any ‘non-negligent offence’.

⁴³² Article 301 (1) of the Spanish Penal Code describes the predicate offence as ‘serious’ (i.e., imprisonment greater than three years). It should be noted that the Spanish Penal Code was amended by the Organic Law 15/2003 of 25 November to adopt an ‘all-crimes’ approach to define the predicate offense of ML.

⁴³³ Article 305 *bis* of the Swiss Penal Code refers to assets derived from a ‘serious offence’ (i.e., imprisonment greater than one year).

⁴³⁴ Turkish Criminal Law No. 5,237 penalizes the laundering of assets derived from crimes sentenced to imprisonment from two years up to five years’.

⁴³⁵ Article 472 of the Venezuelan Penal Code criminalizes the laundering derived from ‘a non-negligent offence’.

covered, since these offences are classified as less serious crimes.⁴³⁶ From the defendant's point of view, another disadvantage might be that the predicate offence defined in the crime of ML could be unconstitutionally vague, so that it violates the principle of legality of criminal law. This objection is explained below because it is common to the third and last model of law.

(c) Model that refers to 'all criminal offences' as predicate offences.

The third model consists of penalizing the laundering of money or any other economic value derived from a 'crime' (whether serious or minor). This model of law includes the legislations of Belgium,⁴³⁷ Denmark,⁴³⁸ Mexico,⁴³⁹ Nigeria,⁴⁴⁰ Paraguay,⁴⁴¹ and the UK,⁴⁴² where laundering derives from 'a crime', without any limiting description of the crime. The main disadvantage of this approach is that the broad scope of predicate offences may violate the principle of legality of criminal law, making the penalized conduct unconstitutionally vague and unclear.

So, the question here is whether or not the model of law that refers to 'all-criminal offences' as predicate offences is incompatible with the principle of legality of criminal law. This principle is one of fairness. It implies that the law should be as

⁴³⁶ See FATF/OECD and IMF 'Mutual Evaluation Report of Germany' (Report, 2010) 51.

⁴³⁷ Article 505 (2), (3) and (4) of the Belgian Penal Code.

⁴³⁸ Article 290 (1) of the Denmark Penal Code.

⁴³⁹ Article 400-Bis of the Mexico's LFPC Law, is an all-crimes ML offence.

⁴⁴⁰ Article 14 (1) (a) and (b) of the Nigerian Money Laundering (Prohibition) Act, 2004, penalizes the laundering of 'resources or property derived directly or indirectly from illicit traffic in narcotic drugs and psychotropic substances *or any other crimes or illegal act*'.

⁴⁴¹ Article 196 (1) (a) of the Paraguay Penal Code, penalizes the concealment and laundering of assets or objects derived from 'a crime'.

⁴⁴² Under the UK's Proceeds of Crime Act (POCA) 2002 the offences of ML (sections 327-340) apply to all criminal offences, however serious or minor they may be.

specific and clear as possible, so that the citizens may know beforehand what type of conduct is considered criminal. A corollary of this principle is the need for maximum certainty in the definition of crimes and penalties. This quality requirement of the principle of legality is called the principle of strict legality or maximum certainty of criminal law.⁴⁴³

It is clear that this ‘all-crimes’ approach or model of law, covers any kind of criminal offences (e.g., serious and minor criminal offences) as a predicate offence of ML. Then, it could be argued that this formula is clear enough, since citizens can clearly know beforehand that the conduct of handling and laundering assets, knowing that these assets derived from any kind of criminal offences, is considered a crime. In other words, it is clear enough that this formula does not leave room for differing interpretations and confusions by the general public, so this formula is not vague/uncertain enough to violate the principle of legality of criminal law.

I should recognize, however, that a valid objection is that the scope and size of this formula is too broad, so it can generate an unjustified expansion of criminal law and punishment. Therefore, my objection is that this formula is too broad/wide so it may produce an unjustified inflation of criminal punishment; but, it is not too vague/uncertain to violate the principle of maximum certainty of criminal law. To limit the scope and size of predicate offences of ML, I propose to penalize only high-scale ML conducts. That is, I propose to penalize ML, but only when the economic values, sums or assets derived from a crime, exceed a limited and specific monetary value. This quantitative limitation clause will avoid the punishment of ML conducts, when they involve many trivial and minor predicate offences. In my opinion, the seriousness of predicate offences should be evaluated in light of the monetary value of the sums or

⁴⁴³ For further details about the principle of legality, see above section 2.3.

assets involved in the ML process. I will further explain this ‘monetary limit’ requirement in due course.

4.1.2. Inconsistencies in defining the scope of predicate offences and the condition of dual criminality.

The definition of the crime of ML, as drafted in hard law instruments, offers explicit options to State Parties of how they may delineate the scope of the predicate offence of ML. This allows for a degree of variation between countries, when classifying the predicate offence. Substantial differences in the adaptation of predicate offences might produce practical difficulties for prosecutors when seeking mutual legal assistance or requesting an extradition of a defendant from one jurisdiction to another. One example may illustrate this point:

- Country A adopts an all-crimes approach to establish the scope of the predicate offence (e.g., Belgium or Nigeria); and, country B selects the legislative catalogue model of predicate offences (e.g. the United States).
- According to the principle of double criminality,⁴⁴⁴ when country A sends a Letter of Request (i.e., a mutual legal assistance or an extradition request) to country B, country A’s prosecutors will have to convince country B’s authorities that ML has been committed, as country B interprets that offence. In other words, they must prove that the proceeds were derived from a predicate offence as defined by country B’s legislation. Meanwhile, in country A, prosecution for ML occurs regardless of the particular type of crime that gave rise to the ill-gotten profits.

⁴⁴⁴ For the principle of dual criminality see *supra* chapter II, section 6.3.

- Therefore, if country A's prosecution does not demonstrate that ML derived from a predicate offence as defined by country's B definition of the crime—on the basis of the principle of dual criminality—country A's request of international cooperation might not be answered by country B's legal authorities.

Given the practical problems created, domestic legislative bodies and scholars need to consider that the adoption of an 'all-criminal offence' model of law to define the scope of predicate offences of ML, might be the best option to promote international cooperation between countries. This is, in fact, the opinion of Brigitte Unger, who proposed the adoption of a broad approach to predicate offences of ML, in order to improve the international cooperation. In particular, this scholar says:

One possible way to address the problems outlined above [problems of international cooperation between countries] would be to adopt a very broad approach to predicate offences, to expand their scope as much as possible. This would increase the chances that the double criminality requirement would be satisfied, thus leading to international efficacy of law enforcement actions.⁴⁴⁵

I agree with Unger's point of view, especially because, as explained above, this all-crimes approach to predicate offences does not violate the principle of maximum certainty of criminal law. However, this author's point of view is incomplete. Unger does not underline, in particular, that the inclusion of this broad formula to define the scope of predicate offences might generate an unjustified inflation of criminal law and punishment. I will further explain this topic in the next section.

⁴⁴⁵ Brigitte Unger, *The Scale and Impacts of Money Laundering* (2007) 20.

4.1.3. Towards a broad approach to predicate offences, but including a quantitative limitation clause and penalizing ‘smurfing’ conducts as well.

The inclusion of a broad approach to predicate offences, such as the all-crimes approach, serves as an excellent illustration of the phenomenon of *overcriminalization* and the unjustified expansion of criminal law and punishment in the field of ML punitive legislation.

In order to reduce the scope and size of predicate offences of ML, this work is proposing to penalize and punish only high-scale ML operations. That is to say, this work is proposing to adopt a formula that captures ‘all criminal offences’ as predicate offences of ML, but only punishable if the economic value of the sums or other criminal assets involved in the laundering operation *exceeds* the monetary limit required by the ML criminal offence. As a result, if the economic value of the criminal assets does *not exceed* this monetary limit (i.e., the quantitative limitation clause), the laundering operation is not punishable. At the domestic level, a similar model of law was adopted, for instance, by Argentina.⁴⁴⁶

This proposal respects and follows the theory of minimum penalization, because the laundering of proceeds of crime that do not exceed the monetary value required by the ML offence, are less serious misconducts that cannot seriously damage the social interests that ML offences should safeguard; which are, for us: the social value protected by the predicate offence of ML, the administration of justice and the socio-economic system or fair competition.⁴⁴⁷ Respectable theories of criminalization, such as

⁴⁴⁶ Article 278 (1) (a) of the Argentine Penal Code, adopted a crime of ML that covers all offences as predicate offences, when the amount is over a monetary value. That is to say, the definition of ‘property’ in the Argentine ML offence is restricted in terms of value. The offence only applies to property of a value greater than AR\$ 50,000 (= USD 16,181.22 at the exchange as of December 2008). It should be pointed out that, by an amendment dated June 2011, the amount of this economic value was elevated to AR\$ 300,000 (= USD 75,000 at the exchange rate as of June 2011).

⁴⁴⁷ See above, chapter III, sections 2 and 3.

the minimalist approach, only allow the penalization of conducts that seriously and directly harm specific and relevant social values. And, it seems to be clear that high-scale ML operations may seriously and directly harm these mentioned social interests.

But the question to tackle now is: what happens if the launderer carries out ML operations for amounts below the monetary value imposed by the definition of the crime, for the only purpose of eluding criminal punishment? This eluding conduct is known as the act of structuring a ML operation or, simply, as an operation of *smurfing*. In this context, to '*smurf*' means to divide a large sum into small amounts and to make a series of small payments into bank accounts, in order to keep proceeds below the minimum amount or monetary value included in the definition of the criminal offence, to avoid criminal punishment.⁴⁴⁸

To avoid that the operation of *smurfing* remains unpunished, this dissertation proposes the criminalization of these kinds of structured operations of ML. To do this, the definition of the ML criminal offence might refer to 'a crime', in general, as a predicate offence of ML, but only punishable if the monetary value of the property involved in the process of ML is over a certain monetary value *in a single act or through the repetition of different related acts*. At the domestic level, this provision was also adopted by the Argentine crime of ML.⁴⁴⁹ By including this last phrase in the definition of ML criminal offences, we are penalizing *smurfing* activities.

⁴⁴⁸ For an example of a ML operation including *smurfing* or structuring operations, see in Appendix I of this work the case study No. 8 entitled 'Geosur S.A.'

⁴⁴⁹ Article 278 (1) (a) of the Argentine Penal Code penalizes the laundering of proceeds of crime when 'the value of the assets exceeds the amount of fifty thousand pesos, *either in a single act or through the repetition of different related acts*' (emphasis added).

4.1.4. Some final thoughts.

In this chapter, I proposed an amendment to the definition of the international crime of ML. In particular, I proposed the inclusion of a new, more integrated, and longer formula to define the scope of predicate offences. The main purpose of this amendment is twofold: first, to improve international cooperation between countries; and, secondly, to establish a ML offence that is in line with the minimalist theory of criminalization.

However, criminal law is conventionally conceived as the last bastion of national sovereignty and it is closely tied to domestic systems' legal culture and history. Then, someone could argue that the proposed amendment to this key element of the international crime of ML could hardly be achieved in practice, given the cultural and historical differences between countries that negotiate, at the international level, the drafting of new international hard law instruments.

Nevertheless, this argument clearly fails, after showing in this section that there is not a direct and strong relation between the way State Parties are adopting the analyzed models of law and their legal culture or history. Civil law countries such as Brazil, Chile or Uruguay are adopting the same model of law that has been adopted, for instance, by common law countries such as the US. These countries adopted the model of catalogue or list of predicate offences. Hence, it could be argued that differences on the adaptation of these models of law are more a question of choice among the offered options, rather than of significant differences in the legal systems, culture or history of countries. Or, moreover, that the offered and analyzed models of law could be implemented by any country of the world, regardless of the general characteristics of their legal system (e.g., common law, civil law). Consequently, a better harmonization and convergence within the offered models of law appear to be more attainable than perhaps previously thought.

4.2. Tax Fraud as a predicate offence of money laundering.

I now turn to the problem of tax crimes (also called tax frauds) as a predicate offence of ML.⁴⁵⁰ Although tax fraud/tax crime is different from the crime of ML, in practice, these two crimes are linked. Both tax crimes and ML criminal offences usually share the same sophisticated techniques of fund dissimulation and they are often perpetrated through the misuse of off-shore corporations domiciled in tax haven jurisdictions, also named 'off-shore financial centres'.⁴⁵¹ These tax haven jurisdictions might be attractive for perpetrators of both tax fraud and ML offences, since these jurisdictions offer high levels of bank secrecy together with a variety of financial mechanisms and institutions guaranteeing anonymity.⁴⁵²

The above was highlighted by the United Nations Office for Drug Control and Crime Prevention in its report 'Financial Havens, Banking Secrecy and Money-Laundering', which explains how criminals are making wide use of the opportunities offered by off-shore and tax haven centres to practice tax fraud and ML offences. This report states, among other conclusions, that:

One of the key remaining facilitators of crime has been the tax avoidance/evasion exemption in the laundering regulations of many countries. It may not be essential for tax evasion to be a predicate offence for money laundering charges [...]. But if financial and other institutions are permitted not to pass information about conducts that otherwise would be suspicious on the grounds that they think (or say they think) that the

⁴⁵⁰ The words 'tax fraud' and 'tax crime' will be used interchangeably. For the purpose of this thesis, 'tax fraud' or 'tax crime' is defined as the action of concealment and fraud adopted by the taxpayer that involves breaking the criminal tax law and which was wilfully undertaken with the intent of escaping payment of tax to the tax authority.

⁴⁵¹ See, e.g., J.A. Blum, M. Levi, and others, '*Financial Havens, Banking Secrecy and Money-Laundering*' (UNODC, New York 1998) 2-3.

⁴⁵² *Ibid.*

funds are “only” tax money, this offers both them and their customers an easy way of rationalizing doing business for themselves and representing to a court or regulators in future that they did not think the funds were proceeds of crime but rather tax “dodges” thereby evading conviction and/or severe regulatory action.⁴⁵³

Beyond the differences and similarities between tax crimes and ML criminal offences, the purpose of this section is to analyze whether the crime of tax fraud should be included as a predicate offence of ML.

As it was explained in previous sections, article 6 (2) (b) of the Palermo Convention oblige all State Parties to adopt the definition of the ML offence to all ‘serious’ predicate offences, with a view to including the ‘widest range of predicate offences’. However, no international convention defined, in any detail, the meaning of the expressions ‘serious’ predicate offences or ‘widest range of predicate offences’. More recently, the Warsaw convention (hard law instrument), as well as the Recommendation 1 of the 2003 version of the FATF 40 Recommendations (soft law instrument), clarified this ‘widest range’ expression, suggesting the inclusion of a list of 20 offences as predicate offence of ML; but none included ‘tax fraud’ or ‘tax crime’. It is clear, therefore, that both hard and soft law instruments do not oblige or recommend the inclusion of tax crimes as predicate offences of ML.

Consequently, there are some countries, such as Argentina,⁴⁵⁴ Austria,⁴⁵⁵

⁴⁵³ Ibid, p. 51. It should be noted that the term ‘tax fraud’ might be different to the term ‘tax evasion’, but the UNODC’s Report used them interchangeably as synonymous. Tax fraud or tax crime usually refers to a fraudulent or cheating criminal offence; while ‘tax evasion’ usually means an administrative non-criminal offence (e.g., the mere failure to declare tax duties, without fraudulent or cheating behaviors). In this sense, see: *Gabriel, R v. IK* (2007) 1 WLR 2272.

⁴⁵⁴ Article 278 (1)(a) of the Argentine Penal Code is an all-crimes ML offence, except when the value of the asset ‘exceeds the amount of fifty thousand [Argentine] pesos’ (AR\$ 50,000 = USD 16,181.22 at the exchange rate as of December 2008). Thus, tax offences could be a predicate offence of ML, when the value of the assets derived from the fraudulent tax crime are over the appointed value.

⁴⁵⁵ In Austria only customs fraud and evasion of import and export duties are considered a predicate offence of ML.

Belgium,⁴⁵⁶ France,⁴⁵⁷ Italy, the Netherlands,⁴⁵⁸ Germany,⁴⁵⁹ Spain⁴⁶⁰ and the United Kingdom,⁴⁶¹ where tax fraud is considered a predicate offence of ML. But, in other countries such as Brazil, Canada, Chile,⁴⁶² Japan,⁴⁶³ Luxembourg, Russia,⁴⁶⁴ Singapore,⁴⁶⁵ the United States⁴⁶⁶ and Uruguay,⁴⁶⁷ tax crimes are not included as a predicate offence of ML.

⁴⁵⁶ This country adopted an all-crimes ML offence, so tax fraud/tax crimes are predicate offences of ML.

⁴⁵⁷ Article 222 (38) of the French Penal Code includes ML offences related to drug-trafficking and article 415 of their Customs Code penalize the laundering of proceeds derived from customs offences. With the Law of 1996, France has adopted that 'all crimes' can be predicate offences of ML (article 324 (1) of the French Penal Code). Therefore, tax offences fall under this legislation as do any other offences.

⁴⁵⁸ Articles 420 *bis* and 420 *quater* of the *Wetboer van Strafrecht* (Dutch Penal Code) apply to proceeds derived from any criminal offence. Tax crimes under article 68, 69 and 72 of the Dutch General Law Concerning National Taxes are, thus, punishable in the Netherlands. This was also confirmed by the Supreme Court of this country in a ruling of 7 October 2008 (*NJ* 2009, 92).

⁴⁵⁹ Pursuant to article 261 (1), second paragraph, of the German Penal Code, tax crime under section 370 of the Fiscal Code (*Abgabenordnung*) constitutes a predicate offence for ML under German Law if it was committed with the intention of making a profit or, if it was perpetrated by an organized criminal group or criminal organization.

⁴⁶⁰ Article 301 of the Spanish Penal Code (amended by Organic Law 5/2010 of 22 June 2010).

⁴⁶¹ The Proceeds of Crime Act 2000 (POCA) was adopted on 24 July 2002. Part 7 of the Act deals with ML. Pursuant to this Act, the scope of the predicate offence of ML offences is reformed to include the proceeds of 'any crime'. Thus, the UK ML offence makes no real distinction between laundering the proceeds of tax crimes and those of any other crime.

⁴⁶² In Chile, tax crimes are not included in the list of predicate offences.

⁴⁶³ Pursuant to the 'Act on the Punishment of Organized Crime, Control of Crimes Proceeds and other Matters' of 2000, Japan does not include tax crimes in the list of predicate offences.

⁴⁶⁴ Article 174 of the Russian Penal Code, follows an 'all-crime' approach; except for tax crimes related to non-fulfilment of tax agent obligations (article 199 (1) of the Russian Penal Code).

⁴⁶⁵ Singapore has adopted a list approach to define the predicate offence of ML; and tax crimes are not included on the list—article 47 (1), (2) and (3) of the Corruption, Drug-Trafficking and other Serious Crimes Act (CDSA).

⁴⁶⁶ In the United States tax fraud is not expressly included in Section 1956 (c) (7) as a crime in the catalogue of ML predicate offences. However, 'wire fraud' is included as a predicate offence. The crime of wire fraud means any fraud committed through the use of US communications (e.g., fax, e-mail, telephone). Thus, tax fraud—as a special or aggravated kind of fraud—committed throughout any US communication, might be seen as a predicate offence of ML. For more details about the crime of ML in the US, as well as wire fraud in this country see: Bruce Zagaris 'Trends in international money laundering from a US perspective' (2001) 35 *Int' Law*, 839-65; B. Zagaris 'Tax haven beware, fiscal transparency and what else?' (Oct. 2001) *International Banking Regulation*, 111-44.

⁴⁶⁷ In Uruguay, tax crimes are not included in the list or catalogue of predicate offences.

For many years tax fraud has been excluded as a predicate offence of ML. The debate about including tax fraud as a predicate offence of ML is controversial in both the preventive/regulatory AML regime and in the criminal approach, that is, the definition of the crime of ML. In summary, if tax fraud is included as a predicate offence of ML in the preventive/regulatory AML approach, then financial institutions among other ‘obliged agents’, such as notaries, accountants, auditors and real estate agents, will have the duty to report their suspicions about funds that could stem from tax fraud activities to the FIUs. In these cases, FIUs would receive numerous reports regarding tax fraud instead of ML activities. One may then consider that the main purpose of FIUs is the prevention and investigation of ML and not to take preventive actions and investigate tax crimes. The preventive and regulatory legal framework against tax crimes is different from that created by the international community to deal with ML, as they did not create it to prevent and investigate tax crimes.

But let us focus on the debate concerning the inclusion of tax crimes as a predicate offence of the ML criminal offence. Many countries are reluctant to do so. Their arguments, among others, are based on the long tradition of international instruments providing reserves in this respect. The exception for tax crimes stems from a traditional concept of sovereignty by which States are seen as competitors since their economic and fiscal interests collide. Therefore, their main concern with this tax exception is to protect the economic and fiscal interests of their financial sectors.

This long tradition of international instruments providing reserves to include tax duties at the international level was implicitly exposed in the Vienna Convention, which provides, in article 3 (10), that the offences established in accordance with this Convention would not be considered tax offences in order to refuse cooperation between countries. The drafters of the Vienna Convention wanted to restrict the

possibility of State Parties to invoke the tax excuse in order to avoid mutual legal assistance and extradition requests between States in ML cases. An example of a Convention that directly and explicitly included the tax exception clause is article 18 of the Strasbourg Convention, which establishes the possibility to refuse cooperation between States if the offence to which the request relates is a tax crime.

However, since the 2000s, more and more countries are opting to include tax fraud as a predicate offence of ML. An example of this global trend is that, since 2000, all FATF member countries have a definition of a ML criminal offence based on a wide range of 'serious offences' in place; and, most of them including tax fraud or tax crimes as a (serious) predicate offence. The UK legislation is an example. Part 7 of the Proceeds of Crime Act 2000, adopted in this country on 24 July 2002 reforms the scope of the predicate offence of ML to include the proceeds of 'any crime'. Through this amendment the UK crime of ML makes no real distinction between laundering the proceeds of tax crimes and those of any other crime.⁴⁶⁸

A different argument against the inclusion of tax crimes as a predicate offence of ML is that these crimes are not always committed by organized criminal groups. According to this view, tax crimes could be serious crimes but can never be assimilated to other serious offences that are strongly related to organized criminal groups activities, such as smuggling, drugs and arms trafficking. On this basis, it could be said that the international legal order against ML was created as an important defense against organized criminal enterprises through the criminalization of their ML operations and not to prosecute and punish the perpetrators of tax crimes. In support of this position, one might invoke article 1 of the Palermo Convention, which stresses that this convention was approved with the aim of 'promoting co-operation to prevent and fight

⁴⁶⁸ For further details about ML offences in the Proceeds of Crime Act (POCA) 2002 see: Robin Booth, and others *'Money Laundering Law and Regulation: A practical guide'* (OUP, Oxford 2011); in particular, see chapter 3 entitled 'Money Laundering Offences under the Proceeds of Crime Act 2002'.

transnational organized crime more effectively', rather than to prevent and prosecute tax crimes as well.

Nevertheless, this claim also fails. There is no reason to support the assertion that organized crime or any other kind of organized criminal enterprise does not commit tax fraud offences to finance their activities and construct power. On the contrary, organized criminal groups can accumulate significant sums of money or economic values through the commission of tax frauds. This is highlighted by the Action Plan on Organized Crime of the High Level Group on Organized Crime endorsed by the Amsterdam European Council on 16 to 17 June 1997. In its Recommendation 29, the High Level Group on Organized Crime encouraged the development of legislation to combat organized crime linked to tax fraud and recommended that tax fraud, linked with organized crime, should be treated as any other form of organized crime, even if tax laws may contain special rules on recovering the proceeds of tax fraud.⁴⁶⁹ Then, after accumulating substantial amounts of ill-gotten assets through the commission of tax crimes, organized criminal groups could take the decision to launder the accumulated assets derived, again, from tax criminal offences. It could be alleged, finally, that the non-criminalization of the laundering of assets derived from tax crimes can encourage organized criminal groups to use this form of financing to continue consolidating their economic power in the legal economy with impunity; so they can continue damaging the social values protected by the crime of ML.

But this is not the only argument against the inclusion of tax crimes as a predicate offence of the ML criminal offence. Another concern relates to the legal nature of tax crimes compared to other potential predicate offences of ML. According to

⁴⁶⁹ Amsterdam European Council, 'Action Plan on Organized Crime of the High Level Group on Organized Crime endorsed by the Amsterdam European Council on 16 to 17 June 1997' (OJ, C 251, 156 August 1997).

Manuelle Gely, one significant difference between tax crimes and other crimes, in the context of predicate offences, is that the proceeds of tax crimes can arise from legal activities; meanwhile the crime of ML requires that assets to be laundered shall always derive from crime.⁴⁷⁰ For instance, according to Gely, a person receiving a lawful income but failing to declare it to the tax authorities, thereby saving the pertaining tax, has exercised a legal activity but has concealed the proceeds, which constitutes a single tax offence.⁴⁷¹

Nonetheless, this last concern is incorrect. I have a different view on this last concern. The evaded sum of a person who receives a lawful income but fails to declare it to tax authorities constitutes the proceeds of a tax crime; assuming, of course, that this concealment behavior is a tax crime violation in the jurisdiction where this evasive conduct was perpetrated. Therefore, in this line of reasoning, the evaded sum is not the proceeds of a legal activity as asserted by Manuelle Gely. There is no logical reason to consider those evaded assets as the product of a legal activity, as opposed to the result of a crime. In the described context, a tax crime or, to be more precise, a tax fraud against tax authorities was perpetrated. And, through the commission of this acquisitive criminal offence, proceeds of crime have been generated. Then, if these evaded sums derived from a tax crime are submitted to a process of laundering, the obvious and logical conclusion is that the crime of laundering the proceeds of a tax crime has been committed.

Of course, the crime of ML requires that the assets subject for laundering shall derive from a crime. Tax crime is a crime; a serious crime, that subjects the offender to criminal penalties, such as fines and imprisonment. More precisely, a tax crime can be

⁴⁷⁰ Manuelle Gely, 'Tax Offences: The Hidden Face of Money Laundering?' (2003) *Intertax*, Kluwer Law International Vol. 31, Issue 10.

⁴⁷¹ *Ibid.*

classified as a special type or an aggravated crime of fraud where the direct victim is the tax authority. Then, it is clear that this crime may be a predicate offence of ML. Indeed, there is no apparent difference between tax fraud/tax crimes and any other acquisitive crime in the context of ML. An individual may launder the proceeds stemming from any possible acquisitive crime. These proceeds of crime may be associated not only with drug trafficking, but also with fraud, corruption, tax fraud/tax crimes or any other predicate offence, as a result of which profits were acquired or generated.

Ultimately, the inclusion of tax fraud as a predicate offence of ML is justified, among other reasons, since tax fraud is an acquisitive criminal offence, which can generate significant amounts of criminal assets. Moreover, from the global trend in favour of a wide scope of the predicate offence given in the definition of the crime of ML as drafted in international conventions,⁴⁷² it is clear now that tax crimes may be the underlying offence of ML. This wide scope shows the willingness of the international community to prosecute and punish the laundering of economic values derived from all types of criminal offences; including, of course, the laundering of assets derived from tax frauds.

4.3. A debate: administrative or civil non-criminal offences as predicate offences of money laundering?

It is now necessary to discuss whether or not major administrative or civil offences, among other non-criminal offences, might be seen or considered as predicate offences of ML.

⁴⁷² See above, in chapter II, section 3.3, entitled 'Examining the evolution of the global legal order against ML'.

As I have indicated in the previous chapter, scholars such as Blanco Cordero⁴⁷³ and Fabian Caparros⁴⁷⁴ justify the criminalization of laundering proceeds of crime, with the fact that this conduct seriously harms the socio-economic system and the fair competition of the economic market. Inspired by this idea, both scholars began a debate regarding whether or not to penalize the laundering of assets derived from high scale non-criminal offences, such as civil, tax, administrative or commercial offences. The question they arise is if serious non-criminal offences could also seriously harm the economic/financial system or the fair competition of the economic market, so their inclusion as predicate offences is justified. Assuming that the laundering of assets derived from a crime, as well as the laundering of assets derived from non-criminal offences (e.g., torts, civil or commercial illegal activities) could both generate negative implications for the socio-economic order, the penalization of laundering proceeds derived from both criminal and non-criminal offences might be justified and recommended. Fabián Caparros adds that the practice of laundering the proceeds of major civil frauds may remain a mere civil or commercial wrong, although the laundering of assets derived from these major civil frauds might be powerful enough to undermine the free and fair competition together with the financial/economic system.⁴⁷⁵

Although the above explanation might be persuasive, none of these authors conclude in favour of this position; arguing that the criminalization of laundering assets derived from non-criminal offences might violate the principle of minimum criminalization or *ultima ratio* of criminal law. A ramification of this principle means that the legislator should use the tool of criminalization only as a last resort. Therefore, criminal law should only be invoked if civil-administrative measures are inappropriate

⁴⁷³ Isidoro Blanco Cordero, 'El delito de blanqueo de capitales' (Aranzadi, Pamplona 1997) 222.

⁴⁷⁴ Eduardo Fabián Caparros, 'El delito de blanqueo de capitales' (Colex, Madrid 1998) 289-290.

⁴⁷⁵ Ibid.

to cover and prevent the social value that the legal system expects to protect. Based on this idea, laundering proceeds derived, for instance, from torts, civil or commercial misconducts, among other non-criminal offences, should be sanctioned by civil-administrative laws or regulations, instead of using criminal law. Civil-administrative norms may effectively deal with these minor misconducts.

I agree, in general, with the argument offered by these authors to reject the penalization of laundering objects derived from serious civil or administrative non-criminal offences. However, I will go one step further and invoke additional arguments to support this same conclusion.

The penalization of laundering the proceeds derived from non-criminal misconducts produce an abusive increase in criminalization. It produces, in other words, an ‘overcriminalization’, which is destructive of the rule of law itself. Legal theories typically construe the rule of law to require that criminal rules be enacted by legislatures and contain an exhaustive description of the conduct proscribed. One of many ways that an expansion of criminal law can undermine this principle of legality is when the penalized behaviour cannot be ascertained without straying beyond the boundaries of the criminal statute and examining non-criminal laws. In the words of Douglas Husak, this abusive increase in penalization is called the ‘criminal law *outsources*’.⁴⁷⁶ The hypothesis of penalization of ML operations derived from non-criminal misconducts (e.g., major administrative or civil frauds) is a clear example of the need to look beyond criminal codes to identify the context and extension of crimes. According to this hypothesis, a person will be criminally liable when the prohibited act of ML is otherwise imposed by non-criminal misconducts. Civil or tort law will provide, in practice, the source of the ML criminal rule. As a result, amendments to non-criminal

⁴⁷⁶ Douglas Husak, ‘*Overcriminalization*’ (OUP, Oxford 2009) 13.

laws will also alter the context of the crime of ML. Or, to be precise, expansions in the domain of non-criminal law will enlarge the boundaries of the crime of ML as well. This criminal law outsourcing, of course, undermines the principle of legality of criminal law.

Moreover, one of the fundamental concepts in the justification of criminal law is the principle of individual autonomy. There is an immense literature on this principle, which cannot be examined here.⁴⁷⁷ An important part of this principle means that individuals should be respected and treated as agents capable of choosing their acts and omissions. The principle of individual autonomy assigns great importance to liberty and individual rights in any discussion of what the State ought to do in a given situation. A ‘defensive’ approach to criminalization insists on the importance of protecting individuals from undue State power. Following this assessment, the penalization of laundering proceeds derived from non-criminal norms means a ‘social censure’ that affects the rule of law and it is incompatible with the principle of individual autonomy. In this case, the social censure goes with criminalization and which provides a good reason for minimal/ratio reasoning. The opposite hypothesis would give rise to an increasing ‘overcriminalization’, which jeopardizes the rule of law itself.

4.4. A prior or simultaneous conviction for the predicate offence as a prerequisite for a conviction of ML? Analysis of different alternatives.

The definition of the crime of ML requires the existence of ‘property’ derived from a predicate offence (i.e., the ‘proceeds of crime’). Thus, naturally, a ML prosecution requires proof that the property involved in a process of ML is the proceeds of a crime.

⁴⁷⁷ See, e.g., A. Ashworth (2006) 25-27.

Indeed, one of the most difficult issues that a prosecutor may face in securing a ML conviction is offering sufficient indications of a predicate offence.⁴⁷⁸

Having said this, lawmakers and scholars usually discuss the levels of evidence required to prove the existence of a predicate offence. In particular, the academic literature discusses whether or not there should be a prior or simultaneous conviction or prosecution for the predicate offence as a prerequisite for bringing charges or for searching a conviction for ML. Hence, the question to tackle now is: Is a prior or simultaneous conviction for the predicate offence a prerequisite or a necessary pre-condition for a conviction of ML?

I imagine three different alternatives: (a) a prior or simultaneous conviction for the predicate offence as a prerequisite for a conviction of ML; (b) serious evidence gathered in a previous or simultaneous prosecution for the predicate offence as a prerequisite for a conviction of ML; and finally; (c) a crime of ML investigated and sentenced independently and regardless of the prosecution for the predicate offence of ML. Each of them will be critically analyzed next.

(a) A prior or simultaneous conviction for the predicate offence as a prerequisite for a conviction of ML:

This first alternative presupposes a previous or simultaneous prosecution for the predicate offence of ML, where the existence of a committed predicate and prior offence is confirmed through a judicial conviction. Only after this conviction, will the ML prosecutor be able to demonstrate, beyond a reasonable doubt, that the assets involved in the laundering process really derived from a prior criminal offence.

⁴⁷⁸ See the '2009 Model Provisions on Money Laundering' (Report, April 2009) 17.

In this context, a *prior* conviction for the predicate offence would occur, when this predicate offence is prosecuted independently from the ML investigation; that is, for instance, when a court in country A is investigating the predicate offence and a different court in country B prosecutes the separate wrong and crime of ML. In contrast, a *simultaneous* conviction for the predicate offence might occur, when both the predicate offence and the subsequent and separate wrong of ML are prosecuted in the same jurisdiction and by the same criminal court. An example is the case *R. Roger Brian Alexander and others*,⁴⁷⁹ where the defendant was convicted for both the conspiracy to supply cannabis and, simultaneously, the conspiracy to conceal and launder the proceeds of this drug-trafficking activity.

This first alternative is not suggested or even mentioned in hard law instruments. Moreover, we did not find any soft law instrument, as well as domestic ML offences or courts that explicitly supported this first position. This alternative was mentioned as possible, but not recommended or suggested by the literature in general.⁴⁸⁰ Moreover, this first alternative was explicitly criticized, for instance, by the Supreme Court of Brazil, which has ruled that ML criminal offences in this country are autonomous offences, which should be prosecuted, tried and sentenced independently from the prosecution of other offences, including the predicate offence. On this basis, this Court held that a conviction for the predicate offence is not always a pre-condition to bring charges or to convict for ML. This, notwithstanding, the Court recognized that a conviction for the predicate offence might be the best evidence that may be submitted when proving that property is the proceeds of crime.⁴⁸¹

⁴⁷⁹ (2011) 2 Criminal Appeal R. (S.) 297.305. For more details about this case, see above ch. III, s. 3.

⁴⁸⁰ See, e.g., Blanco Cordero (1997) 252; and Aránguez Sánchez (2000) 200.

⁴⁸¹ Supreme Court of Brazil, Inq. 2245, Reporter Ministry Joaquim Barbosa, full plenary, judgment: 28.08.2007. Justice Gazette 09.11.2007.

(b) A prior or simultaneous investigation of the predicate offence as a prerequisite for a conviction for the crime of ML:

A second alternative, that I define as an ‘intermediate’ position, presupposes an open judicial proceeding (separate or not from the laundering prosecution) in which there is ‘serious evidence’ of the existence of a predicate offence, from where assets involved in ML operations have been generated. For ‘serious evidence’ to exist in the investigation of the predicate offence, a court order of indictment, pre-trial declaration order, or any other equivalent formal written accusation or order of a crime, presented by a court for prosecuting a predicate offence, should exist.

This second alternative is not explicitly covered or even mentioned in hard law instruments. Moreover, I did not find any soft law instrument that supports or even discusses this second alternative. And, finally, at the domestic level, I did not find any domestic court or ML offence that explicitly supported this second alternative.

This alternative was explicitly criticized by the Supreme Court of Spain, which pointed out that ML investigations should be independent of the investigations of other crimes, such as the predicate offence’s investigations. Then, the position adopted by this court is that ‘when proving that property is the proceeds of crime, it is not necessary that a person be convicted of a predicate offence *or that the prior act be under judicial proceedings*’ (emphases added).⁴⁸²

⁴⁸² Spanish Supreme Court, judgement No. 1595, dated 29 November 2003.

(c) A prior or simultaneous conviction for the predicate offence is not a pre-condition for bringing charges or for a final conviction of ML:

In accordance with this position, ML could be investigated independently from a predicate offence proceeding. Thus, under this alternative, the ML prosecution should establish if the assets involved in the process of ML derived from an underlining or prior crime (the predicate offence), just like any of the other key physical or *actus reus* elements of the ML criminal offence that should be proved for a conviction of ML. This is the opinion of scholars such as Blanco Cordero⁴⁸³ and Aranguéz Sanchez,⁴⁸⁴ who concluded that ML could be investigated independently from the predicate offence, but the ML prosecution should reach the standard ‘beyond a reasonable doubt’, to demonstrate that property represents the proceeds of a crime.

The Warsaw convention is the only hard law instrument that explicitly referred to this topic. Article 5 of this convention establishes: ‘Each Party shall ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering’. The alternative in question was also referred to by several soft law instruments. The ‘2005 Model Legislation on Money Laundering’, for instance, provides the following: ‘In order to prove the illicit origin of the proceeds it shall not be required to obtain the conviction of the predicate offence’.⁴⁸⁵ In similar terms, the ‘2009 Model Provisions on Money Laundering’ states: ‘In order to prove the property is the proceeds of crime, it shall not be necessary that there be a conviction for

⁴⁸³ Isidoro Blanco Cordero (1997) 253.

⁴⁸⁴ Carlos Aranguéz Sanchez (2000) 200.

⁴⁸⁵ Article 5.21 (2) of the ‘2005 Model Legislation on Money Laundering’ (Report, 2005) 34.

the offence that has generated the proceeds'.⁴⁸⁶ In this vein, article 6 of the OAS-CICAD Model Regulations provides that the ML offence

shall be defined, investigated, tried and sentenced by a court or competent authority as autonomous offences distinct from any other offences. It shall not be necessary to establish that a criminal process with respect to a possible serious [predicate] crime has occurred.⁴⁸⁷

Finally, the FATF pointed out, in its Methodology Essential Criterion 1.2.1. to Recommendation 1, that: 'When proving that property is the proceeds of crime it should not be necessary that a person be convicted of a predicate offence'.⁴⁸⁸

At the domestic level, countries such as Brazil included this alternative in the definition of their crime of ML. Article 2 (II) of the Brazilian Penal Code, which defines the ML offence, establishes the following:

The judicial proceedings and sentencing of the [ML offence] referred to in this law, are not dependent on the judicial proceedings and sentencing applicable to prior crimes referred to in the previous article [predicate offences].⁴⁸⁹

Other countries did not include this third alternative in their definition of ML criminal offences, but left it to their courts. For example, the Spanish Supreme Court established, in its judgement dated 2 April 1993 (repeated in its judgement dated 29 November 2003) that it is not necessary to wait for a prosecution or final conviction for the predicate offence as a prerequisite for a conviction for the crime of ML. Along similar

⁴⁸⁶ Article 3 (8) of the '2009 Model Provisions on Money Laundering (Report, April 2009) 16.

⁴⁸⁷ OAS-CICAD, 'Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and other Serious Offences' (Report, December 2005).

⁴⁸⁸ FATF, 'Methodology for Assisting Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations' (Report) (27 February 2004, updated as of February 2009) 11.

⁴⁸⁹ Anti-Money Laundering Brazilian Law No. 9613, dated 3 March 1998. The translation from Portuguese into the English language of article 2 (II) of the Brazilian Penal Code is online: www.coaf.fazenda.gov.br accessed 10 September 2010.

lines, the Russian Supreme Court established that it is up to the court handling down a sentence for money laundering to establish that property is the proceeds of crime.⁴⁹⁰

(d) Conclusion and proposal.

In light of the foregoing analysis, it is clear that, according to hard and soft law instruments, as well as domestic legislations and Court judgements, a prior or simultaneous conviction for the predicate offence should not be a prerequisite to bring charges as well as for a conviction for ML. I support this assessment in the following three main lines of reasoning.

For one, the first and second alternatives are not consistent and effective alternatives to respond to the worldwide problem of ML. If a final conviction of the predicate offence (first alternative) or the existence of a prior or simultaneous investigation of the predicate offence with serious evidences of its existence (second alternative), is required as a pre-condition for a conviction of ML; then, punishing trans-border ML operations might be practically impossible. The collection of serious evidence and, furthermore, a conviction for the predicate offence may take years, for instance, when the predicate offence is prosecuted in country A and the crime of ML in a different country B, but country A has a low enforcement capacity to investigate acquisitive and often complex predicate offences (e.g., drug-trafficking, arms smuggling).

The second assessment in favour of this last alternative is related to the independent social values protected by the ML criminal offence. In chapter III, we have seen that ML in high scale often harms three main social values or community rights, which are: the value of the predicate offence, the administration of justice and the socio-

⁴⁹⁰ Resolution of the Plenum of the Russian Supreme Court No. 22 (18/11/2004) 'On Court Practice on cases about illegal entrepreneurship and legalization (laundering) of proceeds from crime', Clause 21.

economic system. Then, on this basis, it was concluded that ML should be seen and modelled as an independent crime, which protects autonomous social values and rights that go beyond the values safeguarded by the predicate offence, the concealment offence and any other criminal offence.⁴⁹¹ A crime is really autonomous when it protects independent community values, distinct from the interests safeguarded by any other crime. Given that ML is an autonomous criminal offence, it is obvious, then, that ML criminal offences might be prosecuted independently from the prosecution and judgement of other crimes, such as the predicate offence of ML.⁴⁹² Having said this, it is also clear that ML is a derivative conduct that occurs after the commission of a core and prior offence; thus, it is obvious that a conviction of the predicate offence is still the best proof that the ML prosecution may provide to establish, beyond a reasonable doubt, that property is the proceeds of a crime.

Thirdly, we have seen that the Warsaw Convention is clearly in favour of an independent investigation for the crime of ML, regardless of the prosecution of the predicate offence. The same is proposed by the recommendations and resolutions issued by the FATF, the 'OAS-CICAD Model Regulations' and the '2009 Model Provisions on Money Laundering' (soft law instruments). Therefore, it could be argued that the international community is already in the process of moving, domestically and through regional/international hard and soft law instruments, towards an autonomous crime of ML, which is drafted and investigated independently to any other offence, such as the predicate offence or the concealment criminal offence. So, the pertinent question is: Why develop different alternatives or theories, which are in contradiction with the spirit and structure of the most updated international hard and soft law instruments against

⁴⁹¹ See above, Chapter III, section 4.

⁴⁹² This seems to emerge in the opinion of the Spanish Supreme Court, judgement No. 1595, dated 29 November 2003; and, the Russian Supreme Court (Resolution of the Plenum No. 22, dated 18 November 2004; among other Court's sentences.

ML? This opinion is specially true and correct, bearing in mind that this global trend is consistent with due process guarantees and an adequate protection of human rights.

Still, there could be a disadvantage in the implementation of this last alternative—where a prior or simultaneous conviction for the predicate offence is *not* a prerequisite for a conviction for ML. The objection could arise when, after the conviction of ML, there is a judgement or conviction by another criminal court denying the commission of the predicate offence or revealing, furthermore, that the assets involved in the already sentenced ML case did not derive, in fact, from the expected predicate offence. These scenarios are plausible since, according to this last alternative, the conviction for the crime of ML does not prevent another criminal court from prosecuting the predicate offence that, in this context, did not serve as the basis of proof for the previous and independent conviction of ML.

Having said this, I also believe that the above negative scenario, despite its possible risks, is one that must be assumed. Indeed, these same risks may arise in any criminal judgement or sentence. This unfortunate situation may occur, for instance, when a person is convicted for committing a murder, but later, the innocence of the offender is determined in light of a decisive proof that had been wrongly interpreted or omitted in the sentence of conviction. So, it could be said that the implementation of this third alternative would include one of the many risks that arise in every fair trial and democratic system—trials will never be infallible due to the mere fact that they are made up and developed by human beings.

But this is not the only disadvantage that might arise with the implementation of the third and last alternative. From the defendant's point of view, the implementation of this last alternative might be incompatible with the right to be presumed innocent (corresponding to the right to demonstrate beyond a reasonable doubt). I will refer later,

in section 4.6., to the right to be presumed innocent until conviction and its possible violation when the ML prosecution tries to prove that property is the proceeds of a predicate offence. For the present, it is sufficient to note that according to this procedural safeguard of fairness the prosecution is the one that should bear the burden of proving the offender's guilt, and that guilt should be proved 'beyond a reasonable doubt', rather than on a simple balance of probability. On this basis, one could believe that the standard of evidence 'beyond reasonable doubt' might only be reached with a prosecution and conviction of the predicate offence of ML. Consequently, proving the existence of a predicate offence in a ML prosecution without a prior or simultaneous prosecution or conviction of the predicate offence, might challenge the right to prove beyond a reasonable doubt.

I do not agree with this last opinion. As concluded above, it is clear that ML offences might be investigated and sentenced independently from the prosecution and conviction of other crimes, such as predicate offences. Then, it is also clear that ML prosecutions must demonstrate that the property involved represents the proceeds of crime and this key physical element of the crime must be proved reaching the standard of evidence 'beyond a reasonable doubt'. This standard of proof might be reached in different ways. I agree, of course, that one of the alternatives to reach this standard is through a conviction of the predicate offence. But this *cannot* be the only reasonable and acceptable way to do so. If we really believe, as concluded above, that ML offences must be modelled, investigated, and sentenced independently from the prosecution and conviction of the predicate offence, then, it is obvious that the standard 'beyond a reasonable doubt' can be reached in different other ways that go beyond the prosecution and conviction of the predicate offence of ML. These other valid alternatives, as explained in further detail in the following section, are: (i) by proving the causal link

between the ‘property’ involved in ML conducts and a specific predicate offence; or (ii) by seriously proving the circumstances in which the property involved in ML is handled, which are such as to give rise to the irresistible conclusion that the property represents a ‘criminal acquisition’.

What is clear, again, is that all these possible and admitted legal ways that ML prosecutors could invoke to demonstrate the existence of a predicate offence should reach the standard of evidence ‘beyond a reasonable doubt’. That is to say, the structure of predicate offences should be demonstrated ‘on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt’.⁴⁹³ This is, of course, to avoid tensions with the right to be presumed innocent.

This line of reasoning is explicitly adopted by the Brazilian crime of ML. Article 2, paragraph one, of the Brazilian Anti-ML Law No. 9,613 emphasizes:

The judicial proceedings and sentencing of the [ML offences] referred to in this law, are not dependent on the judicial proceedings and sentencing applicable to prior crimes referred to in the previous article [predicate offence]. *However, money laundering charges should include sufficient indications of the existence of the prior crime*’ (emphases added).⁴⁹⁴

Thus, the Brazilian ML offence explicitly provides that ML can be investigated independently from other offences, such as the predicate offence; but, ML charges shall include ‘*sufficient*’ indications of the existence of the predicate offence.

This point is also made by the Spanish Supreme Court:

On many times, it will not be possible to render a judgment of conviction for the predicate offence, from where assets derive; nevertheless, the structure of a predicate offence shall be fully proved or demonstrated. And, for that purpose, as it is a constituting and necessary element of the crime, it is necessary that the proof aimed at

⁴⁹³ *Australia v. Italy*, 6 Yearbook 740 (1963) at. 782.

⁴⁹⁴ The English translation from Portuguese of article 2 (II) of the Brazilian Penal Code is online: www.coaf.fazenda.gov.br accessed 10 September 2010.

verifying it be executed with the constitutional and procedural guarantees that enable the principle of presumption of innocence [...] established in section 24.2 of the Spanish Constitution and the assessment pursuant to section 241 of the Criminal Procedure Code.⁴⁹⁵

Finally, it should be noted that article 5 of the Warsaw Convention correctly asserts that each State Party must ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for ML. However, this article of the convention does not add that a conviction for ML requires serious and sufficient indications of the existence of a predicate offence, as stressed, for instance, by the Brazilian crime of ML. Therefore, I propose to amend article 5 of the Warsaw Convention to specify that ML charges should seriously demonstrate the existence of a predicate offence. The wording of article 5 of the Warsaw Convention could be as follows:

Each country shall ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering. *However, ML charges shall include sufficient indications of the existence of a predicate offence.*

Subsequently, I propose to include this new clause in my proposed longer, more detailed and narrower definition of the international crime of ML.

4.5. Evaluating the levels of evidence to prove that the property is the proceeds of a predicate offence.

Now I will inquire about another issue closely related to the previous one, but not as easy and clear to solve. In the previous section, we concluded that the crime of ML should be seen and structured as an independent crime, so it should be investigated and

⁴⁹⁵ Spanish Supreme Court, judgement dated 2 April 1993. The translation of this phrase from Spanish into English is mine.

sentenced independently from other criminal offences, such as the predicate offence of ML. This means, among other things, that a prior or simultaneous conviction for a predicate offence is not a prerequisite for a conviction for ML. Having said this, it is also clear that the ML prosecution still needs to meet the standard of evidence 'beyond reasonable doubt' to prove that property stemmed from a predicate offence.

However, not all courts might settle on the same level of evidence to reach the standard 'beyond a reasonable doubt'. If a judgment sets the standard too high, a conviction of ML will have to prove too many specifics of the predicate offence (e.g., that proceeds stem from a specific predicate offence, who was the perpetrator of the predicate offence and if he or she acted with 'guilty mind', as well as the place, time and other specific circumstances concerning the commission of the predicate offence). Then, the question to tackle now is: What level of evidence is required to seriously prove, beyond a reasonable doubt, the facts that structure the predicate offence?

The different alternatives at the time of setting the level of evidence could be classified into three groups: (a) a *narrow* position: in order to structure a predicate offence it is necessary to demonstrate many specifics of it (e.g., to identify the perpetrator of the predicate offence, the timeframe when the predicate offence was committed and that the conduct amounted to a designated offence); (b) an *intermediate* position: it is necessary to identify, exactly, the predicate offence from where assets were derived, *but* the crime of ML can be prosecuted and convicted even if the perpetrator of the predicate offence is unknown or exempt from punishment; (c) a *broad* position: it is necessary to prove sufficient and serious indications of the existence of a predicate offence; but, for that purpose it is not always a requirement to establish precisely which offence. Each position is criticized and described in more detail below.

a) *The narrow position: the crime of ML may be prosecuted when, at least, the predicate offence and the perpetrator of the predicate offence are identified and individualized (but he or she could be personally exempt from penalty).*

According to this first alternative, when proving that property is the proceeds of a crime, the ML prosecution needs to demonstrate, at least, two important features of the predicate offence. *First*, to establish many specificities of the predicate offence (e.g., the types of assets originated from a specific predicate offence, the timeframe when the predicate offence was committed, among other objective and special circumstances concerning the predicate offence). *Secondly*, to individualize the person or persons that perpetrated the predicate offence and establish if they acted with intention or ‘guilty mind’. However, this position allows the conviction for ML even when the identified perpetrator of the predicate offence is personally exempt from penalty or criminal liability; that means, when there is a justification to bring criminal charges.⁴⁹⁶

Hence, according to this first alternative, a prosecution or a conviction of ML requires, at least, the identification of several specificities concerning both the predicate offence and the person who committed or participated in the commission of that predicate offence; but a conviction of ML is possible, even if the perpetrator of the predicate offence is, for instance, a handicapped person, among other typical grounds for excluding criminal liability.⁴⁹⁷

But let us illustrate the requirements of this first alternative through the following example:

⁴⁹⁶ Sometimes different terminology is used to describe when an offender is personally exempt from penalty or criminal liability. For instance, article 31 of the Rome Statute speaks of ‘grounds for excluding criminal responsibility’. Other authors use the expression ‘general defences’ and divide ‘defences’ into two categories: (i) ‘Negation of liability, including error of law, error of fact and diminished mental capacity; (ii) ‘Excuses and justifications’, including self-defence, defence of others, defence of property, necessity, lesser of evils, duress/coercion/force majeure, superior order and law enforcement.

⁴⁹⁷ For a further discussion about justification causes in criminal law see: A. Ashworth, ‘Principles of criminal law’ (2006) 151.

- In Surinam, Peter and Susan were prosecuted for drug trafficking.
- Later, Sean, the son of Peter and Susan was investigated by Argentine criminal courts for practising ML operations in Argentina through the purchase and sale of real estate.
- Although the ML prosecution demonstrated the ML operations perpetrated in Argentina, it was not proved ‘beyond a reasonable doubt’ that the assets involved in those ML operations stemmed from drug-trafficking operations dismantled and prosecuted in Surinam and perpetrated by Peter and Susan.
- As a result, Argentine criminal courts closed the case without convicting Sean—the son of Peter and Susan—for ML.⁴⁹⁸

This first alternative was not included in hard law instruments. In addition, we did not find soft law instruments proposing this alternative. However, at the domestic level, countries such as Spain adopted this position. Specifically, article 300 of the Spanish Penal Code established that the crime of ML may be prosecuted even if the ‘perpetrators or any of the participants in the commission of the predicate offence are not responsible or personally exempt from penalty or punishment’.⁴⁹⁹ According to Spanish scholars such as Arangué Sanchez,⁵⁰⁰ article 300 of the Spanish Penal Code was adopted in light of the so-called principle of ‘limited ancillary participation’ or ‘principle of accessory’ (in Spanish, *principio de accesoriedad limitada*).

But what does the principle of accessory mean in this context? The definition of the crime of ML requires that the property involved in a process of laundering derive

⁴⁹⁸ This example is based on a case captioned ‘*Gil Suarez, Humberto Nicanor et al. money laundering*’, (2000) (High Federal Criminal Courts, City of San Martín, Province of Buenos Aires, Argentina, Room 2).

⁴⁹⁹ Organic Law 5/2010 of 22 June 2010, modified article 300 of the Spanish Penal Code, eliminating this provision.

⁵⁰⁰ Arangué Sanchez (2000) 198.

from a prior 'crime', the so-called predicate offence. So, the principle of accessory tries to explain, in this context, the meaning and extension of the prior 'offence' or 'crime', for the purposes of defining and establishing the existence of a 'predicate offence' of ML.

Criminal law analysis of an intentional crime proceeds from a basic distinction between the physical or objective element (the *actus reus* in common law system) and the mental or subjective element (the *mens rea* in common law system). For this discussion, this explanation corresponds to a 'complete' description of a 'crime' or 'criminal offence'. To the criminal lawyer, these elements of the offence are fundamental because they set out the ground rules of the trial, showing what must be proven by the prosecution for a case to reach a conviction.

Based on this complete meaning of a crime and the above explanation, someone could argue that, for a conviction of ML it is necessary to prove that the assets involved in a process of ML derived from a 'complete' definition of a prior 'crime' or predicate 'criminal offence'. That is to say, if the ML prosecution fails to individualize the offender who committed a prior crime in accordance with the subjective (*mens rea*) and objective (*actus reus*) elements of this predicate crime, the accused of ML is entitled to be acquitted. Remember that a criminal conviction may lie only when the prosecution establishes all the elements of a crime, beyond a reasonable doubt. So, in this line of reasoning, if a 'complete' definition of a prior crime is not proved, the ML prosecution will fail to demonstrate an essential physical element of the ML offence: the existence of a predicate 'crime', from which assets are derived (i.e., the predicate offence), so the defendant might be finally acquitted.

However, a different interpretation could be given, in the light of and in accordance with the 'principle of accessory' of criminal law. According to this principle

or concept, the term ‘crime’—adopted by the definition of the crime of ML for the purpose of defining the expression ‘predicate offence’ or ‘prior crime’—is used as an accessory and limited element of the ML offence. Therefore, in this line of reasoning, the crime of ML can be prosecuted and convicted even when a ‘complete’ definition of the prior ‘crime’, for the purpose of defining and structuring the predicate offence of ML, is not proved by the ML prosecution. This is true, for instance, in the context of article 300 of the Spanish Penal Code, where the ML prosecution needs to prove several key elements and specificities of a predicate offence to establish that property is the proceeds of a predicate offence, but not all its *actus reus* and *mens rea* elements. According to article 300 of the Spanish Penal Code, the prosecution of ML needs to identify, at least, from which crime the property derived and who was the perpetrator of the predicate offence; but ML is punishable even if the individualized perpetrator of the predicate offence is personally exempt from punishment. This conclusion is in line, again, with the idea that the expression (prior) ‘crime’ or ‘predicate offence’ in the context of ML offences, should be seen and evaluated as an accessory concept.⁵⁰¹

b) *An intermediate position: the crime of ML can be prosecuted even if the perpetrator of the predicate offence is unknown.*

This second alternative goes one step further setting an intermediate level of evidence when proving, beyond a reasonable doubt, that property is the proceeds of crime. Upon this alternative, a prosecution or conviction for ML is possible, even if the perpetrator(s) or participant(s) of the predicate offence are unknown. Still, within this intermediate

⁵⁰¹ For further details about the principle of ‘*accessoriedad limitada*’ in the context of article 300 of the Spanish Criminal Code see, for instance, C. Arangué Sanchez (2000) 198.

alternative, the ML prosecution needs to identify and prove some other specifics of the predicate offence, such as, from which crime the property stemmed as well as the causal link between the property subject to laundering and a specific predicate offence—a higher standard of proof than we will see in the last alternative.

I will illustrate the requirements of this second alternative with the following example:

- In country A, a drug-trafficking Cartel accumulates cash money derived from its drug-trafficking sales in this country.
- This cash money is transferred to a bank account opened in country B, and then these criminal assets are used to purchase financial instruments (e.g., shares and bank notes).
- Later, these financial instruments are sold and the product of this sale is invested in country C to purchase a hotel.
- Hence, for structuring the existence of a predicate offence, the ML prosecution requires, at least, to prove the causal link or nexus between the cash money originated from drug-trafficking activities in country A and the assets used to purchase the hotel in country C. To do that, the ML prosecution needs to prove the nexus between all the transformations and transfers of criminal assets accumulated in country A and moved throughout countries B and C. However, according to this second alternative, a conviction of ML is possible, even if the perpetrator of the predicate offence is unknown.⁵⁰²

At the international level, no hard law instrument on the matter has suggested this alternative. Soft law instruments, though, have covered it. As an optional clause for

⁵⁰² This example is based on case study No. 5, entitled '*Di Tullio, Nicolas A., Carrillo Fuentes, Amado, and others*' (See Appendix I).

countries, article 3 (8) of the ‘2009 Model Provisions on Money Laundering’, provides the following: for a ML conviction it is not necessary to establish, specifically, ‘that a particular person committed the [predicate] offence’ that has generated the proceeds.⁵⁰³

This position was also adopted at the domestic level. For instance, the Brazilian crime of ML, in article 2 (II), paragraph 1 of the Brazilian Penal Code establishes that ‘the criminal acts referred to in this law [crimes of ML] shall be punishable even when the offender in the prior crime is unknown [...]’.⁵⁰⁴

Moreover, it could be said that this second alternative adopted an intermediate reading of the so-called principle of ‘limited ancillary participation’. That is to say, in accordance with this view, an ‘incomplete’ and accessory definition of a predicate ‘crime’ was adopted to demonstrate that property derived from a prior criminal offence. The prosecution of ML does not need to prove all the *actus reus* and *mens rea* elements of the predicate offence of ML. Within this view, a conviction for the crime of ML is possible in cases where the perpetrator or participant of the predicate offence was not even identified.

For reasons which will become clearer as the dissertation goes on, I have come to see that this second alternative could not be implemented by countries such as Argentina or China, which adopted a ML offence that does not apply to the person who perpetrated the predicate offence. Courts in these countries must refrain from prosecuting a person for ML who has committed the predicate offence. One could argue

⁵⁰³ See, Section 3 (8) ‘2009 Model Provisions on Money Laundering’ (Report) (UNODC, Commonwealth and IMF, April 2009): ‘In order to prove the property is the proceeds of crime, it shall not be necessary that there be a conviction for the offence that has generated the proceeds [OPTION: or that there be a showing of a specific offence rather than some kind of criminal activity, *or that a particular person committed the offence*] (emphasis added).

⁵⁰⁴ Article 2 (II) (1) of the Brazilian Penal Code establishes that the crime of ML shall be punishable ‘even when the offender in the prior crime is unknown or exempt from punishment’. Hence, to be precise, this country adopted both the ‘narrow’ and ‘intermediate’ positions; since ML can be prosecuted in this country when the perpetrator of the predicate offence is unknown or it was individualized, but he/she is exempt from penalty. The translation from Portuguese into the English language of article 2 (II) (1) of the Brazilian Penal Code is online: www.coaf.fazenda.gov.br accessed 10 September 2010.

that the ML prosecution in these countries should identify who the perpetrator of the predicate offence was, to confirm that the person who committed the predicate offence and the one who perpetrated the laundering are different persons. If the prosecution fails to demonstrate this, the accused of ML is entitled to be acquitted since one essential element of the crime was not proved (i.e., that a person who committed the predicate offence is not the person that is prosecuted for ML).

I disagree with this assessment because, in these countries, the objective or *actus reus* element of the ML offence only requires the prosecution to prove that the defendant of the crime of ML did not perpetrate or participate in the commission of the predicate offence; rather than requiring to identify, specifically, who the perpetrator of the predicate offence was. This viewpoint was adopted by the Federal Criminal Courts of San Martín, Province of Buenos Aires, Argentina, in the case ‘*Mirkin*’, when they state: ‘Even if the perpetrators of the predicate offence are not individualized, the scenarios provided in the [crime of ML] are applicable with the mere verification of the existence of profits or assets derived from a crime, drug-trafficking’.⁵⁰⁵

Thus, it is clear that this intermediate alternative can be perfectly fulfilled and adopted in countries where ML offences cannot apply to the person(s) that committed the predicate offence.⁵⁰⁶

c) *A broad alternative: for prosecuting ML it is sufficient to prove that the property involved in ML operations represents a ‘criminal acquisition’, without it being necessary to establish precisely and in every case, from which specific offence assets derived.*

⁵⁰⁵ Federal Criminal Courts of San Martín, Province of Buenos Aires, Argentina (Case No. 378/96, entitled ‘*Mirkin, M.*’, dated 28 June 1996). The English translation is mine.

⁵⁰⁶ See below, chapter VI.

According to this third and last alternative, there are different ways in which courts can prove, beyond a reasonable doubt, that the property involved in ML derived from a crime: one is by seriously showing/demonstrating the circumstances in which the property involved in ML is handled, which are such as to give rise to the irresistible conclusion that it can only be derived from a crime.

Within this alternative, it is enough to seriously show that the property involved in ML represents a ‘criminal acquisition’; without it being necessary to prove from which specific crime the property derived. Thus, in light of this last alternative, a conviction for ML might exist without establishing further specifics of the predicate offence, such as when or where the predicate offence was committed, who committed the predicate offence and if the individual who committed the predicate offence is personally exempt from penalty or punishment. Proving, beyond a reasonable doubt, that assets involved in ML conducts represent a ‘criminal acquisition’ might be enough for a prosecution or conviction for ML. This alternative would be specially allowed in trans-border ML cases, where establishing the link or nexus between the property and a specific predicate offence apparently perpetrated in a foreign jurisdiction seems to be impossible.

The only international convention that *explicitly* referred to this alternative is the Warsaw Convention, which provides in article 9 (6):

Each Party shall ensure that a conviction for money laundering under this Article is possible where it is proved that the property, [...] originated from a predicate offence, *without it being necessary to establish precisely which offence* (emphasis added).

Soft law instruments also recommended this alternative. As an optional clause for countries, the ‘2009 Model Provisions on Money Laundering’ provides that, for a ML conviction, it is not even necessary to establish, specifically, from which crime the

property derived. Direct and indirect evidence showing *sufficient* and *grave* indications of the existence of property derived from ‘*some kind of criminal activity*’ would be enough to structure a predicate offence.⁵⁰⁷ I should say, however, that the expression ‘some kind of criminal activity’ is too broad and vague. Probably, it is better to say that the ML prosecution should prove, beyond a reasonable doubt, that property represents a ‘criminal acquisition’, which seems to be more accurate.

At the domestic level, this alternative seems to be adopted by the Israeli legislation. Article 5 of its ‘Prohibition on Money Laundering Law, 5760-2000’ provides that, for a conviction of ML, it is sufficient to prove that the property was a *criminal property* even if it is unknown to which specific offence the property is connected.⁵⁰⁸ Along this same line of reasoning, article 165 (5) of the Austrian Penal Code (StGB) points out that, in case of laundering in the interest of a criminal organization or of a terrorist, it is not necessary to link the ML activity to a specific predicate offence and it is sufficient to prove that the property laundered belongs to a criminal organization, a terrorist or a terrorist group.

For reasons which will become clearer later, I have come to see that this third alternative cannot be implemented by countries such as Brazil, Chile, the United States or Uruguay, all of which adopted a ‘catalogue model’ to define the scope of predicate offences.⁵⁰⁹ Under this catalogue model, one of the physical or *actus reus* elements of

⁵⁰⁷ See, article 3 (8) of the ‘2009 Model Provisions on Money Laundering (Report, April 2009): ‘In order to prove the property is the proceeds of crime, it shall not be necessary that there be a conviction for the offence that has generated the proceeds [OPTION: *or that there be a showing of a specific offence rather than some kind of criminal activity*, or that a particular person committed the offence] (emphasis added).

⁵⁰⁸ Specifically, article 5 of the ‘Prohibition on Money Laundering Law 5760-2000’, established: ‘for the purpose of the ML offence it is sufficient if it is proved that the person performing the act knew that the property was prohibited property, even if he did not know to which specific offence the property is connected’. An English language translation of this article is online: www.justice.gov.il accessed 10 October 2010.

⁵⁰⁹ See above, in section 4.1.2. a critical analyses of the different models of law or options adopted by State Parties to describe the scope of predicate offences.

the ML offence is a list of specific predicate offences. Then, if a predicate offence is specifically listed in the definition of the crime of ML, it might be reasonable to say that the ML prosecution should establish *precisely* from which listed crime the property derived. It should be recalled that a criminal conviction may lie only when the prosecution establishes *all* the elements of the offence beyond a reasonable doubt (or the intimate conviction). As a consequence, if the prosecution in these countries fails to demonstrate the link between the property involved and a specific and listed predicate offence, the person accused of ML might be entitled to be acquitted.

In contrast, the option in question might only apply in jurisdictions that adopt a ‘threshold approach’ or an ‘all-crimes approach’ to establish the scope of the predicate offence. This is true given the fact that, in these jurisdictions, ML offences do not require an accurate knowledge of a specific and listed predicate offence. The definition of the crime of ML, in these countries, defines the predicate offence with the generic and broad category of ‘crime’ or ‘serious crime’. Thus, a logical and balanced interpretation is that the definition of the crime of ML as drafted in these jurisdictions might allow ML prosecution and conviction when showing, beyond a reasonable doubt, that the property involved in ML derived, in fact, from a ‘serious crime’ or, simply, from a ‘criminal offence’, with no requirement to demonstrate which prior crime in particular.

This point of view was interpreted by Federal High Criminal Courts of the City of Buenos Aires, Argentina, in the case ‘*N. Di Tullio, A. Carrillo Fuentes*’.⁵¹⁰ Argentina follows an ‘all-crime approach’, punishable only when the amount of property exceeds a specified monetary value (i.e., a threshold approach) to define the scope of the

⁵¹⁰ Federal High Criminal Courts, City of Buenos Aires, Room 1 (13 February 2002). See chapter I, section 2, for a general description of the ML operations practised by the Juarez Cartel in Argentina. See also the Appendix I, case study No. 5 entitled ‘Di Tullio, Nicolas A., Carrillo Fuentes Amado, and others’.

predicate offence of ML. This case concluded that, to meet the standard ‘beyond a reasonable doubt’ it is sufficient to prove that the property involved is a criminal property or criminal acquisition, without it being necessary to establish precisely which the prior crime is. In this case, the collected evidence was enough to demonstrate, beyond a reasonable doubt, that the general context and circumstances in which the property involved in recycling conducts are such as to give rise to the irresistible inference that they can only be derived from crime. More precisely, the prosecution in this case demonstrated that the property represents the proceeds of a (predicate) crime, through the following circumstantial or indirect evidence:⁵¹¹ (i) that the proceeds, in practice, do not stem from legal income (e.g., an inheritance, a loan, a gift); (ii) unjustified increases of assets and movements of assets which do not follow any regular commercial purpose; (iii) inexistence of legal activities that justify asset increases; and, finally, (iv) the nexus of the defendants with a drug-trafficking Cartel in Mexico (i.e., the Juarez Cartel).⁵¹²

This alternative has also been taken by the Supreme Court of The Netherlands in a ruling of 28 September 2004 (NJ 2007, 278), where the court clarified that it is not necessary to prove that funds or property is proceeds of a specific criminal offence, but that it would be sufficient to establish that objects ‘must have been derived from criminal activity’.⁵¹³ One objection, however, might be that the expression ‘criminal activity’ is much too broad and unclear for this. Then, it might be better to say that:

⁵¹¹ See below, in section 4.8, further information concerning the relevance of circumstantial evidence to demonstrate the existence of a predicate offence of ML.

⁵¹² In this ML case, the existence of a predicate offence—from where the assets derived—was demonstrated, among other proofs, by a report provided to the Argentine Federal Criminal Courts by the Embassy of Mexico in Argentina. The report contained empirical evidence and data showing, not only that the assets involved in the laundering could derive from the Juarez Cartel’s drug-trafficking activities, but also that Amado Carrillo Fuentes and some of the other defendants for practising ML operations in Argentina, had familiar and social relations with relevant members of the Juarez Cartel.

⁵¹³ FATF/OECD and IMF, ‘Mutual Evaluation of the Netherlands’ (Report, 2011) 48.

‘when proving that property is the proceeds of crime, only proving (beyond a reasonable doubt) that the property represents a criminal acquisition is sufficient’. I am not sure, moreover, that the prosecutor can prove that funds or property emanate from ‘criminal activities’, without establishing the link within the property and a specific predicate offence. Then, to prove that the property represents a ‘criminal acquisition’ or a ‘criminal object’ might be a better and more accurate expression.

This issue was considered also in the case of *Anvoid*,⁵¹⁴ in which Latham LJ stated:

We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derived from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime.

Then, according to the case *Anvoid*, it is clear that the prosecution does not have to identify the kind of offending from which the property derives, provided they can prove it to be criminal in origin. This approach was confirmed in *R v. F & B*.⁵¹⁵ However, it is also clear that such an inference can only properly be drawn if it meets the ‘beyond a reasonable doubt’ standard of proof.

d) Conclusion and proposal.

It is clear that there is no consensus between scholars and lawmakers on the required level of evidence needed to demonstrate the existence of a predicate offence in the context of a ML investigation. Negotiating between the different viewpoints and

⁵¹⁴ *R v. Anvoid and others* (2009) 1 WLR 980.

⁵¹⁵ *R v F and B* (2008) EWCA Crim 1868.

alternatives, it was concluded that the ‘broad approach’ is the minimum ground to avoid violations to the standard of proof ‘beyond a reasonable doubt’ requirement.

One way to measure the ‘broad alternative’ is by standards of consistency and effectiveness in terms of responding to the problem of ML. The first and second analyzed alternatives (i.e., the narrow and intermediate positions) can be widely criticized on these terms. ML operations often include trans-border and complex financial operations; thus, it is usually extremely difficult or impossible for the ML prosecution to demonstrate several specificities concerning the predicate offence, such as: where and when the predicate offence was committed or who committed it or, in particular, to show all the transformations, transfers and movements of the assets subject for laundering and its link with a specific predicate offence. Then, considering this mutable, hidden and transnational circumstances, the first and second alternative can make proving the crime of ML of impossible or, at the very least difficult in its application.

Nevertheless, the ideal of effectiveness in the prosecution of the ML offence cannot subordinate the right to be presumed innocent (as applied to the right of proof ‘beyond a reasonable doubt’). Hence, the key issue to evaluate is whether or not the level of evidence required by this third alternative to prove the existence of a predicate offence (i.e., the broad alternative), could violate this sound human right principle. I will say more about the presumption of innocence later. For the time being it is sufficient to point out that this third alternative will not violate the right to be presumed innocent when ML charges reach the standard of evidence ‘beyond a reasonable doubt’.

And, this standard of evidence is satisfied in two ways. One is demonstrating the link between a property involved in ML conducts and a specific predicate offence (i.e., the intermediate position); and, the other is, as considered in the case *Anwoid*, ‘by

evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime' (i.e., the broad alternative). Under both alternatives, it is not necessary to establish who committed the predicate offence. This last alternative, as remarked above, is followed, for instance, by the Israeli⁵¹⁶ and the Austrian⁵¹⁷ legislation.

4.6. Establishing the existence of a predicate offence versus the right to be presumed innocent (the non-reversal of the burden of proof).

Although I have already referred to the right to be presumed innocent in the context of structuring the predicate offence of ML, it is time to explain this topic in more detail.

The imposition of a crime should be accompanied by a number of constitutional guarantees or fundamental rights. The most important guarantees are those linked with international human rights provisions. The right to be presumed innocent until conviction is established in Article 6 (2) of the European Convention on Human Rights, which states that 'everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law'. A similar provision is stated in Article 14 (2) of the International Covenant on Civil and Political Rights: 'everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law'. The essence of these provisions is the right to a fair trial or due process.

The presumption of innocence, as it is usually termed, is a procedural safeguard of fairness and its basis lies in both the coercive nature of criminal law and the need to

⁵¹⁶ See above article 5 of the 'Prohibition on Money Laundering Law, 5760-2000' of Israel.

⁵¹⁷ Article 165 (5) of the Austrian Penal Code (StGB).

protect the accused against the extensive power of the State. The opposite rule—a presumption of the guilt of all those prosecuted for an offence—would impose an oppressive burden on individual citizens and would delegate great power in the hands of the State officials who decide on prosecution.

This principle has a number of ramifications. Beyond the scope of this dissertation, it refers to the treatment of suspects and defendants before and during the trial, insisting that such treatment must be consistent with respect for their innocence. It also refers to the logistics of proof in criminal cases; for instance, which party must prove what. This will be the focus of the discussion here.

The general principle in civil and common law systems is that the prosecution should bear the burden of proving the accused's guilt, and that guilt should be proved to the standard of 'beyond a reasonable doubt' rather than by simply balancing probabilities. In civil law countries this certain standard of proof is normally called 'the judge's innermost conviction law' (in French, *l'intime conviction du juge*).⁵¹⁸ One way to express this is that a defendant should not be required to exculpate himself or otherwise disprove guilt just because he/she has been charged with an offence.⁵¹⁹ In democratic systems it would be intolerable for courts to operate with a presumption of guilt which the defendant had to strive to displace. This principle is translated, therefore, into the procedural requirement that the burden of proving the offence lies on the prosecution. The European Court of Human Rights has defined this aspect of the presumption of innocence as follows:

It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the

⁵¹⁸ A. Cassese '*International Criminal Law*' (2008) 380.

⁵¹⁹ A. Ashworth, '*Human Rights, Serious Crime and Criminal Procedure*' (Sweet & Maxwell, London 2002) 14.

prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.⁵²⁰

Notwithstanding the foregoing, in the leading case of *Salabiaku v. France*⁵²¹ the Strasbourg Court reveals a weaker presumption of innocence. This case makes it clear that the presumption may be displaced by contrary presumptions, so long as States ‘confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence’.⁵²² In *Phoam Hang v. France*⁵²³ the European Court also articulated this position. Unfortunately, the vagueness of this endorsement of the presumption has never been remedied by the Strasbourg Court, and facts of *Salabiaku* and *Phoam Hang* demonstrate that the presumption of innocence may be enshrining even when imprisonment is a penalty.

In the previous section, we said that a conviction of ML is possible when it is proved, beyond a reasonable doubt, that property represents a criminal acquisition, without having to establish, in every case, several specificities about the predicate offence (e.g., to show precisely which crime, or who committed or participated in the commission of the predicate offence). In this respect, it was concluded that the proposed level of proof when proving that property is the proceeds of crime, does not mean that the burden of proof is reversed, and the right to be presumed innocent is violated. This is because, the prosecution still must abide by the criminal standard of proof (i.e., ‘beyond a reasonable doubt’, rather than by mere presumptions or simple indicia), showing that a criminal offence occurred which resulted in proceeds. I believe, then,

⁵²⁰ *Barberá, Messegué and Jabardo v. Spain*, Series A, No. 146, 6 December 1988, para. 77.

⁵²¹ *Salabiaku v. France*, 13 EHRR 379 (1988).

⁵²² *Salabiaku*, at para 27.

⁵²³ *Phoam Hang v. France*, judgment of 25 September 1992, Publ. ECHR, Series A, No. 243, para. 34.

that this is the middle ground between the procedural and effective work of establishing the existence of a predicate offence on the one hand, and the preservation of the right to be presumed innocent on the other hand—as applied to the right to prove ‘beyond a reasonable doubt’ and the burden of proof.

But what do the international conventions against ML say about the burden of proof to establish the criminal origin of the assets involved in a ML case? The only international convention that mentions this aspect is the Vienna Convention. Article 5 (7) allows State Parties to ‘consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property [...] to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings’. Thus, according to this clause, State Parties have the option to include a reversal of the burden of proof, when proving that the property is the proceeds of a crime. There are not apparent soft law instruments that support this reversal on the burden of proof to establish the criminal origin of proceeds.

At the domestic level, a partial reversal of the burden of proof seems to be adopted in some countries such as Mexico. Article 400 *bis* of Mexico’s Federal Law against organized crime (LFDO, Spanish acronym for ‘*Ley Federal Contra la Delincuencia Organizada*’) applies to:

The proceeds of an illicit activity which is derived as resources, rights or assets of any nature for which there exists well-founded indicia or certainty that are derived directly or indirectly from or represents the earning derived from the commission of a crime *for which no legitimate origin can be established* (emphases is added).⁵²⁴

This construction of the predicate offence allows the prosecution, upon demonstrating indicia of criminality, to shift the burden of proof on the defendant. Once the probable

⁵²⁴ The translation of this article is on: FATF, ‘Mutual Evaluation Report of Mexico’, (Report) (17 October 2008) 10.

cause is established, the owner has to demonstrate, by a preponderance of evidence, either that the property does not qualify as a proceeds of crime (e.g., by establishing the legitimate origin of the property) or that he/she has done all he/she reasonably could be expected to do to prevent the proscribed use of the property or that the property had been taken from the defendant without his/her consent. So, the natural question to answer is: when a ML criminal offence is charged and the prosecution established minimum indicia of criminality, should the accused not bear the burden of establishing that assets are not derived from criminal activities?

According to Stessens, the reversal of the burden of proof could be justified and partly dictated by the difficulty of investigating the crime of ML. Specifically, this scholar believes that in the case of proceeds with a foreign origin, it will often be extremely difficult for the prosecution to demonstrate that these proceeds have been generated in violation of foreign criminal law.⁵²⁵ Plausible as this argument may sound, none of it makes a strong case to support reversing the burden of proof when structuring the predicate offence. This is because the maximum goal of effectiveness cannot subordinate the strict adherence to the rule of law and the idealistic preservation of legality. It is obvious that the difficulty of investigating crimes must be overcome through better surveillance and greater police resources, not by risking the conviction of the innocent.⁵²⁶ This seems to be the approach taken by the Strasbourg Court in *Saidi v.*

France:

The Court is fully aware of the undeniable difficulties of the fight against drug-trafficking—in particular with regard to obtaining and producing evidence—and of the ravages caused to society by the drug problem, but

⁵²⁵ Stessens (2000) 67.

⁵²⁶ A. Ashworth, 'Terrorism and the Value of Human Rights', in B. Goold B., L. Lazarus (edt.) '*Security and Human Rights*', (Hart Publishing, Oxford 2007) 218.

such considerations cannot justify restricting to this extent the rights of the defence of ‘everyone charged with a criminal offence’.⁵²⁷

In this vein, the House of Lords in ‘*Lambert*’⁵²⁸ held that, in principle, the burden of proof should remain on the prosecution and that the mere fact that this might make it more difficult to prosecute is not a sufficient reason for holding a reverse onus interpretation.

But difficulties in the proceeding are not the only argument for reversing the burden of proof. Proponents of this view could also cite the seriousness of the ML criminal offence and the threat to public safety. However, this second argument also fails, because just as ML offences are serious crimes, so too, a conviction of a ML offence is an extremely serious matter for any individual and all proper safeguards should be observed. In other words, given that a punitive sanction is much higher in a ML case, ML suspects arguably require even more due process and fair trial guarantees. Moreover, as Zedner observes: ‘when disregard for due process results in wrongful convictions, not only are the innocent convicted, the guilty may go free’.⁵²⁹ Thus, departure from due process is not only unjust; it is also liable to being counterproductive.

4.7. Circumstantial evidence and its relevance to prove the existence of a predicate offence.

The ML prosecution must prove that the property involved represents proceeds of crime. Proving this element of the ML offence can be onerous, especially in view of the

⁵²⁷ *Saidi v. France* (1993) 17 E.H.R.R. 251, para. 44.

⁵²⁸ (2001) 3 W.L.R. 206.

⁵²⁹ See Lucia Zedner, ‘*Security*’ (2009) 141.

fact that ML is a hidden and complex process that usually includes trans-border elements and effects. This is the case when assets initially obtained from a predicate offence are converted into other objects and later transferred from one jurisdiction to another, in order to be disguised, before making them appear legitimate and then, completing the process of laundering. Let us illustrate this idea with the following example: cash money generated from a predicate offence committed in country A is transferred to a bank account opened in country B, and then this cash money is converted into financial instruments, such as money orders, in country C, to finally change their form and shape, again, as cheques and bank notes in country D.

Based on the above explanation, it could be said that direct proofs are often lacking, insufficient or generally do not exist in ML investigations. By ‘direct proof’, I mean the evidence that is based on personal knowledge or observation and that, if true, proves a fact without indirect evidence. Consequently, the study of indirect/circumstantial evidence to demonstrate, beyond a reasonable doubt, that funds or property represent proceeds of crime, is critical. For this analysis, indicative, indirect or circumstantial evidence means the facts or circumstances from which the existence of other facts or circumstances can be deduced through a process of logical interpretation. The probative force of this kind of evidence depends on the strong and evident relation showed between a well-known fact duly verified (the evidentiary one) and the unknown one (the indicative or indicated one) with intended proof of existence; and, for the relation between both, the evidentiary and the indicated one, the circumstantial evidence can only be related to the indicated fact. This interpretative task is known as the ‘unique and indicative interpretation of the evidence’ (in Spanish, ‘*la univocidad de la prueba indiciaria*’).⁵³⁰

⁵³⁰ José L., Cafferata Nores, ‘*La prueba en el proceso penal*’ (Depalma, Buenos Aires 2001) 190; Lino E., Palacio, ‘*Los recursos en el proceso penal*’ (Abeledo-Perrot, Buenos Aires 2001) 78.

The relevance of circumstantial evidence is not only to prove the existence of a predicate offence (i.e., a key physical or *actus reus* element of the crime in question) but also to show the knowledge of the offender about the criminal origin of the assets (i.e., one important mental element of the ML offence). I will refer later to the importance of ‘circumstantial evidence’ in terms of proving the knowledge and special intent required by ML offences. It is sufficient now to note that article 3 (3) of the Vienna Convention and article 6 (2) (c) of the Strasbourg Convention, establish that ‘the knowledge, intention or aim required as element of [ML offences] may be inferred from objective factual circumstance of the case’. Similar provisions have been included in other hard law and soft law instruments, such as the Warsaw Convention⁵³¹ or the OAS-CICAD Model Regulations.⁵³² In this way, both hard and soft law instruments recognize the importance and validity of circumstantial evidence in the context of ML investigations.

The question to tackle now is: Which are the typical parameters set by domestic legislative bodies and courts to consider indirect evidence in the context of ML prosecutions? This is specifically highlighted, for instance, by article 462 (39) of the Canadian Penal Code, which established the following:

‘[...] the court may infer that property was obtained or derived as a result of the commission of a designed offence where evidence establishes that the value, after the commission of that offence, of all the property of the person alleged to have committed the offence exceeds the value of all the property of that person before the commission of that offence and the court is satisfied that the income of that person from sources unrelated to designated offences committed by that person cannot reasonably account for such an increase in value’.

⁵³¹ Article 9 (2) (c) of the Warsaw Convention.

⁵³² Article 5 of the OAS-CICAD Model Regulations: ‘Knowledge, intent or purpose required as an element of any (money laundering) offence set forth in this Article as well as the relationship of any proceeds or instrumentalities, to a serious criminal activity may be inferred from objective, factual circumstances’.

The Spanish Supreme Court has also expressed its opinion on this matter. According to this Court, the following scenarios can be seen or considered as indirect or indicative evidence in order to demonstrate the physical element (the *actus reus*) and the mental element (the *mens rea*) of the crime in question; particularly, when proving the existence of property derived from a crime:⁵³³

- (i) The abuse in the use of off-shore corporations with simulated activity or with no business relation that justifies the movement of cash money; especially, if they are domiciled in the so-called ‘off-shore centres’ or ‘tax haven’ jurisdictions.
- (ii) The use of front-men without a real disposition of the assets.
- (iii) The possession and use of false documents.
- (iv) The fractioning of income in bank deposits to disguise its quantity and avoid bank compliance controls and criminal, administrative or civil liabilities (i.e., ‘*smurfing*’ operations).
- (v) The disposition of huge amounts of cash money without justification of their origin; particularly, when cash-money is in small change. Moreover, when the funds or property, clearly, do not stem from legal income, an inheritance, a loan, a gift, etc.
- (vi) Simulation of businesses and unjustified increases of assets or movements of capital which do not follow any commercial purpose.
- (vii) Economic activities related or linked with drug trafficking, corruption, among several other serious acquisitive crimes.
- (viii) In summary, any economic scenario that generates the situations enumerated so far and that may be classified as ‘irregular’ or ‘suspicious’ from a

⁵³³ Pursuant to the judgments of the Spanish Supreme Court of 7 December 1996; 23 May 1997; 15 April 1998; 28 December 1999; 10 January 2000; 18 September 2001, 29 September 2001, sentence No. 1595/2003 of 29 November 2003 and sentence dated 25 February 2004.

financial perspective and that may not reasonably indicate a situation different from an attempt to launder assets derived from a crime.

It is clear that the circumstantial evidence invoked to prove key elements of the ML offence, such as the existence of a predicate offence, may include a wide variety of acts or subterfuges from a criminal. However, to avoid violations of the presumption of innocence, the invoked circumstantial evidence should be compelling enough to reach the standard 'beyond a reasonable doubt'. That is to say, ML offences cannot be proved based on mere presumptions or indicia. All the procedural guarantees shall be respected at the time of proving, for instance, that the property involved is the proceeds of a predicate offence.

CHAPTER V

The mental or subjective element of money laundering

1. Overview.

In chapter IV we analyzed the physical element of ML offences, from a global-comparative angle. This chapter will address the adaptation process of the degrees of criminal liability at the domestic level (e.g., intent, recklessness and negligence category). In particular, I will examine if the main goal of effectiveness in the application of these degrees of criminal liability at the domestic level is damaging other values that international and domestic law is seeking to protect, namely the theory of *ultima ratio* of criminal law. Then, if the adaptation of any of these degrees of criminal liability has shown to be inconsistent with this theory or legislative principle of criminal law, I will propose how to remedy this deficiency.⁵³⁴ The analysis, of course, will be undertaken from an international-comparative angle.

To do this, the discussion will proceed as follows: first, I will define the levels of mind and degrees of negligence for both common and civil law systems (Section 2). Then, I will describe the *intentional* crime of ML and its possible levels of *mens rea* (Section 3). Later, I will refer to the mistake of fact in the crime of ML (Section 4). Subsequently, I will examine the importance of ‘circumstantial evidence’ to prove intentional crimes of ML (Section 5). And, finally, I will examine if there is room for negligent ML offences (Section 6).

⁵³⁴ See above, in chapter III, section 2, for further details about the *ultima ratio* theory of criminalization.

2. Defining the levels of mind and the degrees of negligence in common and civil law systems.

It is imperative, first of all, to define the various categories of state of mind and degrees of negligence that I will invoke in this chapter. Both civil and common law systems agree that intention, recklessness and negligence are all forms of fault or degrees of criminal liability. However, there is no clear consensus between common and civil law countries over the meaning and extension of the different forms of fault (i.e., intention, recklessness and negligence). For the analysis in this chapter, I have selected the definitions of these forms of fault that I consider most representative of domestic criminal law, so they can be most helpful in fulfilling one of the main purposes of this research: drafting a more detailed and better integrated definition of the international crime of ML that is consistent with sound principles of criminal law and criminal procedure.

In common law, the traditional term for the state of mind which must be proved, '*mens rea*' ('guilty mind'), is unfortunately sometimes used by courts to include all degrees of fault (i.e., intention, recklessness and negligence).⁵³⁵ However, if *mens rea* is taken in its more literal sense of 'guilty mind', this usage is inappropriate since negligence, in common law, may be proved without establishing anything as to what was going on in the offender's mind. That is, in common law, negligence does not imply a state of mind, since it means that in the offender's mind there has been a

⁵³⁵ David Ormerod, '*Smith & Hogan: Criminal Law*' (11th ed. OUP, Oxford 2005) 91.

complete absence of a particular thought.⁵³⁶ Thus, in this chapter I restrict the term *mens rea* to intention and recklessness and I use the term ‘negligence’ to describe failure to comply with an objective standard of conduct.

Below, I will first discuss the forms of *mens rea*; that is, the intent and reckless levels of mind. Later, I will deal with the negligent category.

(i) *Intention*, namely awareness that a certain conduct will bring about a certain result in the ordinary course of events, and the will to attain that objective.⁵³⁷ Then, a person has intent when, in relation to his or her conduct, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.⁵³⁸ For instance, I use a gun to shoot a person because I want to cause his or her death and I am aware that, as a consequence of my shooting, he or she will die. Intent, in common and civil law systems, requires a combination of cognitive and voluntary elements; that is, knowledge of the elements of the offence and the will to bring about its completion.⁵³⁹ It is necessary to note that the offender is not required to understand and be aware of all the elements of an offence in their correct legal meaning; otherwise ‘only lawyers could commit crimes’.⁵⁴⁰ It is sufficient if he or she can make the correct evaluations about their substance in layman’s terms.⁵⁴¹ This level of *mens rea* is normally termed ‘wilful

⁵³⁶ Ibid, 131.

⁵³⁷ For an ordinary meaning of ‘intention’ in civil law, see: Eugenio Raúl Zaffaroni, *Tratado de Derecho Penal Penal. Parte General* (Ediar, Buenos Aires, 2000) 500; and, F. Muñoz Conde and M. García Arán, *Derecho Penal. Parte General* (Tirant lo Blanch, Valencia 1996) 372. For an ordinary meaning of ‘intention’ in common law see: David Ormerod, *Smith & Hogan: Criminal Law* (2005) 93-94. While *Smith & Hogan* make a distinction between an ordinary and a wide meaning of the ‘intent’ level of mind, this assessment is not relevant to our discussion.

⁵³⁸ Ibid.

⁵³⁹ Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing, Oxford 2009) 61.

⁵⁴⁰ Ibid, 72.

⁵⁴¹ Ibid.

intention’, ‘intent’,⁵⁴² or actual ‘knowledge’ in common law systems; and *dolus directus* in civil law systems.

(ii) In common law systems, the *recklessness* level of *mens rea* means a person who does not intend to cause a harmful result, but takes an unjustifiable risk of causing it. Consequently, to establish recklessness it is necessary in all cases to show, not only that the offender took an *unreasonable* risk, but also that he or she was *aware* of the existence and circumstances of the unreasonable risk taken.⁵⁴³ An example of this class of *mens rea* in a ML case would be when a banker has *suspicious* about the illicit origin of his client’s assets and nonetheless decides to receive and convert that property into a different asset. In the context of ML offences, these confirmed suspicions are reckless because they imply knowledge and advertence. Later, I will return to discuss the correct legal meaning of ‘suspicions’ in the context of ML offences.

In civil law systems, the reckless level of *mens rea* is generally referred to as conditional intent, *Bedingter Vorsatz* or *dolus eventualis*. In the terminology used here *dolus eventualis* means ‘the person who is aware that undertaking a course of conduct carries with it an unreasonable or unjustifiable risk of producing harmful consequences, and the decision nevertheless is to go on and undertake that risk’.⁵⁴⁴ There are several (common and continental) scholars addressing the question of how to establish the similarities and differences between recklessness in common law and *dolus eventualis*

⁵⁴² Rome Statute of the International Criminal Court refers to the word ‘intent’. Article 30 of the Rome Statute provides that a person has intent where: (a) In relation to a conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events’.

⁵⁴³ ‘*Smith & Hogan: Criminal Law*’ (2005) 102-103.

⁵⁴⁴ Eugenio Raúl Zaffaroni, ‘*Tratado de Derecho Penal Penal. Parte General*’ (Ediar, Buenos Aires, 2000) 501.

in civil law.⁵⁴⁵ In light of the definitions invoked above, what is common to ‘reckless’ in common law and ‘*dolus eventualis*’ in civil law is that the offender must have been *aware* of the fact that the risk that he or she took is *unjustifiable* or *unreasonable*, so it may lead to an offence being committed. Put differently, both require *awareness* of the person that took an unreasonable or unjustifiable risk. But, beyond the small differences that schools of thought can invoke between the legal meanings of reckless in common law and *dolus eventualis* in civil law, for this work both terms will be used interchangeably. This is in line with the opinion of several scholars in the area of international criminal law.⁵⁴⁶

Finally, we should refer to ‘wilful blindness’. In common law systems, wilful blindness means ‘when the defendant has deliberately shut his eyes to the obvious or refrained from enquiry because he suspected the truth but did not want to have his suspicions confirmed’.⁵⁴⁷ The term ‘wilful blindness’ is used interchangeably with a variety of other labels such as ‘conscious avoidance’, ‘deliberate ignorance’ and ‘intentionally ignorant’. In the context of ML offences, reckless may also extend to ‘wilful blindness’ standards of mind, since both levels of mind imply knowledge and advertence.⁵⁴⁸ More will be said about this in due course.

⁵⁴⁵ See, Michael Bohlander (2009) 64; Zaffaroni (2000) 500-501.

⁵⁴⁶ See A. Cassese ‘*International Criminal Law*’ (2nd edn, OUP, Oxford 2008) 58; Gerhard Werle, ‘*Principles of International Criminal Law*’ (TMC Asser Press, The Hague, Netherlands 2005) 102. See also, Illias Bantekas and Susan Nash, ‘*International Criminal Law*’ (3th., Routledge, London 2007) 43-45. See also, the case *Stakic Milomir*, ICTY (International Criminal Tribunal for the former Yugoslavia) AC, 22 March 2006 (Case No. IT-97-24-T): ‘Reckless in common law would meet the continental criteria of *dolus eventualis*’.

⁵⁴⁷ *Westminster City Council v Croyalgrange Ltd.* (1996) 83 Cr App R 155.

⁵⁴⁸ F. Von Haenel, ‘Wilful Blindness: a permissible substitute for actual knowledge under the Money Laundering Control Act?’ (1993) Washington University Law Quarterly, Vol. 71:1189, p. 1212: ‘wilful blindness is a product of both knowledge and recklessness’.

(iii) *Degrees of negligence*: beyond the differences that schools of thought can invoke between the meaning of the ‘negligent category’, both common and civil law scholars agree that this form of fault is regarded as failing to meet a required objective or generally accepted standard of conduct, thereby causing harm to another person. In essence, negligence liability is based on a violation of a duty of care, or to be more precise, on a breach of a duty of diligence.⁵⁴⁹

Considering the definitions of recklessness and negligence that I invoked above, the clear distinction between both is the following: recklessness is the conscious taking of an unjustifiable risk and negligence the inadvertent taking of an unjustifiable risk. Therefore, on this basis, another distinction between recklessness and negligence is that the first one involves proof of a state of mind, while negligence may be conclusively proved by simply showing that the offender’s conduct failed to measure up an objective standard. As *Smith & Hogan* observes, in crimes of negligence, the offender cannot state, ‘I considered whether there was a risk and decided there was none’. Where the risk is one, that he should have foreseen, that is an admission of negligence.⁵⁵⁰

If negligence is regarded as non-attainment of a required standard of conduct, then it is clear that there are degrees of fault in failing to advert. The more obvious the risk and the greater the offender’s capacity to advert to it, the greater the fault in failing to be aware of it. In common law systems, it is normally called ‘gross negligence’ when one person falls blatantly and far short of the required objective standard; and, it is simply called ‘negligence’, when the person falls just short of the required standard.⁵⁵¹

⁵⁴⁹ Zaffaroni (2000) 523-524; Cassese (2008) 58. See also, Michael Bohlander (2009) 54-55; and, ‘*Smith & Hogan: Criminal Law*’ (2005) 129-131.

⁵⁵⁰ ‘*Smith & Hogan: Criminal Law*’ (2005) 129.

⁵⁵¹ *Ibid*, 132-133.

In turn, we should refer to the common law phrases ‘should have known’ and ‘having reasonable ground to believe or suspect’. In summary, common law scholars agree that these phrases are involved in the *negligent* category because they do not imply that the person actually did know or suspect—only that he or she had reasonable ground or duties to do so.⁵⁵²

Finally, it should be noted that these selected legal definitions are only examples of domestic criminal law. We must keep in mind that penal courts of common and civil law systems alike do not often draw the same definitions between these forms of fault. Or, to be precise, courts across the world may use different definitions in order to describe these degrees of fault, regardless of whether they are common or civil law courts. Sometimes, differences in the use of the analyzed legal terms may also appear between common and civil law systems, as well as across the two systems.

3. The intentional crime of ML: analysis of both *dolus directus*/actual knowledge and *dolus eventualis*/recklessness levels of *mens rea*.

According to the three types of ML criminal offences as drafted in the Vienna Convention⁵⁵³ and the rest of the international conventions⁵⁵⁴ and EU Directives,⁵⁵⁵ the *mens rea* element of the crime in question is twofold: *first*, the required knowledge of the criminal origin of the funds or property involved; *second*, awareness that

⁵⁵² See Ilias Bantekas and Susan Nash, ‘*International Criminal Law*’ (3rd edn, Routledge, London 2007) 44-45; and, Cassese, ‘*International Criminal Law*’ (2008) 71.

⁵⁵³ Vienna Convention, article 3 (b) (i).

⁵⁵⁴ See, for instance, the Palermo Convention, article 6 (1).

⁵⁵⁵ See, e.g., article 1 of the 2005/60/EC Directive.

circumstances exist and a consequence will occur in the ordinary course of events, through the commission of the acts of laundering (e.g., conceal, transfer, disguise or use proceeds).

However, the first type of ML criminalization, which refers to the ‘converting or transferring’ of such property, is only committed by a person whose acts are performed ‘for the purpose of concealing or disguising’ the illicit origin of the property. Then, it is clear that this first type of the crime of ML went one step further requesting a *third element*: the so-called ‘ulterior/specific’ intent.⁵⁵⁶ These three elements will be analysed in the following sub-sections, from a global-comparative perspective.

3.1. Knowledge of the money’s criminal origin.

The three forms of criminalization, as drafted in hard law instruments, require a person prosecuted for ML to have intentional knowledge of the assets’ criminal origins when practising the prohibited conduct of laundering. In other words, the alleged perpetrator of ML should be sufficiently aware that a prior crime occurred which resulted in the proceeds of crime that he or she is laundering. Specifically, international conventions and EU Directives refer to the words ‘knowing’ that such ‘property’ represents the ‘proceeds of crime’. Pursuant to human rights principles of criminal justice, most notably the presumption of innocence, the ML prosecution must prove ‘beyond a

⁵⁵⁶ Although it is outside the scope of this thesis, it should be said that, when State Parties adopt this requirement, they are drafting an inchoate form of criminality: a person who does a certain act ‘*for the purpose of*’ doing X, are in reality defined in an inchoate mode. For more details about this type of inchoate offence see: A. Ashworth, ‘*Principles of Criminal Law*’ (2006) 444.

reasonable doubt' that the launderer knew that property was derived from a criminal offence, so it represents a 'criminal acquisition'. Anything less is unacceptable.⁵⁵⁷

But the question we need to address here is: What level of knowledge about the proceeds of crime might be required by ML criminal offences? Does *actual knowledge* (*dolus directus*) about the criminal origin of property constitute the only necessary mental level? Or, instead, does having *actual suspicion* (*dolus eventualis/recklessness*) that the property is the proceeds of a criminal offence also meet a possible mental level to bring charges or a conviction of ML?

Not all the international conventions refer to both 'intent/knowledge' and 'suspicious'/reckless' mental levels. The Vienna Convention, the Strasbourg Convention and the Palermo Convention only refer to 'intentional/knowledge' standards of mind. The first international convention to *allow* the adoption of both 'intent/knowledge' and 'recklessness/suspiciousness' of the money's criminal origin is the Warsaw Convention. Article 9 (3) of this convention allows each State Party to adopt a ML offence when the offender 'suspects' that the property was proceeds of crime.⁵⁵⁸ However, the adoption of this class of *mens rea* is not binding on State Parties. The use of the verb 'allow' is sufficient to establish its optional nature.

Among the soft law instruments, both the 2005 Model Legislation on ML⁵⁵⁹ and the 2009 Model Provisions on Money Laundering⁵⁶⁰ provide that any person, who

⁵⁵⁷ For further details of the right to be presumed innocent and its possible challenge when the ML prosecution tries to show the existence of a predicate offence, see above, chapter IV, sections 4.5 and 4.6.

⁵⁵⁸ It should be noted that the word 'reckless' is not used by any of the hard law instruments. Instead, the Warsaw Convention uses the word 'suspect'.

⁵⁵⁹ See article 5.2.1 (1) (a), (b), (c), of the '2005 Model Legislation on Money Laundering' (IMF, UNODC, 1 December 2005) 34.

⁵⁶⁰ See, Section 3 (2), (3), (4) of the '2009 Model Provisions on Money Laundering' (UNODC, Commonwealth Secretariat and IMF, 2009) 15.

performs any of the acts described in the three kinds of ML offences, knowing or suspecting that the property is proceeds of crime, commits a ML criminal offence.

Following the wording of the Warsaw convention and the above mentioned soft law instruments, the general trend among countries is to accept both the *dolus directus* (knowledge/intent) and the *dolus eventualis* (suspicions/recklessness) levels of *mens rea*.⁵⁶¹ An example is the UK legislation, which explicitly includes in the text of their ML criminal offence the word ‘suspicious’. In particular, the UK’s ML offences, as drafted in section 340 (3) of the Proceeds of Crime Act 2002 (POCA), defines ‘criminal property’ as follows:

[...] property is criminal property if (a) 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 (b) the alleged offender knows or *suspects* that it constitutes or represents such a benefit. (emphasis added)

In contrast, several other countries do not expressly establish in their definition of the crime of ML the level of mind suspicion/recklessness, but leave this analysis to their courts. For instance, criminal courts in Argentina,⁵⁶² Canada,⁵⁶³ Spain,⁵⁶⁴ Switzerland,⁵⁶⁵ and the United States,⁵⁶⁶ ruled that knowledge (*dolus directus*) and having no more than suspicion (recklessness/*dolus eventualis*) that the property is the

⁵⁶¹ Paul Allan Schott, ‘Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism’ (2006) V-2.

⁵⁶² ‘Mario Caserta, and others’, [2006] (The National Court of Criminal Cassation of Argentina, Room 1); ‘Santos Caballero, Maria I., and others’, [2000] (Federal High Criminal Courts, City of Buenos Aires, Room 2).

⁵⁶³ In *R. v. Sansregret*, (1985) 1 S.C.R. 570, the Supreme Court of Canada held that recklessness (and wilful blindness) may be used to establish the criminal law requirement for intention.

⁵⁶⁴ Spanish Supreme Court (*Supremo Tribunal Español*) STE, judgement of 7 December 1996; judgement of 29 September 2001; and repeated in judgement of 27 May 2005: ‘if the negligent laundering is a crime (in Spain), then it is obvious that the *dolus eventualis* level of mind should be covered’ and constitute a level of mind for a conviction of an intentional crime of ML.

⁵⁶⁵ *R. v. Public Prosecutor of the Canton of Vaud*, 6 June 2003 (No. 6S. 59/2003).

⁵⁶⁶ *United States v. Antzoulatos*, 962 F.2d, 720 (7th Cir.); or *United States v. Parramore*, 720 F Supp. 799, 802 (N.D.Cal 1989).

proceeds of a predicate offence constitutes the requisite state of mind to obtain convictions of intentional ML offences. Thus, it could be concluded that within these jurisdiction, in order to meet the standard of knowledge required for *mens rea* it may be sufficient for the prosecution to establish that the person accused was reckless or had suspicions about the criminal origin of the assets.

But what does ‘suspicious’ about the criminal origin of property mean in the context of ML criminal offences? It should be noted that international standards against ML (both hard and soft law instruments) do not define the meaning of ‘suspicions’. As mentioned above, some hard law instruments such as the Warsaw Convention, and some other soft law instruments, such as the 2005 Model Legislation on Money Laundering, refer to the word suspicious about the criminal origin of assets, but none of them provide a definition of this key word. This silence is formidable a problem. A clear and univocal definition of this legal concept is important to avoid misunderstanding and inconsistencies when adopting, at the domestic level, the different degrees of criminal liability, such as the ‘actual suspicions’ (which is recklessness/*dolus eventualis* level of mind) and ‘reasonable ground to believe or suspect’ (which is negligence). Both recklessness and negligence are so conceptually close to one another that the inclusion of a detailed definition of ‘suspicious’ in the international crime of ML would help domestic legislative bodies to draw the line between these two degrees of criminal liability and clarify the matter at the domestic level.

However, what ‘suspicions’ means in the context of ML criminal offences was considered in the UK; particularly in the case ‘*Da Silva*’:⁵⁶⁷

⁵⁶⁷ [2007] 1 W.L.R. 303; [2006] 2 Cr.App.R. 35.

What then does the ‘suspecting’ mean in its particular context in the [ML offence as drafted in the POCA]? It seems to us that the essential element in the word “suspect” and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicious to be ‘clear’ or ‘firmly grounded and targeted on specific facts’, or based on ‘reasonable grounds’. To require the prosecution to satisfy such criteria as to the strength of suspicion would, in our view, be putting a gloss on the section.

The case *Hussein v. Chong Fook Kam*⁵⁶⁸ also analyzed the correct legal meaning of ‘suspicion’ in the context of ML offences as drafted in the POCA. In this case the word ‘suspicion’ means, in its ordinary meaning, a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’.⁵⁶⁹ As *Smith & Hogan* observes, in the case *Hussein* ‘suspicious arises at or near the starting point of an investigation of which the obtaining or *prima facie* proof is the end. There is no requirement to prove dishonesty. Such a low level of *mens rea* is remarkable for offences of such seriousness’.⁵⁷⁰

Inspired on the above mentioned opinions, I will explain the meaning of the legal concept ‘suspicious’ about the criminal origin of assets as follows. In a launderer’s level of mind there might be a declining scale, beginning with ‘knowledge’, then moving to ‘belief’, then strong ‘suspicion’, ‘conjecture’ or ‘surmise’ where proof about the criminal origin of the assets is lacking, and finally, moving to mere ‘speculation’ or simple ‘doubt’.

Based on this declining scale, we can say that the first two standards of mind; that is, ‘knowledge’ and ‘belief’ standards should be interpreted within the ‘actual intent’ or *dolus directus* level of mind (and not within suspicions or recklessness level

⁵⁶⁸ *Hussein v. Chong Fook Kam* (1970) AC 942.

⁵⁶⁹ *Ibid*, 948.

⁵⁷⁰ *Smith & Hogan: Criminal Law* (2005) 862.

of mind). In turn, ‘conjecture’, ‘surmise’ or ‘strong suspicious’ where proof about the criminal origin of the assets is lacking, might be classified within the reckless/*dolus eventualis* level of mind. Anything less might be interpreted as negligence. That is to say, the last two standards, ‘speculation’ and mere ‘doubt’ are vague feelings, meaning that the offender is, in practice, unaware of the unjustifiable risk taken. So, if it is interpreted that he or she is unaware of the risk, but it is proved that he or she ought to have been aware of it, then, the defendant is negligent (not reckless).

But criminal knowledge should also be established in cases of ‘wilful blindness’, where an individual deliberately fails to inquire into the consequences of certain behaviour and where the person knows that such inquiry should be undertaken. So, in the context of ML procedures, the common law concept of wilful blindness requires that the defendant has at least acknowledged or suspected that the property involved in ML represents the proceeds of crime, but he or she refrained from enquiring; because he or she suspected the truth but did not want to have these suspicions confirmed. This is the opinion of Lord Bridge, who argued in *Westminster City Council v. Croyalgrange Ltd.*,

[...] it is always open to the tribunal of facts [...] to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not wish to have his suspicion confirmed.⁵⁷¹

Consequently, even if there is no proof that an accused knew about the money’s criminal origin, the defendant may still have had sufficient knowledge of the criminal origin of the assets, if it can be shown that he or she deliberately shut his or her eyes to the obvious. In the words of Stessens: ‘only if a defendant effectively harboured a suspicion that the proceeds were derived from an illegal source and paid no further

⁵⁷¹ *Westminster City Council v. Croyalgrange Ltd.* (1986) 83 Cr App R 155, at. 164.

attention to those suspicions by, for example, asking questions about their origin, may his actions be construed as wilful blindness'.⁵⁷²

It should be noted that none of the international conventions include the expression 'wilful blindness' or any of the synonymous expressions 'conscious avoidance', 'deliberate ignorance' or 'intentionally ignorant'. This last expression was covered, however, by soft law instruments such as the OAS-CICAD Model Regulation, which establishes in article 2 (1), (2) and (3) that ML criminal offences should be committed by a person who 'knows, should have known or is *intentionally ignorant*' (emphasis added). It is clear that the term 'know' refers to intent. It is also clear that the term 'should have known' refers to negligence; and the phrase 'intentionally ignorant' to 'wilful blindness' (that also extends to the state of mind *dolus eventualis* in the civil law system). The '2009 Model Provisions on Money Laundering' also refers to the 'wilful blindness' level of mind. In particular, it says that in some countries a more flexible standard of knowledge, or situations of wilful blindness, might be adopted at the domestic level to establish the sufficient knowledge of the criminal origin of the assets.⁵⁷³ Criminal courts in (common law) countries such as Canada,⁵⁷⁴ the UK⁵⁷⁵ and the US,⁵⁷⁶ have ruled that wilful blindness may be used to establish the criminal law requirement for intention. So, in these countries the prosecutor does not have to establish actual knowledge about the asset's criminal origin. Instead, a prosecutor may set the required knowledge element by establishing that the accused was wilfully blind.

⁵⁷² Stessens (2000) 125.

⁵⁷³ The '2009 Model Provisions on Money Laundering' (UNODC, Commonwealth Secretariat and IMF) (Report, April 2009) 12.

⁵⁷⁴ *R v. Sansregret*, (1985) 1 S.C.R. 570 (Supreme Court of Canada).

⁵⁷⁵ *Westminster City Council v. Croyalgrange Ltd.* (1986) 83 Cr App R 155.

⁵⁷⁶ Senate Report 99-433, 3 September 1986, pages 9-10 makes it clear that the knowledge requirement in s. 1956 (a) (1) are intended to cover instances of 'willful blindness'. This was confirmed by *United States v. Parramore*, 720 F Supp. 799, 802 (N.D.Cal 1989).

3.2. Knowledge of the circumstances and consequences of the acts of laundering.

Legal theorists allege that a person cannot be punished for an intentional crime, unless he/she is aware of the effects and circumstances of his/her conduct (or was reckless about causing a harm by his/her conduct) in an ordinary course of events. On this basis, it could be said that the alleged ML offender must have knowledge of the consequences of his or her conduct of laundering in the ordinary course of events.

Knowledge of the consequences will vary, of course, depending on the penalized act of laundering. According to the *first type of ML offences*, as drafted in hard law instruments, the accused must have knowledge, at the time of conversion or transfer that the assets are criminal proceeds; and the accused must be aware that this will indeed result in the act's occurrence. This knowledge at the time of 'converting' or 'transferring' shall be applied with an ulterior intent either of concealing or disguising the illegal origin of such property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her actions. This ulterior/specific intent will be analyzed in the following sub-section.

In accordance with the *second type of ML criminalization*, the accused must have knowledge at the time of 'concealing' or 'disguising' that the property constitutes proceeds of crime. Moreover, the offender must be aware that the consequence of these conducts will be the concealment or the disguise of the 'true nature, source, location, disposition, movement or ownership of or right' with respect to the proceeds of crime. Finally, according to the *third type of ML criminalization*, there must be intent to acquire, possess or use proceeds of crime and the accused must have knowledge, at the time of receipt, that the property was proceeds.

Nevertheless, the analysis of this subject matter does not conclude here. English and Welsh law in cases such as *Le Brun*⁵⁷⁷ and others⁵⁷⁸ had to deal with how to solve the question of what the accused must have known about the offence elements and their underlying facts and at which point of time. In common and civil law systems, the general rule is that there has to be full coincidence of *mens rea* and *actus reus* at the time the offender acts. Then, the rule is that the offender must have the necessary intent for the offence of ML at the time he or she acts. What he or she knows or wants before or after her or his actions of laundering is, in principle, irrelevant.⁵⁷⁹

Within the context of financial or banking activity there are special cases concerning the moment or time when the knowledge of the circumstances or consequences of the laundering activity should take place. Such a scenario essentially occurs because ML is often a continuous criminal offence, those which are not of instantaneous commission. A continuous criminal offence means that the crime is not committed in only one act or behaviour but rather over a period of time. Specifically, particular situations could arise when the accused does not know the property's criminal origin at the beginning, at the time of receipt, but knows about it later, during the time the conduct of laundering takes place.

Blanco Cordero pays special attention to this possibility, taking as an example the case of a corrupt politician who deposits the proceeds of bribery in a bank.⁵⁸⁰ An officer of the bank, who receives the deposit of this money, later learns and becomes aware that the money is derived from bribery. Another example given by Blanco

⁵⁷⁷ *Le Brun*, (1992) QB 61, (1991) 4 All ER 673.

⁵⁷⁸ *Church*, (1966) 1 QB 59, (1965) 2 All ER 72.

⁵⁷⁹ M. Bohlander (2009) 67; and *Smith & Hogan: Criminal Law* (2005) 115-118.

⁵⁸⁰ Isidoro Blanco Cordero, '*Responsabilidad penal de los empleados de banca por el blanqueo de capitales*' (Comares, Granada 1999) 358.

Cordero, to analyze the topic in question, is that of a financial institution granting a mortgage loan to be repaid in affordable instalments. After the loan is issued, officers or employees at the bank institution learn that the debtor, on the one hand, uses the mortgage to conceal and launder the drug-trafficking origin of the assets and, on the other, pays the remaining instalments using the money derived from such criminal activity.

The question that arises is: at which moment is the officer of the bank committing the crime of ML—at the moment he received the deposit of the assets or after he became aware of their origin?

Blanco Cordero concluded that, in both examples, the officer of the bank would be committing a crime of ML at the moment he or she becomes aware that the received money derived from a crime, and decides to undertake a laundering behaviour, knowing the circumstances and consequences of his or her laundering behaviour.⁵⁸¹

This notwithstanding, Blanco Cordero does not explain what the officer of the bank should do, in the context of his two examples, to avoid criminal liability. To that end, an appropriate alternative could be submitting the report of the transactions (i.e., the SAR) to the judicial authority or the FIU as soon as the bank's officer becomes aware of the criminal origin of the managed and possessed assets. Otherwise, bank managers, officers and/or employees who know of the criminal origin of the assets and kept silent, not reporting the transaction to law enforcement authorities, could be accused of committing the crime of ML. Of course, the level of *mens rea* is established and evaluated through evidence. And, if the defence casts reasonable doubt on this *mens rea* element of the crime, then, the accused is entitled to acquittal. So, on this basis, filing a report on the suspicious transaction to legal authorities (e.g., FIUs) would be a

⁵⁸¹ Ibid.

decisive evidence when proving the innocence of the defendant, since the report will be showing that the person lacked the required intentional level of mind.

3.3. An ulterior and specific intent to conceal or disguise the proceeds.

The first type of ML offences as drafted in international conventions⁵⁸² and EU Directives (hard law instruments) stipulates that the conversion or transfer of property is a criminal offence when the defendant knows that the property involved is the proceeds of crime and does so for one of the following two purposes or ulterior intents: (1) concealing or disguising the illicit origin of the property; (2) helping any person who is involved in the commission of the predicate offence evade the legal consequences of his or her action.

A person has intent when, in relation to his or her conduct, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. But the word '*for the purpose*' that appears in the first type of ML criminalization does more than simply reiterate that ML is a crime of intent. It also indicates a special degree of intent that international and domestic crimes may require, often described as a 'specific' intent or 'ulterior' intent.⁵⁸³ 'Specific' and 'ulterior' intent appear to be synonymous terms.⁵⁸⁴ These common law legal terms correspond to the *dolus specialis* or *dolus subsiquens* of civil legal systems. This reference to the 'specific intent' indicates that the prosecution, in addition to demonstrating the intent to bring about a

⁵⁸² See, e.g., Art. 3 (1) (i) of the Vienna Convention and article 9 (1) of the Warsaw Convention.

⁵⁸³ For reference to the common law use of specific and ulterior intent see: David Ormerod, '*Smith & Hogan: Criminal Law*' (11th eds., OUP, Oxford 2005) 112-113. For more information about international crimes with special intent see, A. Cassese, '*International Criminal Law*' (2007) 65.

⁵⁸⁴ A. Cassese (2007) 65.

certain result by undertaking certain conduct, must also prove that the agent pursued a special goal that goes beyond the result of his/her conduct.

But, let us understand this ‘ulterior/specific intent’ requirement in the context of ML prosecutions. In domestic ML offences with this specific intent requirement, it is not enough to establish that the conducts of ‘conversion’ or ‘transfer’ of property have been practised with intent and knowledge that the property is the proceeds of crime—something more is required. The ML prosecution should also demonstrate that the agent pursued a special and ulterior goal that goes beyond the result of his or her conduct of conversion or transfer proceeds of crime, which is, according to this first type of ML criminalization: to conceal or disguise the illicit origin of the property *or* of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action. Where this specific intent is not proven, the behaviour of ML cannot be punished as an intentional crime of ML.

Though the international obligation is to implement this first definition of the crime of ML with this ulterior intent requirement, some soft law instruments such as the OAS-CICAD Model Regulations,⁵⁸⁵ and several countries such as Luxembourg⁵⁸⁶ and The Netherlands⁵⁸⁷ have done away with this requirement. In contrast, other countries included this ulterior intent requirement but in different terms. For example, article 278 (1) (a) of the Argentine Penal Code penalizes whoever

converts, transfers, manages, sells, encumbers or applies in any other way [...] money or any other kind of assets arising from a crime [...], *with the possible consequence that the original assets or the substitutes thereof appear to come from a lawful source*’ (emphasis added).

⁵⁸⁵ See article 2 (1) of the OAS-CICAD ‘Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and other Serious Offences’.

⁵⁸⁶ Article 504 (4) of the Luxembourg Penal Code.

⁵⁸⁷ Article 420 *bis* and 420 *quater* of the Dutch Penal Code, does not require proof of a specific purpose in committing any of the penalized laundering acts.

The crime of ML as drafted in Argentina implies the defendant's active engagement not only in the predicate offence, but also in the ulterior intent of legalizing the proceeds of crime so they can appear to have originated from legitimate sources.

Canada is another example, which adopted this ulterior intent, but with shorter wording. Section 461 (31) of the Canadian Penal Code requires the conversion or transfer of property to be an offence of ML, where the defendant knows that the property involved is the proceeds of crime and does so for only one purpose elements (i.e., for the purpose of concealing or disguising its illicit origin) instead of for the two ulterior purposes required by the international conventions (i.e., for the purpose of concealing or disguising its illicit origin *and* helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action).

But the question we need to address here is: Does the recklessness/suspicious (i.e., *dolus eventualis*) level of *mens rea*, also apply to this specific/ulterior intent to conceal or disguise proceeds of crime? The first type of ML criminalization as drafted in hard law instruments only refers to the 'intent/knowledge' level of mind to the requirement of this specific/ulterior intent. That is to say, none of the international conventions and EU Directives referred to the 'suspicious/recklessness' level of mind at the time of classifying this requirement of specific and ulterior intent. In addition, I did not find any soft law instrument that recommends or discusses this matter.

However, according to Cassese, domestic legal systems may penalize a mental state that is less grave than the one criminalized at the international level.⁵⁸⁸ Hence, it

⁵⁸⁸ See e.g., A. Cassese (2007) 70: 'That national legal systems may penalize a mental state that is less grave than the one criminalized at the international level should not be surprising'. See also I. Blanco Cordero (1997) 373.

should not be a surprise that domestic legal systems also allow the adoption of *dolus eventualis*/recklessness level of *mens rea* in this ulterior intent to conceal the proceeds of crime. Although, as of now there is no case law on this subject, it is relatively easy to conceive of examples of recklessness within the context of this ulterior (specific) intent. An example might be when a banker knows that one of his/her clients has money derived from crime but decides to accept his/her client's instructions to purchase bank notes, even though he *suspects* (recklessness/*dolus eventualis*) that ill-gotten assets, consequently, will be concealed in the legal economy. In such a case, the banker could be prosecuted for ML by national systems that adopted this ulterior intent in their domestic crime of ML.

4. Mistake of fact in the crime of money laundering.

An individual in error about an essential element of a crime lacks the knowledge requirement and cannot have the appropriate level of mind of the criminal offence. This is the so-called *mistake of fact*, which is generally considered a defence that excludes criminal liability since it negates a *mens rea* element.⁵⁸⁹ The argument for the defence would be, then, that the factual circumstances that make the conduct unlawful are precisely what the defendant was mistaken about. However, a mistake relating to one of the elements of a crime will not necessarily exculpate the defendant. Commentators have generally interpreted the defence as only applying to honest and serious mistakes.⁵⁹⁰ This rule is codified, for instance, in article 32 (1) of the Rome Statute,⁵⁹¹

⁵⁸⁹ See, for instance: M. Bohlander (2009) 70-71; Smith & Hogan: Criminal Law (2005) 290-293.

⁵⁹⁰ M. Bohlander (2009) 70-71.

⁵⁹¹ Signed 17 July 1998, entered into force 1 July 2002 (hereinafter, Rome Statute or Treaty of Rome).

which sets forth: ‘1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime’. The mistake of fact is also recognized in domestic legal systems.

It is outside the scope of this dissertation to study the *mistake of law*; however, it should be said that this kind of mistake is generally refused in international criminal law, primarily on policy grounds,⁵⁹² but it could be accepted, exceptionally, in domestic criminal law systems. In South Africa, for instance, in the case *S v. De Blom*,⁵⁹³ the Appellate Division held that the defendant’s ignorance of the law prohibiting her from taking jewels out of the country negated the *mens rea* required for the offence.⁵⁹⁴ The general principle against the admission of a mistake in law, is usually placed in the maxim *ignorantia legis non excusat* (i.e., ‘ignorance of the law is no excuse’). This is because, in general, it is the act itself—not knowledge of its unlawfulness—that generates culpability.

Let us analyze, below, the mistake of fact in the context of ML cases. An accused person might conceivably claim error or mistake of a number of factual elements in the *actus reus* of ML. First and foremost, of course, is the knowledge of the criminal origin of the assets involved in the process of ML. Thus, when it is clear that the defendant was persuaded that the property is of lawful origin, when it is, in fact, the proceeds of a crime that constitutes a predicate offence for the purpose of a ML offence, there is an absence of malicious intent and knowledge and no punishment should be imposed. For example, a person honestly believes that the assets involved proceed from

⁵⁹² See, e.g., article 32 (1), first sentence of the Rome Statute: ‘A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the court shall not be a ground for excluding criminal responsibility’.

⁵⁹³ 1997 (3) SA 513.

⁵⁹⁴ See this reference in: A. Ashworth ‘Ignorance of the Criminal Law, and Duties to Avoid it’ (2011) *The Modern Law Review*, Vol. 74, No. 1, p. 5.

a loan, but in fact they derive from the crime of drug-trafficking (a predicate offence for the purpose of the ML offence).

Moreover, ML operations will not be criminal if the alleged offender honestly believes that the proceeds involved were derived from a criminal activity that does not constitute a predicate offence for the purposes of a ML criminal offence.⁵⁹⁵ This type of mistake of fact might often be invoked under those jurisdictions that recognise only a limited number of predicate offences.⁵⁹⁶ This is the case of countries that adopted a catalogue/listed model of law to define the predicate offence of ML (e.g., Chile and Brazil) and in those countries that refers to the category of ‘serious offences’ to the predicate offence (e.g., Austria).

For example, Chile penalizes ML only derived from a listed predicate offence; including in the list crimes such as kidnapping and drug-trafficking offences, but excluding other serious crimes, such as fraud. Thus, in this country, the mistake of fact might be recognized when the defendant honestly believes that the property subject to laundering derived from a fraud, but in fact it derived from a listed predicate offence such as kidnapping. Another example is Austria, which penalizes ML only derived from ‘serious’ crimes (article 165 StGB); and, pursuant to article 17 StGB ‘serious crimes’ are intentional crimes punished with imprisonment of over three years. Then, the defendant might honestly believe that the funds or property derive from ‘minor’ crimes when, in fact, they come from ‘serious’ offences. In such cases, this type of mistake excludes intent.

But intent and knowledge is not absent, though, when the individual knows that the property derives from a specific criminal offence, but it is, in fact, property derived

⁵⁹⁵ Guy Stessens (2000) 124.

⁵⁹⁶ Ibid.

from a different criminal offence that constitutes a predicate offence for the purpose of the ML offence. In this case, the mistake in fact would be irrelevant, since, after all, there is knowledge of funds or property that represent the proceeds of a predicate offence. For example, in a country that adopted an ‘all-crime’ approach to define the scope of the predicate offence of ML (e.g., México) it does not matter whether the alleged offender believes that the property involved in the laundering process comes from kidnapping when it is, in fact, the proceeds of bribery. In this example, the *mens rea* element is already met, since the defendant has full knowledge or enough suspicions of the criminal origin of funds, whatever the specific predicate offence may be.

The above explained reasons should be taken into account for adopting a new definition of the ML offence, which refers to ‘all offences’ as predicate offences of ML (but only punishable if the value of the assets involved is over a specific monetary value, in a single act or through the repetition of related acts).

Furthermore, it is appropriate to highlight that a defence might also argue that there was a mistake of fact with respect to the relationship or link between the property and a specific predicate offence. This is so, for example, when in spite of knowing the criminal origin of the property, the launderer is unaware of all the intermediate conversions and transfers linking such property with a specific predicate offence. This type of mistake is, however, irrelevant for the crime of ML, since the agent was aware of the fact that the assets were criminal in origin. This type of error might often be invoked by the defense, bearing in mind that money or any other asset derived from a crime and subject to a process of ML is usually transformed through several stages before it finally enters into the legal market.⁵⁹⁷

⁵⁹⁷ See above, chapter I, section 2, when we referred to the general features of a ML process.

In the previous chapter, I proposed a ML offence that refers to a crime in general as a predicate offence, but only punishable if the value of the property is over a certain monetary value, even in a single act or through the repetition of different related acts. Hence, in the framework of my proposed definition, there may be a mistake of fact concerning the amount of criminal assets involved in the ML operation. That is to say, a mistake of fact might be accepted when the accused knows that the money derives from a crime but honestly believes that the economic value of the property is substantially *below* the quantitative limit set by the offence when, in fact, it is not. Let me illustrate this thought in the following example. Imagine a domestic crime of ML, which sets a monetary limit of USD 100,000. The defendant knows that the assets are derived from a crime, but he/she honestly believes that the total value of the assets is USD 40,000, when, in fact, the amount of the assets is USD 300,000. This mistake is relevant to prove the innocence of the defendant, since the agent is aware of the criminal origin of the funds, but he/she honestly believes that the proceeds derived from a crime that do not constitute a predicate offence for the purpose of this domestic crime of ML.

5. Proof of knowledge and ulterior (specific) intent.

Based on the nature of ML operations (e.g., hidden, complex and transnational processes, etc.), intent is not usually proved with direct evidence.⁵⁹⁸ Moreover, only the accused himself has first-hand knowledge of his/her own mental state, and he or she is unlikely to testify to his/her own laundering goals. Thus, the use of ‘circumstantial

⁵⁹⁸ For a definition of ‘direct evidence’ and its usual absence in the context of ML investigations, see above ch. IV, s. 4.7.

evidence’ rather than ‘direct evidence’ might be the most important clue for the judge’s assessment of evidence.

This way of proving the knowledge and special intent is recognized at the international level by article 3 (3) of the Vienna Convention and article 6 (2) (c) of the Strasbourg Convention, which provides the following: ‘the knowledge, intention or aim required as element of those offences [ML offences] may be inferred from objective factual circumstance of the case’. More recent international hard law instruments, such as the Warsaw Convention ⁵⁹⁹ and the EU Directive 2005/60/EC,⁶⁰⁰ provide the same idea with similar wording.

Soft law instruments, such as the 2009 Model Provisions on Money Laundering⁶⁰¹ and the OAS-CICAD Model Regulations,⁶⁰² also recognize that ‘knowledge, suspicion, intent or purpose required as elements’ for the three kinds of ML offences may be inferred from objective factual circumstances. At the domestic level, countries such as Austria,⁶⁰³ Canada,⁶⁰⁴ Spain⁶⁰⁵ and The Netherlands⁶⁰⁶ also

⁵⁹⁹ Article 9 (2) (c) of the Warsaw Convention.

⁶⁰⁰ Article 1 (5) of the EU Directive 2005/60/EC.

⁶⁰¹ See the ‘2009 Model Provisions on Money Laundering’ (UNODC, Commonwealth Secretariat and IMF, April 2009) 16.

⁶⁰² Article 2 (5) of the OAS-CICAD ‘Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and other Serious Offences’.

⁶⁰³ The crime of ML in Austria does not explicitly provide that the intentional element of the offence of ML may be inferred from objective factual circumstances. However, Austria relies on the principle of free evaluation of evidence. This is codified by Article 14 of the Criminal Procedure Code (*Strafprozessordnung, stop*) which enables the judge to make these inferences.

⁶⁰⁴ Article 462 (39) of the Canadian Penal Code specifically offers the ability to rely on circumstantial evidence in a ML case. This was confirmed by The Ontario Court of Appeal, in *R. v. Aiello* (1978), 38 C.C.C. (2nd) 485 affirmed 46 C.C.C., at page 488.

⁶⁰⁵ Pursuant to the judgments of the Spanish Supreme Court of 7 December 1996; 23 May 1997; 15 April 1998; 28 December 1999; 10 January 2000; 18 September 2001 and 29 September 2001; among other judgments.

⁶⁰⁶ The Supreme Court of The Netherlands has confirmed in a number of cases the application of indirect evidences in ML cases (e.g., *Hoge Road*, 27 September 2005, NJ 2006, 473).

recognize the inference of the *mens rea* element of ML from objective factual circumstances or indirect evidence.

Such relevant facts and objective circumstantial evidence that may establish the necessary level of mind and special intent are, for instance, the general context of the case, the systematically and repetitive perpetration of intentional acts of ‘smurfing’, the repetition and abusive use of ‘off-shore’ corporations domiciled in ‘tax haven’ jurisdictions and the administration and use of assets, directly or indirectly, linked with the commission of a crime, among other ‘circumstantial evidence’.⁶⁰⁷

The Appeal Chamber of the International Criminal Tribunal for Rwanda has described the ‘circumstantial evidence’ noting that it brings into play the rule by which no other reasonable explanation may exist as an explanation.⁶⁰⁸ In addition, it should be noted that the Trial Chamber of the Rwanda Tribunal raised a note of caution in the use of ‘circumstantial evidence’, saying the following:

Evidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention of a person is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused’s intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action.⁶⁰⁹

It is clear, in conclusion, that the *mens rea* element of the ML offence could be established through the use of ‘circumstantial’ or ‘indirect’ evidences. However, it is also clear that this indirect evidence should be sufficient and compelling enough to reach the ‘beyond a reasonable doubt’ standard. Consequently, elements of the crime in

⁶⁰⁷ See above chapter IV, section 4.7 for further circumstantial evidence, which could be invoked to demonstrate, beyond a reasonable doubt, the elements of ML offences.

⁶⁰⁸ *Nahimana et al. v. Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 524.

⁶⁰⁹ *Prosecutor v. Bagilishema* (Case No. ICTR-95-1^a-T), Judgment, 7 June 2001, para. 63.

question cannot be demonstrated with mere presumptions or indicia. The ML prosecution that invokes circumstantial evidence should respect all the procedural guarantees and the presumption of innocence at the time of proving the existence of the *mens rea* element of the offence. These are the general limits to the use of circumstantial evidence.

6. Is there a place for a negligent ML offence? Arguments in favour of only penalizing intentional crimes of ML.

A crime of negligence is one without genuine intent or recklessness, surely. Negligence imposes, in most cases, an objective standard of criminal liability, holding the accused liable for failing to exercise the degree of care expected for an ordinary, diligent and prudent individual. The question to tackle in this section is: should we recommend the adoption of a negligent crime of ML at both the international and national level?

Not all international conventions against ML (hard law instruments) allowed the adoption of a negligent ML offence. Both the Vienna Convention and the Palermo Convention are silent on this issue. The first convention to mention this option is the Strasbourg Convention that allows the prosecution of ML where the offender ‘*ought to have assumed* that the property was the proceeds [of crime]’ (emphasis added).⁶¹⁰ In this same vein, article 9 (3) of the Warsaw Convention also allows each State Party to adopt a ML offence when the offender ‘ought to have assumed’ that the property was proceeds of crime. The ‘should have assumed’ standard is best applied and generally used to describe crimes of negligence, since this standard do not imply that the defendant actually did know—only that he or she had the duty to do so. For instance,

⁶¹⁰ See, e.g., article 6 (3) (a) of the Strasbourg Convention.

when the accused did not know but ‘should have known’ that the money is crime-derived, and nonetheless transfers that money into the account of another person, then he is acting negligently.

Within soft law instruments, article 2 of the OAS-CICAD Model Regulations, also allows the adoption of negligent ML offences, when it establishes that ML criminal offences should be committed by perpetrators who ‘know, *should have known* or are intentionally ignorant’ (emphasis added). It is clear that the term ‘know’ refers to intent. It is also clear that the phrase ‘should have known’ refers to negligence, and the phrase ‘intentionally ignorant’ refers to ‘wilful blindness’.

Both the 2005 Model Legislation on Money Laundering⁶¹¹ and the 2009 Model Provisions on Money Laundering⁶¹² also provide for liability under a negligent standard for the three kinds of ML offences as drafted in the Conventions. Specifically, as an optional clause for countries, these soft law instruments provide that any person who performs any of the acts described in the three kinds of ML offences, as drafted in hard law instruments, ‘having reasonable grounds’ to believe the property constituted proceeds or ‘should have known’ that the property is proceeds of crime commits a ML criminal offence. I will highlight, again, that these phrases are not a reckless state of mind, because they do not imply that the person actually knows or suspects—only that he or she had the duty to know or that he or she had reasonable grounds to believe. At the domestic level, countries such as Germany,⁶¹³ Spain,⁶¹⁴ Singapore⁶¹⁵ and The Netherlands⁶¹⁶ penalized negligent ML activities.

⁶¹¹ See article 5.2.1 (1) (a), (b), (c), ‘2005 Model Legislation on Money Laundering’ (Report) (IMF, UNODC, 1 December 2005) 34.

⁶¹² ‘2009 Model Provisions on Money Laundering’ (April 2009) 12, 15.

⁶¹³ Article 261 (5) StGB.

⁶¹⁴ Article 301 (3) of the Spanish Penal Code.

Before adopting negligent ML offences, domestic legislative bodies should assess the probable impact of this measure, its side-effects, and, especially, the possibility of tackling the negligent conduct of ML by other potential forms of regulatory control. While there has been a growing tendency in the domestic legislation to create negligent crimes, only a few scholars have debated in particular the inclusion of negligent ML offences. One of these scholars is Guy Stessens who argues against the adoption of a negligent crime of ML solely relying on the following criticism: ‘such a drastic move away from the requirement of intent seems more inspired by the desire to make convictions for money laundering easier than by motives regarding the blameworthiness of this type of negligent conducts’.⁶¹⁷ While I agree with his point of view, I also believe that Stessens’s argument is incomplete. There are three main arguments in favour of adopting only intentional crimes of ML, which can complete Stessens’s point of view.

The *first argument* is related to critical principles of criminal law, such as the minimalist approach. This issue should be analyzed under a test of criminalization that conforms to the principle of *ultima ratio* of criminal law. This minimalist theory of criminalization is needed since it provides the set of conditions under which the State is permitted to resort to punishment. According to the minimalist approach or *ultima ratio* principle of criminal law, the law’s most coercive and condemnatory technique (that is to say, criminal norms) should be reserved for the most serious evasions of interests.

⁶¹⁵ In Singapore, article 47 (1) (2) and (3) of the CDSA, penalizes ML if the defendant either knows or ‘have reasonable grounds to believe’ that the property involved is, wholly or partly, the direct or indirect proceeds of crime.

⁶¹⁶ Articles 420 *ter* and 420 *quater* of the Dutch Penal Code criminalize laundering conducts if the offender either knows or *may reasonably suspect* that objects stem directly or indirectly from a criminal offence. In the common law, having ‘reasonable grounds to suspect’ is a form of negligence-based crime, because it does not imply that the person actually did suspect—only that he or she had reasonable ground.

⁶¹⁷ Guy Stessens (2000) 123.

Criminal law is the last resort of penalization and, in principle, it should not be invoked for minor or negligent wrongs. Less serious or negligent misconducts should be more appropriately dealt with by way of civil law or with administrative regulations. Therefore, the general rule should be to criminalize intentional conducts, and, the criminalization of negligent conducts should be an exceptional measure.⁶¹⁸

It is important to flag up, here and elsewhere, that this dissertation is proposing to penalize only high scale ML operations; that is, when the ML process involves significant sums of money derived from a crime. As concluded in chapter III, there is no doubt that intentional laundering of *substantial* proceeds of crime is a serious conduct that should be criminalized. However, it seems reasonable to say that negligent laundering conducts do not contain the necessary severity and seriousness to be punished by criminal law. Following the spirit of the minimalist approach, negligent laundering conducts could be covered by less condemnatory forms and, therefore, less intrusive laws, such as banking or administrative laws and regulations. Indeed, numerous countries decided to sanction negligent laundering by the preventive/regulatory AML system (composed of banking and administrative law and regulations) instead of adopting negligent ML offences. For instance, Argentina does not penalize negligent ML conducts, but the preventive/regulatory AML system in this country empowers their local FIU to impose fines on any person (either natural or legal person) who violates this AML regime with negligence. Article 23 (2) of the Argentine anti-ML Act No. 25,246 sets forth:

‘2. Where any of the acts had been committed with recklessness or *gross negligence* by the executive or governing body of a legal person or by several executive or governing bodies thereof, the fine to be applied [by

⁶¹⁸ See, e.g., W. A. Schabas, ‘*An Introduction to the International Criminal Court*’ (2009) 223: ‘Criminal law sets itself apart from other areas of law in that, as a general rule, it is concerned with intentional and knowing behaviour’.

the Argentine's FIU] to the legal person shall be twenty per cent (20%) to sixty per cent (60%) of the value of the assets which are the subject matter of the crime' (emphasis added).⁶¹⁹

As explained previously, 'gross negligence' means when one person falls far short of the required objective standard.

The *second argument* against the adoption of negligent ML offences is that the global trend at the domestic level is towards the inclusion of a more flexible and wider standard of knowledge, allowing the prosecution and conviction for an intentional crime of ML, of those having knowledge (intent) or *suspicious (dolus eventualis/recklessness)* that property is the proceeds of a crime. As explained above, in section 3.1., no higher *mens rea* is often required at domestic proceedings: suspicion about the criminal origin of the assets that he or she is dealing with is usually enough in order to be prosecuted and convicted for intentional ML offences in domestic proceedings. So, given the fact that the global trend is to penalize both intent and recklessness levels of mind, a moderate and balanced approach would be against the adoption of negligent ML offences as well. The penalization of intent and reckless levels of *mens rea*, as well as negligence is an exaggeration; further increasing the dramatic and unjustified expansion in the substance criminal law and the extraordinary rise in the use of punishment.

However, there is a potential problem in the application of a ML offence that only penalizes intentional crimes of ML; admitting, of course, both the 'knowledge' (intent/*dolus directus*) and suspicious (recklessness/*dolus eventualis*) about the criminal origin of the assets. This problem is particularly serious at the international level. The current definition of the international crime of ML does not define the 'suspicious' (recklessness) level of mind; and this silence could create difficulties at the domestic

⁶¹⁹ Subsection replaced by article 8 of Act No. 26,268, (Official Gazette 5 July 2007). The translation from Spanish into the English language of this article is online: <http://www.uif.gov.ar/> accessed 28 May 2009.

legislative bodies to identify and establish a precise difference between the ‘actual suspicions’ (which is recklessness/*dolus eventualis* level of mind) and ‘reasonable grounds to suspect’ (which is negligence). As explained in the preliminary comments of this chapter, both recklessness and negligence are conceptually close to one another. So, in order to draw a clear line between both degrees of criminal liability and clarify this subject matter, a detailed and precise definition of the word ‘suspicion’ should be included in the definition of the international crime of ML that this work is assembling. The definition suggested in the *Da Silva* case⁶²⁰ could be an excellent example of a detailed definition of this key word. This precise and longer definition will surely help to distinguish the recklessness/*dolus eventualis* level of *mens rea* and the negligence to comply with an objective standard of conduct. Then, a precise and detailed definition of this key concept at the international level, not only is conceptually and analytically important; it also serves as a restraint on the expansive and overly application of intentional ML offences.

There is a *third and final argument* against the adoption of negligent crimes of ML at both the international and national level. The definition of the international crime of ML is explicitly ambiguous when defining the degrees of liability (mainly, intent and negligence) of the ML offence. While all the international conventions and EU Directives on this subject matter (hard law instruments) oblige State Parties to adopt an *intentional* crime of ML [Model of Law A], the most updated hard law instrument (e.g., the Warsaw Convention)⁶²¹ allow State Parties to adopt *both* intentional and negligent crimes of ML [Model of Law B]. This allows for a degree of variation between State Parties, when defining these different degrees of criminal liability. For instance, many

⁶²⁰ [2007] 1 W.L.R. 303; [2006] 2 Cr.App.R. 35.

⁶²¹ See, article 9 (3) of the Warsaw Convention.

countries such as Argentina,⁶²² Austria,⁶²³ Brazil,⁶²⁴ India,⁶²⁵ the United Kingdom⁶²⁶ and the United States⁶²⁷ adopted only intentional ML offences; while other countries such as Germany,⁶²⁸ Spain⁶²⁹ and The Netherlands⁶³⁰ have adopted both intentional and negligent ML as a criminal offence.

However, substantial differences in the adaptation of this key element of the crime might produce difficulties for prosecutors when seeking mutual legal assistance and/or extradition from one jurisdiction to another. The following example illustrates this point:

- Country A (e.g. Argentina or the UK) implemented only an intentional ML offence (that is, the general rule) and country B (e.g., Spain) adopted both intentional and negligent ML offences (that is, the exceptional rule).
- When country B sends a Mutual Legal Assistance Request or an Extradition Request to country A demanding information of a negligent ML case or the extradition of an offender who committed a negligent ML offence, country B's prosecutor will have to

⁶²² Article 278 (1) (a) of the Argentine Penal Code.

⁶²³ Article 165 of the StGB.

⁶²⁴ Article 1 of Federal Law 9313/1998.

⁶²⁵ Section 3 of the PMLA and Section 68C of the NDPS Act.

⁶²⁶ Proceeds of Crime Act 2002 (POCA) under articles 327, 328 and 329. For further information about the United Kingdom ML offence see: P. Hynes, R. Furlong and N. Rudolf, *International Money Laundering and Terrorist Financing: a UK Perspective* (Thomson Reuters, London 2009) 17-001 – 17-034.

⁶²⁷ Title 18 USC 1956 and 1957, Money Laundering Control Act of 1986, Pub. L 99-570.

⁶²⁸ Article 261 (1) and (2) of the German Penal Code requires intention; however, article 261 (5) also penalizes negligent ML activities.

⁶²⁹ Articles 301 (1) and (3) of the Spanish Penal Code.

⁶³⁰ Article 420 bis and 420 quarter of the Dutch Penal Code.

satisfy country A's authorities that ML, as country A defines that offence, has been committed.

- Negligent ML conducts are not a crime in the requested country A. Thus, according to the principle of double or dual criminality country B's request cannot be answered by country A's authorities.

This example shows, again, how inconsistencies in the application of this key element of the international crime of ML at the domestic level, can affect the efficacy and consistency in terms of responding to the phenomenon of ML. As a result, this must be an additional and practical argument in favour of adopting only intentional ML offences (including both *dolus directus* and *dolus eventualis* levels of *mens rea*) [Model of Law A] instead of both intentional and negligent ML offences [Model of Law B].

7. Conclusion.

The negligent crime of ML serves as an excellent illustration of the phenomenon of *overcriminalization* and the unjustified and tremendous growth of criminal law and punishment in the area of ML legislation. Consequently, I am in favour of only penalizing intentional crimes of ML, but adopting the following two requirements as well. First, the intentional crimes of ML, should allow a flexible level of knowledge and intent, admitting both a *dolus directus* (intent/knowledge) and a *dolus eventualis* (actual suspicion/recklessness) levels of *mens rea* regarding the criminal origin of the assets and the ulterior intent to conceal, disguise or launder the proceeds of crime in the legal economy. Secondly, the crime of ML should contain a detailed and longer definition of the word 'suspicion' in order to draw a clear line between the 'actual suspicion' (which is recklessness/*dolus eventualis*) and 'reasonable grounds to suspect' (which is

negligence). Both standards of liability are conceptually close to one another, and should be explicitly differentiated. All these considerations should be taken, to imagine and draft the new definition of ML offences that this work is proposing to implement within the scope of international law—the law that governs relationships between countries.

Finally, It should be noted that the analyzed Models of Law A and B can be implemented by any country of the world, independent of the main characteristics of its legal system (e.g., common law or civil law). There is not a direct and clear relation between differences in the legal culture or history of a particular country and the adaptation of the analyzed models of law. Indeed, civil law countries such as Argentina are adopting the same model of law concerning the level of mind of the ML offence that is adopted by common law countries such as the UK. Both countries adopted only intentional ML offences [Model of Law A], whereas other civil or common law countries adopted both intentional and negligent ML as an offence [Model of Law B]. So, the variability in models is due simply to a question of choice, rather than to a strong difference in the legal culture or history of countries. Consequently, a move towards convergence between the analyzed models of law across the globe appears to be more attainable than perhaps previously thought.

CHAPTER VI

Should the ML offence apply to the person who committed the predicate offence?

1. Overview.

When the perpetrator(s) of an acquisitive crime launder the proceeds of their own criminal activities, they undertake so-called *self-laundering* behaviour. In contrast, when the person(s) who committed an acquisitive crime delegate the laundering of their proceeds of crime to a third party, they undertake a *third party laundering* conduct. The expressions ‘self-laundering’ and ‘third-party laundering’ are not used by any international convention or EU Directive (hard law instruments), but they are mentioned in soft law instruments, such as the 2009 Model Provisions on Money Laundering,⁶³¹ among other texts.⁶³²

The definition of the crime of ML, as drafted in hard law instruments, offers explicit variants for establishing whether the person who committed the predicate offence can be prosecuted for laundering his or her own proceeds of crime. That is to say, hard law instruments are ambiguous in terms of penalizing self-laundering conducts. For example, article 6 (2) of the Palermo Convention says that if required by fundamental principles of the domestic law of a State Party, it may be provided that the offences of ML set out in this convention would *not* apply to a person who has committed the predicate offence. In other words, a State Party *may* not prosecute the person who has committed the predicate offence for ML, if such a prosecution would be

⁶³¹ See the ‘2009 Model Provisions on Money Laundering’ (UNODC, Commonwealth Secretariat and IMF, April 2009) 10.

⁶³² See above, ch. I, s. 3, for further references and details about self-laundering and third party laundering conducts.

against the domestic law of that State Party. It is clear, therefore, that the legal strategy adopted by the international community is that each State Party has the discretion to adopt (1) a ML offence that applies to the persons who have committed the predicate offence [Model of Law A]; or, (2) a ML offence that cannot apply to the persons who have committed the predicate offence [Model of Law B].

Most of my thesis intends to determine whether or not the implementation of key elements of the international crime of ML is consistent with sound principles of criminal law and procedure. The analysis here is no exception to that main aim. Specifically, the purpose of this chapter is to evaluate if the implementation of these two models of law offered by the international crime of ML might undermine sound human rights principles, namely the right against self-incrimination and the guarantee against double jeopardy (in Latin, *non bis in idem*). As explained later, the discussion about a ML offence that can exclude the perpetrator of the predicate offence will inevitably evoke questions concerning the respect of these key principles of criminal law and criminal procedure.

My claim here is that the adoption of a ML criminal offence that applies to the perpetrator of a predicate offence does not challenge or violate these key principles of criminal law at domestic proceedings. Therefore, in order to standardize and draft a better integrated definition of the crime in question, which is also consistent with sound principles of criminal law, I propose to adopt a crime of ML that could apply to the person who committed the predicate offence; that is to say, I am in favour of adopting Model of Law A rather than Model of Law B.

In discussing these matters the order of the exposition will be the following: first, I will analyze this topic in light of a global-comparative perspective (Section 2). I will then explain the legal arguments in favour and against the adoption of a ML

offence that does *not* apply to the person who committed the predicate offence. This discussion will reveal *why* the adoption of a ML offence that *does* apply to the person who committed the predicate offence, does not challenge sound principles of criminal law (Section 4). Finally, we will examine why the non-penalization of self-laundering operations might generate impunity in some particular circumstances (section 5).

2. A global comparative perspective.

The Vienna Convention, the first international anti-ML convention, does not specify whether the ML criminal offence should or should not apply to the person who committed the predicate offence. The first convention to deal with this matter was the Strasbourg Convention which, in article 6 (2) (b), provides that ML offences may not apply to the person who committed the predicate offence, if such criminalization is against the domestic law principles. In this same vein, article 6 (2) (f) of the Palermo Convention establishes that, if required by fundamental principles of the domestic law of a State Party, it may be provided that the definition of the crime of ML would not apply to a person who has committed the predicate offence. This same clause was included in article 9 (2) (b) of the so called Warsaw Convention.

Among soft law instruments, the 2005 Model Legislation on Money Laundering⁶³³ and the 2009 Model Provisions on Money Laundering⁶³⁴ also supported

⁶³³ See in chapter II, section 5, variants 1 and 2 of article 5.2.4 of the ‘2005 Model Legislation on Money Laundering’.

⁶³⁴ The ‘2009 Model Provisions on Money Laundering’ (Report, April 2009) 10: ‘In some countries, constitutional principles prohibit prosecuting a person both for money laundering and a predicate offence. In the case of most common law countries, there do not appear to be fundamental principles that prohibit the application of the money laundering offence to self-launderers. However, if an exception is necessary, an additional provision, as the offence of money laundering “shall not apply to persons who have committed the predicate offence” should be incorporated’.

this same legal strategy: each country is free to decide whether or not ML offences shall apply to a person who has committed the predicate offence (i.e., whether or not to penalize self-laundering operations) if such criminalization is not against domestic law principles. These domestic law principles will be explained in the next section.

Still, there is one international recommendation (a soft law instrument), coming from the OAS-CICAD, that directly suggests the implementation of a ML offence that also applies to the perpetrator of the predicate offence. Specifically, article 2 (6) of the OAS-CICAD Model Regulation establishes that the ML criminal offence ‘shall be defined, investigated, tried and sentenced by a court or competent authority as *autonomous* offences distinct from any other offences’ (emphasis added). As it will be seen in further detail in the following sections, countries that adopt a ML offence that also applies to the person(s) who have perpetrated the predicate offence, consider the crime of ML an autonomous crime, different from the concealment offence, the predicate offence and any other crime.

In addition, article 7 of the OAS-CICAD Model Regulations also provides that: ‘A person who commits a laundering offence and a related serious criminal activity can be convicted for the commission of both offences’. As explained later, countries that criminalize self-laundering behaviours, thereby, allow the prosecution and conviction of both the perpetrator of the predicate offence and the subsequent laundering of his/her own offences.

At the domestic level, the different models/variants undertaken by countries in this matter can be classified into three groups:

(i) Countries such as Argentina,⁶³⁵ Austria⁶³⁶, Germany⁶³⁷ or Italy,⁶³⁸ that specifically include in the definition of their ML offences that the person who committed the predicate offence cannot be prosecuted for laundering the proceeds of his/her own crimes. Thus, in these jurisdictions, there is not conviction for ML if the alleged offender is criminally prosecuted or convicted as a perpetrator of, or aider to, the predicate offence.

(ii) Countries where the wording of the crime is silent with respect to self-laundering, but they leave this issue to their courts' discretion. For example, in China,⁶³⁹ courts ruled that the perpetrator of the predicate offence cannot be also punished for laundering his/her own proceeds of crime. In contrast, constitutional courts in Hong Kong⁶⁴⁰ and The Netherlands⁶⁴¹ confirmed that ML criminal offences in these countries

⁶³⁵ Article 278 (1) (a) of the Argentine Penal Code. More recently, the crime of ML in this country was amended to penalize self-laundering conducts (amendment dated 21 June 2011—new article 303 of the APC).

⁶³⁶ Article 165 of the Austrian StGB limits the scope of the ML offence to assets 'that derive from the crime of *another* person' (emphasis added).

⁶³⁷ Article 261 (9) of the German Penal Code (StGB), provides that a person who has been punished for the commission of the predicate offence may not be punished for ML as well.

⁶³⁸ Article 648 *bis* and *ter* of the Italian Penal Code, establishes that ML offences do not extend to the author of the predicate offence.

⁶³⁹ In China, ML is penalized in articles 312 (last amended in 2007), 349 and 191 of the Chinese Penal Code; and the wording of these three ML offences are silent about penalizing self-laundering. However, according to the *Quanzhou Cia Jianli* case, all three ML offences apply to third parties, not to the perpetrator of the predicate offence. This is cited in FATF 'First Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism in the People's Republic of China' (Report, 29 June 2007). For further details about ML offences in China see: He Ping, 'Chinese Criminal Law Concerning Money Laundering' (2003) *Journal of Money Laundering Control*; Vol. 6, No. 4, p. 340: 'It can be concluded that [in China] it is not possible to sentence the owner of the criminal money as a money launderer'.

⁶⁴⁰ The crime of ML in Hong Kong was created in 1989 under S. 25 Drug Trafficking (Recovery of Proceeds) Ordinary Law. Cap. 405, section 25 of this Law, provides that it is an offence for a person to deal with property 'knowing or having reasonable grounds to believe' that the property 'in whole or in part, directly or indirectly, represents any person's proceeds of drug trafficking'. In 1994, S. 25 of the Organized and Serious Crimes Ordinance (OSCO) Cap. 455 replicated the mental and physical elements of this offence but extended the scope of predicate offences to all indictable criminal offences. None of these ML offences specify if the person who perpetrated the predicate offence can be prosecuted for the crime of ML. However, this position was confirmed by *HKSAR v. Lok Kar-Win & Others* (1999) 4 HKC 783.

may include cases in which a person launders the proceeds of his/her own criminal conduct. That is to say, ML offences in these countries could also apply to the perpetrator of the predicate offence.

(iii) Finally, countries such as Brazil,⁶⁴² Mexico,⁶⁴³ Russia⁶⁴⁴ Spain⁶⁴⁵ or the UK⁶⁴⁶ adopted a ML offence that explicitly applies to the person who committed the predicate offence. That is to say, in these jurisdictions, laundering of a criminal's own ill-gotten profits (i.e., self-laundering operations) can be prosecuted and convicted, since the definition of the crime expressly provides that ML offences can apply to the perpetrator of the predicate offence. In these jurisdictions, the conduct of laundering proceeds of crime is penalized *per se*, regardless of whether the defendant is a self-lauderer or a third-party launderer.

⁶⁴¹ The Dutch Supreme Court in a judgement of 2 October 2007 (*NJ 2008, 16*) confirmed that the language of the Dutch ML provisions include both cases in which a person launders the proceeds of his/her own criminal conduct (i.e., self-laundering conducts) and cases in which a person launders the proceeds of another person's criminal conduct (i.e. third-party laundering).

⁶⁴² Article 1 of Federal Law 9613/1998 extends to a person who committed both the predicate offence and ML. This was confirmed by the Supreme Court of Brazil in the case No. 2245, Reporter Ministry Barbosa, Full Plenary, Judgment dated 28 August 2007.

⁶⁴³ Article 400 *bis* of the Mexico's Federal Law against organized crime is a fully autonomous crime and it penalizes self-laundering.

⁶⁴⁴ Article 174 (1) of the Russian Penal Code penalizes 'the laundering of monetary funds or other property acquired by the person as a result of a crime committed by him'.

⁶⁴⁵ Organic Law 5/2010 of 22 June 2010 modified article 301 of the Spanish Penal Code, specifying that ML offences extends to a person who committed both the predicate offence and the subsequent ML offence.

⁶⁴⁶ The ML offences under Proceeds of Crime Act 2002 (POCA) apply to 'a person', which means that there is no qualification as to who the person concerned is: these offences can apply equally to self-lauderers (i.e., to a person who commits a predicate offence and carries out the ML activities as well) or to third-party launderers (i.e., to a person who carries out the ML activities without being involved in the predicate offence). This is reinforced by section 340 (4)(a), of the POCA, which provides that it is immaterial who carried out the conduct and who benefited from it.

3. Arguments in favour and against the adoption of a ML offence that does not apply to the person(s) who committed the predicate offence.

There are three major interconnected arguments in favour of a ML offence that does *not* apply to the person who committed the predicate offence (that is, against the penalization of self-laundering). The first argument is based on the idea that the crime of ML should be drafted as a special type of a concealment crime. The second argument deals with the so-called '*privilege of self-concealment*'⁶⁴⁷ (in Latin, '*post factum delicti*') and the right against '*self-incrimination*'. Finally, the third argument, is related to the so-called '*subsequent double-penalized conduct*'⁶⁴⁸ and the *right not to be placed in double jeopardy*.

My claim in this section is that the application of these civil rights and privileges to argue against the penalization of self-laundering conducts is based on a misinterpretation of the meaning and specificities of the phenomenon of ML and ignores the autonomous nature of ML offences. Each of these three assessments are explained and confronted below:

a) *The crime of ML shall be seen and modelled as a special kind of concealment crime or crime of 'handling stolen goods'.*

A first line of reasoning proposes that ML should be seen and structured as a special type of the traditional crime of concealment (also called, in some jurisdictions the crime of 'handling stolen goods' or the crime of 'hiding another offence'). According to this

⁶⁴⁷ This doctrine was named by some scholars as 'the privilege of self-concealment' (In Spanish, '*Privilegio del autoencubrimiento*'). See, e.g., J. Palma Herrera, '*Los delitos de blanqueo de capitales*' (Edersa, Madrid 2000) 370.

⁶⁴⁸ In Spanish, '*acto posterior co-penado*'. See, e.g. C. Arangué Sanchez, '*El delito de blanqueo de capitales*' (Marcial Pons, Madrid 2000) 169. The word subsequent double-penalized conduct or co-penalized conduct is also named as 'in culpable after-act' See e.g., He Ping, (2003) 339.

view, the crime of laundering proceeds of crime, as well as the so-called crime of concealment, should be classified as punitive legal tools to prosecute and punish only a *third party* who did not commit or participate in the commission of the underlying offence, but only assisted the predicate offender in retaining, hiding or recycling the economic benefits of that predicate offence. In this view, the penalization of laundering proceeds of crime, as well as handling or hiding the proceeds of a crime, mainly aims to disrupt the cooperation provided by third parties in retaining and hiding the proceeds of a predicate acquisitive offence. The following example illustrates this idea: person X stole 1 million US dollars from a bank; subsequently, person Y retains and hides the proceeds of the crime of robbery committed by X, and therefore person Y commits a separate crime: the crime of ML that, according to this view, should be seen and drafted as an aggravated or a special kind of a concealment criminal offence.

As explained elsewhere in this work, this view was supported by several scholars (e.g., Pilar Gomez Pavon,⁶⁴⁹ Bacigalupo Zapater,⁶⁵⁰ Stessens⁶⁵¹ and Palma Herrera),⁶⁵² domestic constitutional courts⁶⁵³ and domestic legislative bodies (e.g., Austria, Germany, Italy).⁶⁵⁴

⁶⁴⁹ See, e.g., Pilar Gomez Pavón 'El bien jurídico protegido en la receptación, blanqueo de capitales y encubrimiento' in Cuadernos de Política Criminal, No. 53, Year 1994.

⁶⁵⁰ Enrique Bacigalupo Zapater, 'Estudio comparativo del Derecho Penal de los Estados miembros de la UE sobre represión del reciclaje o blanqueo de dinero ilícitamente obtenido', in Bacigalupo Zapater (ed.) '*Curso de Derecho penal económico*' (Marcial Pons, Madrid, 1998) 199.

⁶⁵¹ Stessens (2000) 121.

⁶⁵² José Manuel Palma Herrera, '*Los delitos de blanqueo de capitales*' (Edersa, Madrid 2000) 284.

⁶⁵³ See, the Supreme Court of Argentina, case '*Geosur S.A.*' (judgement dated 4 November 2003).

⁶⁵⁴ In these jurisdictions, the crime of ML is structured as a law enforcement tool for prosecuting and punishing only a third party who assisted offenders to retain or conceal the benefits of their crimes. So, founded on this view, in these jurisdictions, the crime of ML does not apply to the perpetrator of the predicate offence. See, e.g., article 648 *bis* and *ter* of the Italian Penal Code and article 261 (9) of the German Penal Code (StGB).

Nevertheless, the above explained opinion, which seeks to punish only third-party laundering since ML and concealment offences are in essence the same type of crimes, is incorrect. As concluded in chapter III, the supporters of this last position are misunderstanding the legal nature and specificities of ML offences with those of the traditional crime of concealment.

The key difference between these two crimes lies in *two* main aspects. *First*, the *mens rea* and *actus reus* elements of the concealment offence, in most cases, do not trespass on the so-called ‘pre-laundering stage’; while the *actus reus* and *mens rea* elements of a crime of ML is more complex and active. This is especially true in ML operations that include substantial amounts or economic values of the involved criminal assets and, moreover, in ML procedures that contain, according to the terminology of the UNODC, the three stages or phases of a full ML process: that is, the placement, layering and integration stages.⁶⁵⁵ For instance, a person X who stole cash money from a bank and hides the money in the domicile of a third party Y, who then retains and disguises these ill-gotten assets in the garage of his house, will not subsequently convert, transfer, save or use these proceeds in the legal economy, as occurs in a process of ML.

Secondly, the traditional crime of concealment seems to be a uni-offensive crime that protects, mainly, the administration of justice as a social value. The crime of ML in high scale, though, should be seen as a multi-offensive crime that protects several rights and social interests that go beyond the administration of justice. In particular, ML offences should protect not only the administration of justice, but also the value protected by the predicate offence and the socio-economic system or fair competition of

⁶⁵⁵ See *ut supra* chapter I, section 3.

the market; since high-scale ML operations often harm all these social interests.⁶⁵⁶ As such, it was concluded in chapter III, that ML offences should be seen and modelled as autonomous criminal offences, because they protect independent social interests not safeguarded by any other criminal offence, including the traditional crime of concealment.

On this basis, it could be concluded that the (autonomous) crime of ML should be structured and defined independently of the crime of concealment. This means, for instance, that ML offences should apply equally to a person who commits a predicate offence and carries out the ML activities (i.e., self-laundering), as well as a person who carries out the ML activities without being involved in the predicate offence (i.e., third-party laundering). In other words, this means that ML offences may apply to ‘any person’.

b) The privilege of self-concealment and the right against self-incrimination.

The second argument in favour of a ML offence that does not apply to the person who committed or participated in the commission of the predicate offence, is based on the so-called privilege of self-concealment (in Latin, the privilege of ‘*post factum delicti*’) and the right against self-incrimination.

According to the privilege of ‘*post factum delicti*’, the person who perpetrates an acquisitive crime has the right not to be additionally punished for a ‘post-offence’ conduct that is linked with concealing the proceeds of his or her own crime. This privilege of self-concealment is applicable, for example, when a murderer hides the body of the victim; or, moreover, when a person robs a bank and, subsequently, decides

⁶⁵⁶ For a further analysis of the different social values protected by the crime of ML, see chapter III, sections 2 and 3.

to retain and hide the stolen cash money in his own house. Another example is when dangerous drivers escape from a scenario of a crash and, later, hide the crashed car in the garage of their house. In these examples, the alleged offender cannot be additionally and separately punished for a ‘post-offence conduct’ that relates to the proceeds of his or her own crime, since that would mean forcing the perpetrator to surrender out of his/her free will. A person who commits an acquisitive crime must not be expected to surrender him/herself to the police or judicial authorities out of his/her free will, neither could it be expected that he/she will not try to disguise or use the proceeds of his/her own crimes, giving them an unrecognisable form. As a result of this reasoning, the acts of concealing, possessing and retaining the proceeds of his/her own offences, are not interpreted as a separate wrong or crime that justifies an additional punishment.

This idea is explained by the FATF Mutual Evaluation Report on Germany:

148. [...] the impossibility of convicting a person for the predicate offence and for ML at the same time derives from fundamental principles of German domestic law, such as the general principle of express immunity from criminal proceedings for instances in which perpetrators assist themselves after the fact (*Selbstbegünstigungsprinzip*), which is granted by section 257 and 258 of the CC (StGB). According to this principle, an offender (i.e. the one having committed the predicate offence) cannot be additionally and separately punished for a “post-offense behaviour” that relates to the proceeds of his or her own crime.⁶⁵⁷

In this same line of reasoning, scholars such as Blanco Cordero,⁶⁵⁸ Carlos Aranguéz Sánchez⁶⁵⁹ and Javier Alberto Zaragoza Aguado,⁶⁶⁰ believe that the non-penalization of self-laundering conducts is not only founded on the right not to be

⁶⁵⁷ FATF, ‘Mutual Evaluation Report on Germany’ (Report, 2010) 53. A similar explanation is offered in FATF, ‘Mutual Evaluation Report on Austria’ (Report, 2008) 38.

⁶⁵⁸ Blanco Cordero (1997) 470-471.

⁶⁵⁹ Carlos Aranguéz Sánchez (2000) 172.

⁶⁶⁰ Javier Alberto Zaragoza Aguado ‘El blanqueo de bienes de origen delictivo’ in ‘*Combate del lavado de activos desde el sistema judicial*’ (CeCPLA, Montevideo, Uruguay 2003).

additionally punished for a post-offence (*'post factum delicti'*), but also, in particular, on safeguarding the guarantee *against self-incrimination*. In other words, these authors believe that a ML criminal offence that applies to the perpetrator or participant in the predicate offence might be incompatible with the 'right against self-incrimination'.

This relevant right is linked with two closely connected rights, which are internationally recognised as lying at the heart of the notion of a fair trial and due process. One is the right 'not to be compelled to testify against himself or to confess guilt', which is declared in article 14 (3) (g) of the International Covenant on Civil and Political Rights; while, the other is the 'right of silence' that concerns indirect coercion in the form of the potential drawing of adverse inferences from failure to speak. However, the right against self-incrimination runs, in practice, deeper than the right of silence, since the former concerns direct coercion applied to citizens not only to answer questions or to comment on statements, but also to supply or give information under threat of criminal conviction.⁶⁶¹ Therefore, the essence of the right against self-incrimination is that citizens should not be coerced into producing evidence against themselves, so the person who commits a crime has the right not to incriminate himself/herself (the Latin maxim is, *nemo debet prodere se ipsum*).

This fundamental guarantee of due process is explicitly covered by article 8.2(7) of the Inter-American Convention on Human Rights, which provides: 'the right not to be compelled to be a witness against himself or to plead guilty'.⁶⁶² This provision aims at protecting the right of the accused or the suspect to refuse to answer questions, because he or she is presumed innocent and, hence, has no duty to contribute to the

⁶⁶¹ A. Ashworth *'Human rights, Serious crime and Criminal procedure'* (Sweet & Maxwell, London 2002) 18.

⁶⁶² The Inter-American Convention on Human Rights (also known as the Pact of San José de Costa Rica) (adopted in 22 November 1969, and it became into force on 18 July 1978).

proceeding.⁶⁶³ This aspect of the privilege against self-incrimination has been recognised by the Strasbourg Court, in the case *Saunders v. UK*,⁶⁶⁴ as a way of ensuring that the prosecution 'seek to prove their case against the accused without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused'.

Nevertheless, the application of the privilege of self-concealment and the right against self-incrimination, as being prohibitive to the criminalization of self-laundering is equally not convincing. I do not accept the analogy between ML offences and the application of these human rights principles and privileges. As concluded in chapter III, ML is a distinct and independent offence, separate from the criminality originating the proceeds. Consequently, if a person commits a second offence as a result of the first offence (e.g., by concealing and laundering his/her own proceeds of crime or by threatening a witness) that is, simply, a separate and renewed wrong, requiring separate criminal punishment. In other words, if a person seriously harms further social values, not protected by a first and prior criminal offence, that is a second wrong and conduct, requiring independent punishment.

According to the terminology of the UNODC, a typical money laundering operation usually includes three full stages: placement, layering and integration.⁶⁶⁵ Then, on this basis, an additional damage to further rights not safeguarded by the predicate offence (or by any other criminal offence) may occur, for instance, when the conduct of self-laundering practised by the perpetrator of a predicate offence goes beyond the first and second stages of pre-washing/placement and layering, including a

⁶⁶³ A. Ashworth, 'Security, Terrorism and the Value of Human Rights', in Goold B., Lazarus, L. (eds) *Security and Human Rights*, (Hart Publishing, Oxford 2007) 220.

⁶⁶⁴ *Saunders v U.K.* (1997) 23 E.H.R.R. 313, para. 68.

⁶⁶⁵ See above, chapter I, section 3.

third stage of investment, use or integration of substantial proceeds of crime in the legal economy. As concluded in chapter III, large-scale ML operations that include active recycling behaviours may seriously damage (independent) social values that go beyond the rights protected by the predicate offence, the concealment offence and any other criminal offence. Specifically, the social values seriously harmed by high-scale ML operations might be: the predicate offence's social value, the administration of justice and the fair and transparent competition of the economic market.

Based on this analysis, it seems to be clear that the privilege of self-concealment and the right against self-incrimination do *not* apply in the context of ML offences. Punishing a person for self-laundering behaviours does not involve a violation to these human rights principles and due process guarantees, since it does not demand that the perpetrators of the subsequent crime of ML give evidence against themselves at all. It is only a question of penalizing a subsequent wrong and crime, separate from the criminality originating the proceeds. As a result, it could be argued that those who agree with and support the application of the privilege of self-concealment and the right against self-incrimination in self-laundering are ignoring the specificity and autonomous nature of ML offences.

Having said the above, a balanced and prudent opinion might be that the privilege of self-concealment and the right against self-incrimination only apply when the alleged offenders really assist themselves after the fact, retaining, hiding or simply possessing the proceeds of their own crime. This is the case, for instance, when a person robs a bank and subsequently retains and disguises the stolen cash money in the garage of his house. Another example is, if *D* steals a bicycle, rides it around and, finally, *D* conceals/retains the bicycle in his house. It should be clear that these examples cannot be classified as ML operations. ML is an active, hidden and complex conduct, separate

from the criminality originating the proceeds, which implies a new act by its authors. Then, given the fact that these self-concealment behaviours are not ML operations, the punishment of these behaviours means a violation to the rights and due process guarantees in question. But again, this conclusion is correct and logical, only because these are not ML conducts.

c) The so-called 'subsequent double-penalized conduct' and the 'right not to be placed in double jeopardy'.

A third and final argument in favour of adopting a ML offence that does not apply to the perpetrator of the predicate offence stems from the idea that self-laundering is an 'accessory' conduct, a 'natural consequence' of the predicate offence, so it is 'absorbed' by the predicate offence. If the conduct of self-laundering is 'part of the history' of the predicate offence, it would be unfair to impose on the perpetrator of the predicate offence another separate penalty for laundering his/her own ill-gotten assets. This argument is the so-called 'subsequent double-penalized' doctrine, which is expressly emphasised by Guy Stessens as follows: 'it could be argued that to punish an offender for laundering the proceeds from the predicate offence he committed himself would amount to punishment for being an accomplice to his own offence'.⁶⁶⁶

Along this same line of reasoning, the Argentine legislative body claimed: 'It would be pointless to impose on the person who committed the predicate offence an additional penalty for laundering his own proceeds of crime', because this last conduct is assumed and absorbed in the commission of the prior criminal offence.⁶⁶⁷ Assuming

⁶⁶⁶ Stessens (2000) 121.

⁶⁶⁷ Argentine Congress Debates (Honourable Chamber of Deputy, Vol. 1999, p. 8673).

also that laundering behaviours are part of the ‘same historical happening’ of the predicate offence, Argentine legislators added that the perpetrator of an acquisitive crime, who decides to launder his/her own proceeds of crime (i.e., self-laundering), may only be prosecuted and convicted by criminal courts with jurisdiction upon the predicate offence and for the commission of one single crime (the predicate offence), rather than for two independent crimes (the predicate offence, on the one hand, and the subsequent crime of laundering proceeds of crime, on the other).⁶⁶⁸ This explanation implies that criminal courts with jurisdiction to judge the predicate offence should consider self-laundering behaviours as an aggravating circumstance when determining the punishment for the commission of the predicate offence, so that this would result in a more severe punishment for the offender of the predicate offence. In light of this reasoning, Argentine legislation limits the scope and size of ML offences to assets derived from a crime committed ‘by a person who did not take part in such crime’; that is, the crime of ML does not apply to the person who committed or participated in the commission of the predicate offence.⁶⁶⁹

However, this idea that ML is a natural consequence or just a continuous part of the predicate offence, as alleged by the supporters of the ‘subsequent double-penalized doctrine’ is incorrect. The predicate offence, as one punishable act, does *not* include another concurrent and subsequent punishable act, that is, the concealment, conversion or laundering of property derived from crime. Both, the predicate offence and ML are independent wrongs and crimes that should be prosecuted and investigated independently of one another.⁶⁷⁰ Then, contrary to the opinion of various legislations

⁶⁶⁸ Ibid.

⁶⁶⁹ Article 278 (1) of the Argentine Penal Code.

⁶⁷⁰ See above, in ch. III, s. 3, the case *R. Roger Brian Alexander and others*, (2011) 2 Cr. App. R. (S.) 297-305.

(e.g., Austria, China and Germany) and scholars (e.g., Heba Shams,⁶⁷¹ Gomez Pavon⁶⁷² and Miguel Acosta Romero and Eduardo Lopez Betancourt)⁶⁷³ ML is not a derivative offence or an after-the-fact act, in the sense that its harm is derived only from the harm of the predicate offence that generated the money involved in it. Instead, as I concluded in previous chapters, ML ought to be seen as an autonomous and independent offence that safeguards several social values that are beyond the social interests defended by the predicate offence of ML, the concealment crime and any other criminal offence.⁶⁷⁴ This is especially true in high-scale ML operations (i.e., when the criminal assets involved in ML exceed the monetary limit established in the ML criminal offence). In conclusion and based on this analysis, it is clear that the so-called subsequent double-penalized conduct does not apply in the context of ML offences.

In similar terms, other scholars have said that the *ratio iuris* for adopting a ML offence that excludes the predicate offender is based, in particular, on the protection of the right not to be placed in *double jeopardy*.⁶⁷⁵ According to this view, subsequent laundering conducts seriously harm the same social value protected by the predicate offence, since ML is just a continued part of the predicate offence. Then, as such, punishing both conducts would violate the right not to be placed in *double jeopardy*. Put differently, this position argues that a person who has been prosecuted or convicted for the commission of the predicate offence cannot be prosecuted or punished for ML as

⁶⁷¹ Heba Shams (2004) 7.

⁶⁷² Pilar Gomez Pavon (1994) 284.

⁶⁷³ Acosta Romero and Lopez Betancourt (1994) 226.

⁶⁷⁴ See chapter II, sections 2 and 3.

⁶⁷⁵ See, e.g., José Manuel Palma Herrera, '*Los delitos de blanqueo de capitales*' (Edersa, Madrid 2000) 376-379.

well, in order to avoid multiple punishments for the commission of a single criminal offence (the predicate offence and the subsequent self-laundering).

Civil law systems often refer to the principle against double jeopardy by its Latin name, *non bis in idem* or *ne bis in idem* ('not twice for the same thing'). The rationale offered for the *double jeopardy rule* takes into account both the adverse psychological effect on individuals subjected to repeated prosecutions, and also the need to prevent abuses of State power. Moreover, if the State, with all its power and resources, was allowed to bring repeated prosecutions against a person for the same offence, this would be objectionable as compelling him/her to live in a continuing state of insecurity.⁶⁷⁶

International law provides protection against double jeopardy by prohibiting the same person from being tried or punished twice for the same offence. The spirit of this principle emerges, for instance, in article 14 (7) of the International Covenant on Civil and Political Rights, which provides that: 'No one shall be liable to be tried or punished again for an offence for which he has already been convicted or acquitted with the law and penal procedure of each country'.⁶⁷⁷ Article 4 (1) of Protocol No. 7 of the European Convention on Human Rights provides the same principle with similar wording. At the domestic level this right is covered, for instance, in the U.S. Constitution's Fifth Amendment guarantee: 'nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb'.

Basing its opinion on the right not to be placed in double jeopardy, the German Federal Court of Justice (BGH) has ruled that the *ratio iuris* for drafting article 261 (9) of the StGB, which penalizes only third party laundering conducts, is to avoid punishing

⁶⁷⁶ On this principle see, for instance, Anthony Colangelo, 'Double jeopardy and multiple sovereigns: a jurisdictional theory' (2009) *Washington University Law Review*, vol. 86, No. 4, p. 772 – 857.

⁶⁷⁷ Entered into force 23 May 1976.

perpetrators twice, once for the predicate offence and once for the act of ML.⁶⁷⁸ In this sense, this ruling added that self-laundering behaviours are not considered to be subject to criminalization in Germany since they are deemed not to entail any additional damage to further rights or social values than the harms already caused by the predicate offence.⁶⁷⁹

Nevertheless, this last assumption is incorrect. As concluded above, the predicate offence and the subsequent conduct of ML are distinct and separate wrongs, which seriously harm different social values. Thus, given the fact that ML is *not* absorbed by the predicate offence, the doctrine of double jeopardy is not violated or restricted at all; since the State, upon this reasoning, would not be prosecuting or convicting twice for committing one crime. In contrast, the State will be prosecuting for the commission of two different crimes: the predicate offence and the subsequent crime of ML, which should be seen and structured as independent crimes.

In the leading case *United States v. Edgmon*,⁶⁸⁰ the defendant was convicted for both the predicate offence and the subsequent crime of ML; and he challenged this conviction alleging a violation to the doctrine of double jeopardy. In particular, he contended that his conviction for both the predicate offence and ML constituted multiple punishments for the same offence, since the predicate offence and its subsequent laundering are ‘part of the same history’. The court rejected the defendant’s argument, alleging that ‘his ML conviction was not a violation of double jeopardy

⁶⁷⁸ Judgment published in *New Journal for Penal Law (Neue Zeitschrift für Strafrecht, NStZ)* 2003, p. 499.

⁶⁷⁹ *Ibid.*

⁶⁸⁰ 952 F. 2d 1206 (10th Cir. 1991).

because legislators appear to have intended the ML statute to be a separate crime distinct from the predicate offence that generated the money to be laundered'.⁶⁸¹

Moreover, the position against the penalization of self-laundering activities, since ML is in essence an after-the-fact act of complicity in a previous criminal conduct, seems to be *totally unfair*, and it undermines the so-called 'principle of equality before the law'. A number of distinct meanings are normally given to the provision that there should be equality before the law. For this dissertation, this provision means the status or condition of being treated *fairly* according to regularly established norms of justice.⁶⁸² It is *unfair* that, according to the idea in question, only a third-party launderer (i.e., a launderer who was not the perpetrator of the predicate offence) could be prosecuted for ML, instead of the self-launderer (i.e., a person who launders the proceeds of his/her own crimes). More precisely, it is unfair that only the launderer who was not the perpetrator of the predicate offence shall respond and be punished for the violation of relevant social values; which are also damaged by criminal(s) that launder the proceeds of their own crimes.

To be prosecuted and punished for the crime of ML, there should *not* be substantial differences between the one who launders the proceeds of his or her own crimes (self-laundering) and the one who launders the proceeds of a predicate offence committed by a different person (a third-party launderer). Under a fair analysis, both the self-laundering and third-party laundering are ML operations that seriously damage the same social values or interests. Consequently, to avoid violations to the 'principle of

⁶⁸¹ A. Chang and A. Herscovitz, 'Money Laundering' [1994-1995] *American Criminal Law Review*, Vol. 32:499, p. 510.

⁶⁸² The principle of equality before the law or equality under the law is covered, for instance, by article 7 of the United Nations Declaration of Human Rights, which states that 'All are equal before the law and entitled without any discrimination to equal protection of the law'.

equality before the law', a high-scale ML operation should be penalized itself, regardless of whether the ML defendant is a self-launderer or a third-party launderer.

4. The non-penalization of self-laundering conducts could generate impunity.

A final argument in favour of criminalizing self-laundering conducts is based on a cost-benefit analysis. Adopting ML offences that do not apply to the person who committed the predicate offence might result in impunity. In particular, the non-criminalization of self-laundering might give criminal enterprises, such as terrorist groups and organized crime, an opportunity to enrich themselves and continue constructing their economic power in the legal economy. In addition, it produces difficulties for prosecutors when seeking mutual legal assistance and extradition from one jurisdiction to another. Again, it is worth illustrating this idea with the following example.

- Country A (e.g., the United States) adopted a ML offence that criminalizes self-laundering conducts; meanwhile country B (e.g., China or Germany) does not penalize self-laundering.
- In country A, a criminal organization composed of ten members kidnaps the son of a politician and receives a million dollar for his release.
- Afterwards, two of the ten members of the criminal group, who are accountants specialized in ML, try to conceal, invest and launder the proceeds of the crime in country B, which, again, does not penalize self-laundering.
- The two accountants could effectively stay immune as country B would, in most cases, lack jurisdiction with regard to the foreign predicate offence and could not

prosecute the two accountants for ML as they were also the perpetrators of the predicate offence.

- The only alternative for country B is to extradite the two accountants to country A, but only under the formal request of country A. If country A's formal request is not delivered, country B cannot arrest the two accountants, since they did not commit any crime according to country B's legislation.

This example shows, again, how inconsistencies in the adaptation of the international crime of ML at the domestic level can affect the efficacy and efficiency of the response to the phenomenon of ML.

5. Concluding comments: the supremacy of the autonomous approach.

Countries adopting a ML offence that does not apply to the person who committed the predicate offence are confusing both the concealment offence and the predicate offence with the legal nature and specificities of ML offences. These three offences are distinct and independent crimes. There are pronounced differences in the subjective and objective elements (*mens rea* and *actus reus* elements of the crime) and differences in the social values or interests that should be protected by each of them. On this basis, it could be said that high-scale ML operations shall be penalized, investigated and modeled independently of both the predicate offence and the concealment offence. This means, for instance, that high-scale ML should be penalized regardless of whether or not the ML offender is a third-party launderer or a self-launderer. This conclusion should be taken into account for drafting the new ML offence that this study is proposing to include at the international level.

Once again, in this chapter, I have demonstrated that the analyzed models of law may be implemented by any State Party, regardless of main and relevant characteristics and history of their legal systems. For instance, both civil and common law State Parties (e.g., China, Germany, and others) are adopting the same model of law. Both are adopting a crime of ML that does not apply to the person(s) who have committed the predicate offence [Model of Law A]; while other civil or common law State Parties (e.g., Mexico and the UK) adopted a domestic crime of ML that applies to the persons who have committed the predicate offence [Model of Law B]. Hence, the matter seems to be more a question of choice among the offered models of law, rather than based on strong differences in the history and legal culture of State Parties. Consequently, a move towards convergence and a better integration or unification between the above analyzed models of law appears to be more attainable and natural than perhaps previously thoughts. Put differently, the adoption of a ML offence, as drafted at hard law instruments, that applies to the person(s) who have committed the predicate offence, seems to be more possible and natural than perhaps previously thought. This is specially true, bearing in mind that this uniform and integrated alternative is in line with human rights principles of criminal law and criminal procedure.

PART III
JURISDICTIONAL PROBLEMS OVER MONEY LAUNDERING
OFFENCES

CHAPTER VII

Establishing jurisdiction over money laundering

1. Overview.

As concluded in Chapter II, section 4, the phenomenon of ML is a global, hidden and complex problem, which requires an international response and analysis. International harmonization and convergence efforts in respect to the criminalization of ML were set out, specifically, in Part II of this work. In addition to these efforts, it might be interesting to examine the different forms of jurisdictions to prosecute and convict ML offences; and, more precisely, to study the jurisdictional problems that are likely to arise in a transnational ML case. These are, in fact, the main topics of this chapter, which will be evaluated from a global-comparative angle.

The chapter is organized as follows. First, I will define the various forms of jurisdiction over ML offences (section 2). Later, I will analyze the legal problems that may arise when the predicate offence of ML was perpetrated in a foreign country or territory (section 3). Then, I will examine the increasing use of extra-territorial jurisdiction as a basis to prosecute and convict ML offences in domestic proceedings. My claim will be that the exercise of extra-territorial jurisdiction over ML offences, at the domestic level, poses an obvious challenge to the sovereignty of the countries in

question and is incompatible with the right against double jeopardy (section 4). Finally, I will explain *why* and *how* extra-territorial jurisdiction over ML offences can be included, with no challenge to sound principles of criminal law and criminal procedure, over the jurisdiction of a specialized international court for high-scale ML purposes (section 5).

2. The various forms of jurisdiction over money laundering offences.

2.1. Defining the various forms of jurisdiction.

Before examining several jurisdictional problems over ML offences, it is imperative to define the various forms of jurisdictions that I will invoke for the analysis in this chapter. The term ‘jurisdiction’ is not a unitary or univocal concept. On the contrary, both the longstanding practice of States and doctrinal writings make it clear that the term jurisdiction must be considered in its two distinct aspects; which are, jurisdiction to prescribe (also called ‘legislative’ jurisdiction) and jurisdiction to enforce (also called ‘executive’ jurisdiction). Jurisdiction to prescribe refers to a State’s authority to criminalize given conduct; while jurisdiction to enforce the authority, *inter alia*, to arrest and detain, to prosecute, try and sentence, and to punish persons for the commission of acts so criminalized.⁶⁸³ It should be noted that the jurisdiction to prescribe can be extraterritorial, while jurisdiction to enforce is strictly territorial. A State may not enforce its criminal law in the territory of another State without that State’s consent. As Roger O’Keefe observes: ‘the territorial character of jurisdiction to enforce is seen most clearly in the impermissibility, as of right, of extraterritorial police powers: the police of

⁶⁸³ For further details about the prescriptive jurisdiction (authority to make laws) and the enforcement jurisdiction (authority to apply and enforce laws) see, e.g.: Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *Journal of International Criminal Justice (JICJ)*, 736-744.

one state may not investigate crimes and arrest suspects in the territory of another state without that other state's consent'.⁶⁸⁴

There are different bases for the exercise of jurisdiction, including territoriality, nationality of the accused (active personality), nationality of the victim (passive personality), and universality.⁶⁸⁵ '*Territorial jurisdiction*' is when States enact criminal laws that allow their national courts to prosecute anyone accused of committing crimes within their territory, regardless of the nationality of the accused or the nationality of the victim. The territoriality principle of jurisdiction is a consequence of the sovereignty which States possess over their territory. This is the most common and important principle since it is the only form of jurisdiction where a State can be reasonably sure of exercising the procedures of its own courts.⁶⁸⁶

Jurisdiction based on the *nationality of the defendant* (also called '*nationality principle* or the '*active personality principle*') is when a State is entitled to exercise jurisdiction over its nationals, even when they are found outside the territory, and even when the perpetrator is no longer a national or has only become a national after committing the crime.⁶⁸⁷ Akin to the principle of territoriality, the nationality principle is also relatively uncontroversial under existing international law.⁶⁸⁸

⁶⁸⁴ Ibid, 740. Moreover, under the so-called *Lotus* case, States could set rules for persons, property and acts outside their territory in the absence of a prohibitive rule, provided that they enforce these rules territorially (in keeping with the ban on extraterritorial enforcement jurisdiction). See, PCIJ, *SS Lotus* (France v. Turkey), PCIJ Reports, Series A, No. 10, p. 18-19 (1927).

⁶⁸⁵ Other principles such as the *protective principle* have also a role in the State's exercise of jurisdiction in the field of criminal law, but those principles are not relevant to the current discussion.

⁶⁸⁶ For further details about the historical growth of the territorial principle in Continental Europe, England and the United States see, e.g.: Cedric Ryngaert, '*Jurisdiction in International Law*' (OUP, Oxford 2008) 42-83.

⁶⁸⁷ See, similarly, Cedric Ryngaert, (2008) 88-89.

⁶⁸⁸ See, e.g., Roger O'Keefe (2004) 739: The two heads of jurisdiction unquestionably available to States in respect of all offences are territoriality and, in relation to extraterritorial offences, nationality of the defendant.

In addition, jurisdiction based on the *nationality of the victim* (also called the 'passive personality' principle) is when States have the power to punish an offender for a crime he/she committed on the territory of another State, on the ground that the victim is a national of the extraterritorial State.⁶⁸⁹ This basis of criminal jurisdiction is somewhat rarer and exceptional in contemporary International Law.⁶⁹⁰ For instance, the passive personality principle was heavily criticized by Judge Moore in the Lotus case,⁶⁹¹ and even there the majority, which accepted that Turkey had the right to punish Mr. Demons, did not fully endorse the principle of passive personality.⁶⁹² Having said this, it should be noted that, ultimately, there currently seems to be no rule under international law prohibiting this basis for criminal jurisdiction over domestic offences.⁶⁹³

There is generally no agreed doctrinal definition of *universal jurisdiction* in customary and conventional international law.⁶⁹⁴ Nevertheless, this does not preclude any definition, which embodies the essence of the concept as the ability to exercise jurisdiction, regardless of the nationality of the accused or the victim or the absence of any link with the State where the court is located.⁶⁹⁵ The controversy surrounding the

⁶⁸⁹ A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (OUP, Oxford 2010) 67.

⁶⁹⁰ Ibid.

⁶⁹¹ *SS Lotus (France v. Turkey)*, Permanent Court of International Justice, 1927, Series A, No. 10, p. 70.

⁶⁹² Ibid, No. 10, 18-19. For further details about the Lotus case and its persisting influence in the public international law approaches to jurisdiction, see: Cedric Ryngaert, (2008) ch. 2.

⁶⁹³ Chehtman (2010) 67.

⁶⁹⁴ See, e.g., the dissenting opinion of Judge ad hoc, Van der Wyngaert in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (Judgement of 14 February 2002) 41 I.L.M. 536, paragraph 44. For the philosophical foundation of the theory of universal jurisdiction, its legal elements and its dissenting opinions, see, e.g.: A. Chehtman (2010) 114-136; C. Ryngaert (2008) 100-127.

⁶⁹⁵ See, similarly, Princeton Project on Universal Jurisdiction, which provides that universal jurisdiction pertains broadly to the power of States to punish certain crimes irrespective of the place committed and

concept of universal jurisdiction is not whether the concept validly exists as a basis for jurisdiction in international law, rather the scope of its applicability. The universal jurisdiction applies to a limited number of crimes.⁶⁹⁶ It seems common place in contemporary times and customary international law to assume that international crimes like slavery, slave trade, piracy, apartheid, torture, terrorism and hijacking attract universal jurisdiction.⁶⁹⁷ The application of universal jurisdiction is also widely recognized for genocide, crimes against humanity and war crimes, that is, for the ‘core’ crimes of the Treaty of Rome.⁶⁹⁸ These international ‘core’ crimes are considered offences against humanity as a whole and have to be treated as crimes of international character and concern.⁶⁹⁹

2.2. An international comparative analysis.

United Nations international conventions against ML include mandatory and optional measures concerning ML jurisdiction. Regarding mandatory provisions, State Parties are required to establish jurisdiction where the ML offence is actually committed in their territory and aboard vessels flying their flag or aircraft registered under their laws

by whom committed (i.e., in the absence of other grounds for the exercise of jurisdiction. Available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf, accessed 20 March 2012.

⁶⁹⁶ See, e.g., Rosalyn Higgins, *Problems and Process: International Law and How We Use it* (OUP, Oxford 1994) 58.

⁶⁹⁷ See, e.g., Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001-2002) 42 *Virginia Journal of International Law* 81. See also Kenneth C. Randall, ‘Universal Jurisdiction Under International Law’ (1988) 66 *Texas Law Review*, Vol. 66 791-841.

⁶⁹⁸ Signed 17 July 1998, entered into force 1 July 2002.

⁶⁹⁹ For further details about the difference between international ‘core’ crimes and the so-called treaty-based crimes, see above chapter II, section 6.1.

at the *tempus commissi delicti*.⁷⁰⁰ That is, these hard law provisions require that State Parties assert jurisdiction on the usual basis of the principle of territoriality.

More interesting for our analysis are the optional criteria, which leave room for the application of extra-territorial principles. United Nations conventions concerning ML set forth a number of further basis for jurisdiction that State Parties may assume when: (i) the offence is committed against one of their nationals;⁷⁰¹ (ii) the offence is committed by one of their nationals or stateless habitual resident in their territory;⁷⁰² (iii) the offence is linked to ML planned to be committed in their territory;⁷⁰³ (iv) the offence of ML is committed against the State Party.⁷⁰⁴

However, these UN international conventions also make it clear that the above-mentioned optional basis for jurisdiction are not exhaustive. State Parties can establish additional bases of jurisdiction without prejudice to the norms of general international law and in accordance with the principles of their domestic law.⁷⁰⁵

It should be noted that non-UN hard law instruments (e.g., the Strasbourg Convention, the Third anti-ML EU Directive 2005/60/EC and the Warsaw Convention) do not explicitly refer to any definite head of jurisdiction over ML offences. Concerning this topic, they only refer to the jurisdiction in ML cases even when the predicate offence was committed in a foreign country or territory. For instance, article 1 (3) of the EU Directive 2005/60/EEC provides that a crime of ML is perpetrated even if the

⁷⁰⁰ Article 4 (1) Vienna Convention; article 15 (1) Palermo Convention and article 42 (1) United Nations Convention against Corruption (UNCAC).

⁷⁰¹ Article 15 (2) (a) of the Palermo Convention and article 42 (2) (a) of the UNCAC.

⁷⁰² Article 4 (1) (b) (i) of the Vienna Convention; art. 15 (b) of the Palermo Convention and art. 42 (2) (b) of the UNCAC.

⁷⁰³ Art. 4 (1) (b) (iii) of the Vienna Convention; art. 15 (2) (c) of the Palermo Convention and art. 42 (2) (c) of the UNCAC.

⁷⁰⁴ This base of jurisdiction is explicitly mentioned only by article 42 (2) (d) of the UNCAC.

⁷⁰⁵ Art. 4.3 Vienna Convention; art. 15 (6) Palermo Convention and art. 42 (6) of the UNCAC.

activities that generate the goods to be laundered take place in the territory of another Member State or in a third country.⁷⁰⁶ We will further analyze this topic in the next section.

Given the explicit options offered by hard law instruments, State Parties have implemented the jurisdictional provisions over ML offences in a number of ways. Of course, the territoriality principle continues to play a major jurisdictional role in the context of ML offences. The prevalence of the territoriality principle in the context of ML offences might be attributable to the increasing incrimination of ML even when the predicate offence was committed outside the jurisdiction where the ML offence was perpetrated. As explained below, in section 3, based on the territorial principle, most State Parties allow the prosecution and conviction of ML offences when the predicate offence was committed abroad.

Other countries, however, went one step further including extra-territorial jurisdiction over ML offences (e.g., on the basis of the nationality principle or directly including the universal jurisdiction). The term ‘extraterritoriality’ is confusing. For this work, ‘extraterritorial jurisdiction’ ought to imply that a State exercises its jurisdiction without any ‘real’ and ‘substantial’ territorial link (*extra-territorial*). For instance, China’s jurisdiction extends to the offences of its citizens, regardless of where in the world that crimes take place. So, Chinese Courts will recognize ML acts as crimes according to the Chinese penal laws, even though they may have been committed outside of Chinese territory, provided that the people criminally liable are citizens of

⁷⁰⁶ In this same vein, see below: article 9 (2) (a) of the Strasbourg Convention and article 9 (7) of the Warsaw Convention.

China or foreigners who have acquired the Chinese nationality after the perpetration of the act.⁷⁰⁷

Another example is Austria, which explicitly establishes extra-territorial jurisdiction over ML offences. Article 64 (1) (8) of the StGB states that: ‘Austrian penal laws are applicable regardless of the penal laws which are valid for the scene of crime to the following offences being committed abroad’, quoting explicitly the crimes of ML, when the laundering activities are committed abroad and the predicate offence is committed in Austria. In addition, article 65 (3) of the StGB states the general principle that ‘it is sufficient that the offence is liable to prosecution according to Austrian law if there is no penal power at the place where the criminal act was committed’.⁷⁰⁸

A final example is Spain, which explicitly included the universal jurisdiction over ML offences (see below, article 301 (4) of the Spanish Penal Code). So, Spanish Courts may recognize ML acts as crimes pursuant to the Spanish penal laws, even though they may have been committed outside of Spanish territory, and regardless of whether the people criminally liable or the victim is a citizen of Spain. I will further refer to this last alternative in due course.

3. The condition of dual criminality in the context of predicate offences perpetrated in a foreign country or territory.

We will see that, based on the territorial principle, most jurisdictions allow the prosecution and conviction of ML offences even when the predicate offence was

⁷⁰⁷ FATF ‘First Mutual Evaluation Report on Anti-ML and Combating the FT of the People’s Republic of China’ (Report, 29 June 2007) 26.

⁷⁰⁸ The translation into the English language of these articles is in: FATF/OECD and IMF, ‘Mutual Evaluation Report of Austria’ (Report, 26 June 2009) 38.

committed in a foreign country or territory. The main purpose of this section is to analyse the legal problems that may arise when a country punishes ML covering predicate offences committed abroad, without including and meeting the condition of dual criminality.⁷⁰⁹

First of all, we need to understand the meaning and extension of this condition in the context of predicate offences. A ML offence that takes place purely in the territory of one State poses no jurisdictional problems. This is, when the whole conduct(s) of ML occurred in the territory of one State. However, ML is likely to be a trans-border process so it is common, for instance, that the predicate offence is perpetrated in country A, while most of the ML offence takes place in a different country B. In this regard, if State B has territorial jurisdiction over ML offences that concern the proceeds from a prior offence committed in a foreign country A, most legal systems require that this predicate offence be incriminated in State A (where the predicate offence took place) and in State B (where most of the ML offence took place). This is the so-called dual criminality requirement for predicate offences. More precisely, the condition of dual criminality for predicate offences means that ‘proceeds of crime’ can include assets derived from a conduct committed abroad, if that conduct constitutes an offence in the jurisdiction where that conduct occurred and would have constituted an offence within the territory of the State adopting the crime of ML. The following example may clarify this idea:

- An offence of trafficking animal species occurs in Chile (a criminal conduct in Chile).
- Later, assets derived from that behaviour are laundered in Argentina, where the trafficking of animals is not penalized.

⁷⁰⁹ The words ‘dual criminality’ and ‘double criminality’ will be used interchangeably.

- Then, according to the condition of dual criminality, ML cannot be prosecuted in Argentina, since assets were derived from a behaviour penalized only in Chile (where the predicate offence was perpetrated), but not in Argentina (where the ML operation occurs).

The principle of dual criminality also means that proceeds derived from a conduct which is *not* penalized in the jurisdiction where it was committed, but it is under the legislation where the act of laundering was perpetrated, does not constitute a predicate offence. Let us illustrate this idea with this example:

- Cigarette smuggling takes place in Chile, behaviour that is *not* a crime in Chile.
- Subsequently, assets derived from that conduct are laundered in Argentina, where cigarette smuggling *is* a crime.
- Then, ML cannot be prosecuted in Argentina, since assets derived from a conduct that is not a crime in Chile (where the predicate offence was committed), but it is only a crime in Argentina (in a jurisdiction where the laundering occurred, but not the predicate offence).

The examples presented in the previous paragraphs leads one to conclude that, the function of the dual criminality principle in respect to the jurisdiction of the predicate offence is different from that in the context of international cooperation in ML criminal matters. In the former context, the dual criminality principle is a condition for the State that seeks territorial jurisdiction over the predicate offence of ML committed in a foreign country or territory; while in the latter context, it is a condition for the

requested State to be able to punish and pose investigatory or provisional measures that are requested by a foreign country.⁷¹⁰

At the international level, the Vienna Convention, the first international convention, is silent on this issue. This is logical in view of the fact that all State Parties are obliged, under this convention, to penalize the same predicate offences of ML, namely drug trafficking offences. Of course, the question of dual criminality of the predicate offence is posed when hard law instruments include other predicate offences. Article 6 (2)(a) of the Strasbourg Convention, on the other hand, establishes that in cases of ML ‘it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party’; but this convention is silent concerning the condition of dual criminality of predicate offences. In similar terms, article 1 of the EU Directive 91/308/EEC and article 1 (3) of the EU Directive 2005/60/EC provide that ML shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country. But, again, both EU Directives are silent concerning the condition of dual criminality in the context of predicate offences.

The Palermo Convention is the first international convention that provides the condition of dual criminality in the context of predicate offences committed outside the jurisdiction of the country adopting the ML offence. In particular, article 6 (2) (c) of the Palermo Convention provides that

[...] offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing this article had it been committed there.

⁷¹⁰ For further details about the principle of dual criminality in the context of international cooperation between countries see above, chapter II, section 6.3.

In similar terms, article 9 (7) of the Warsaw Convention provides that ‘each party shall ensure that predicate offences for money laundering extend to conduct that occurred in another State, which constitutes an offence in that State, and which would have constituted a predicate offence had it occurred domestically’. But the convention further provides that ‘each Party *may* provide that the only prerequisite is that the conduct would have constituted a predicate offence had it occurred domestically’ (emphases is added). This provision would amount to a lifting of the double criminality requirement but as it comes forth from the wording above, this is an optional provision. Thus, it is up to the State Party to decide whether to opt for this or maintain double criminality. The UN Convention against Corruption provides a similar clause.⁷¹¹

Both the 2005 Model Legislation on Money Laundering⁷¹² and the 2009 Model Provisions on Money Laundering⁷¹³ also provide that ‘proceeds of crime’ include proceeds of an offence committed outside the national territory if the conduct constitutes an offence in the State or territory where the conduct occurred and would have constituted an offence if committed within the national territory of the State adopting the crime of ML. Nevertheless, other soft law instruments recommended punishing ML even when the predicate offence was committed in a different State, but they are silent concerning dual criminality requirements. This is the case of OAS-CICAD Model Regulations, which simply sets forth:

The [ML offence] defined in Article 2 shall be investigated, tried, judged and sentenced by a court or other competent authority regardless of whether or not the illicit traffic or other serious offense

⁷¹¹ See UNCAC, article 23 (1) (a), (b) and (2) (c).

⁷¹² See article 5.2.1 (3) of the ‘2005 Model Legislation on Money Laundering’ (Report) (1 December 2005) 34.

⁷¹³ Section 3 (9) of the ‘2009 Model Provisions on Money Laundering’ (Report) (April 2009) 17.

occurred in another territorial jurisdiction, without prejudice to extradition when applicable in accordance with the law.⁷¹⁴

At the domestic level, the different models/variants on this matter may be classified in three groups.

- (i) Countries such as Argentina,⁷¹⁵ Brazil,⁷¹⁶ Germany⁷¹⁷ and Uruguay⁷¹⁸ where ML offences explicitly provide: (1) that the crime of ML is punishable even when the predicate offence was committed in a different State; (2) as long as the predicate offence is punished in the jurisdiction where it was committed and would have been constituted a crime in the State where the act of laundering was committed. That is, these countries have explicitly penalized laundering activities derived from a foreign predicate offence, but setting down the condition of dual criminality.
- (ii) Countries where, despite the fact that the wording of the crime is silent with this respect, the issue is clarified and left to the analysis of their courts. For instance, articles 420 *bis* and 420 *quater* of the Dutch Penal Code only refer to the penalization of laundering derived from ‘objects that directly or indirectly stem from an offence’, so they do not explicitly refer to predicate offences committed abroad.

⁷¹⁴ Article 4 of the OAS-CICAD Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and other Serious Offences (OAS, Washington DC, USA 2005).

⁷¹⁵ Article 279 of the Argentina Penal Code provides that: ‘The provisions of this Chapter will be in force even when the predicate offence was perpetrated outside the special scope of application of this Code, as long as the predicate offence was also punishable in the place where it was committed [and in the Republic of Argentina]’.

⁷¹⁶ Brazilian anti-ML Law No. 9,613, dated 3 March 1998.

⁷¹⁷ As a general rule, any conduct criminalized in Germany and abroad constitutes a predicate offence to ML under German law, but providing the condition of dual criminality. However, Article 5 and 6 of the German Penal Code provide for certain exceptions to this rule and apply German law even in the absence of dual criminality. Most of these exceptions are: piracy, trafficking in human beings and migrant smuggling, illicit trafficking in narcotics and counterfeiting of currency or securities, as well as certain forms of sexual abuse of children and certain environmental crimes.

⁷¹⁸ Article 83 of Law No. 17,016 of 1998 points out that: ‘The provisions of this act will be in force even when the predicate offence that gives rise to the assets, products or instruments was committed abroad as long as it is also punished in the place where it was committed and in the Republic of Uruguay’.

However, the Supreme Court of this country in a ruling of 1 December 1998 (*NJ 1999*, 470), held that Dutch ML offences are, at a minimum, applicable to predicate offences that have been committed abroad if the relevant conduct has been criminalized both under Dutch criminal law and the criminal law of the country in which it took place.⁷¹⁹

(iii) Other countries such as Canada,⁷²⁰ Hong Kong⁷²¹ and Spain⁷²² established that ML is punishable even if the predicate offence took place in a different country or territory, but they have expressly removed the condition of dual criminality for predicate offences.

Scholars such as Blanco Cordero,⁷²³ Del Carpio Delgado,⁷²⁴ Fabián Caparrós⁷²⁵ and Palma Herrera⁷²⁶ are in favor of penalizing ML conducts even when the predicate offence was committed outside the jurisdiction where the ML offence was perpetrated. This is recommended, in summary, in light of the fact that ML is often a trans-border process, in the sense that the predicate offence may occur in one jurisdiction and the conduct(s) of laundering themselves in another. Then, they believe that, the frequent

⁷¹⁹ FATF/OECD and IMF, 'Mutual Evaluation Report of the Netherlands' (Report, 2011) 50.

⁷²⁰ Jurisdiction to prosecute the ML and possession of property offences under Canadian law is established so long as the foreign conduct would have been an offence had it occurred in Canada (regardless of whether the offence constitutes an offence in the foreign country). See FATF, 'Mutual Evaluation Report of Canada' (Report, 29 February 2008) 43.

⁷²¹ By virtue of section 25 (4) OSCO, conduct amounting to the commission of a predicate offence can occur in another country. This is so when the conduct would have constituted an indictable offence if it had occurred in Hong Kong. However, under this same provision, it is not necessary that the conduct constituted an offence in that other country.

⁷²² Article 301 (4) of the SPC. But, as explained later in more detail, Spain has gone much further, recognising universal jurisdiction over ML offences.

⁷²³ I. Blanco Cordero (1997) 248.

⁷²⁴ J. Del Carpio Delgado (1997) 143.

⁷²⁵ E. A. Fabián Caparros (1998) 383.

⁷²⁶ J. M. Palma Herrera (2000) 814.

atomization of ML operations (i.e., constituent elements within the soil/territory of different States) requires extending the scope of criminal law beyond the territorial boundaries of individual States.

However, this argument is incomplete. In order to complete this analysis, the question here is whether a State claiming jurisdiction over ML offences should also impose requirements regarding the dual criminality of the predicate offence to avoid tensions with the legality principle— as enshrined in Article 7 of the ECHR and Article 15 of the ICCPR. The answer to this question is simple: pursuant to the legality principle, it would be unacceptable and unfair to prosecute and punish someone in State A for ML conducts derived from a prior conduct perpetrated in country B, if those derived proceeds are perfectly lawful under the law of State B. If that occurs, one of the physical elements of the ML offence as drafted in State A will be lacking, namely the requirement that the proceeds should be *criminally* derived. An example will clarify this idea: if there would be no dual criminality condition, State A (e.g. Argentina) could punish the recycling of proceeds from trafficking animals carried out in State B (e.g., Chile), even if trafficking animals is not a criminal offence in State B. In conclusion, it is clear that one main factor that merits the inclusion of dual criminality in respect to predicate offences flows from the legality principle: ‘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’.⁷²⁷

In addition, it could be said that the inclusion of the condition of dual criminality in the context of predicate offences is critical from a practical perspective. Prosecuting ML for State A, will be difficult (or impossible) in cases where the act of laundering was perpetrated in State A, and the proceeds derived from a non-penalized conduct

⁷²⁷ The International Covenant on Civil and Political Rights, 999 UNTS 171. Article 7 (1) of the ECHR establishes the same principle using identical wording.

committed in country B. In accordance with the rules of dual criminality in the context of international cooperation, the legal authorities of country B will not be allowed to collaborate with the prosecution of the laundering investigation in country A, since in that country B the predicate offence, from where the assets derived, is not a crime.

Finally, it could be said that the condition of dual criminality for predicate offences committed abroad has both a legal and a practical rationale. Both of them must be considered in order to analyze its implications and propose its application in the context of predicate offences.

4. The inclusion of extra-territorial jurisdiction over ML offences at the domestic level.

4.1. Introduction.

As explained above, most hard law instruments against ML require that State Parties must assert jurisdiction on the usual basis of the principle of territoriality. However, they also include optional measures concerning ML jurisdiction, leaving room for the application of extra-territorial principles in the domestic level. Given these explicit options offered by hard law instruments, State Parties have implemented extra-territorial principles, such as the nationality principle (e.g., China) or directly the universal principle (e.g. Spain) to establish jurisdiction over ML offences. For these countries, of course, it is insufficient to only apply the principle of territoriality; or extend the territorial jurisdiction even when the predicate offence occurred in a foreign country or territory. Thus, they invoked extra-territorial jurisdiction basis over ML offences at domestic proceedings.

In the following lines, I will critically analyze two case studies, which can be considered ‘models of law’ for countries in the increasing adoption of extra-territorial jurisdictional principles over ML offences: first, the Spanish case study—article 301 (4) of the Spanish Penal Code that granted universal jurisdiction over ML offences. Secondly, the US case study—*Pasquantino et al v. the United States* that expanded extra-territorial jurisdiction of US Courts to any economic crime, such as the crime of ML, based on the mere contact or use of a US/interstate mail and wire communication.

Both the Spanish and the US case studies will be examined in detail because many of the rules and theories that supported the inclusion of extraterritorial jurisdiction over ML offences at the domestic level originated in these two countries.

The analysis of these examples will reveal that the inclusion of extraterritorial jurisdictional bases over ML offences at the *domestic* level might challenge the sovereignty of other countries and the right against double jeopardy. I will now turn to the first case study.

4.2. The Spanish case study: universal jurisdiction over money laundering offences (article 301 (4) of the Spanish Penal Code).

I have already explained that most of the international conventions, such as the Warsaw Convention, provide that the country where the ML offence occurs maintains jurisdiction regardless of whether the predicate offence was committed in a different jurisdiction or not. Nevertheless, Spanish legislation goes far beyond the Conventions, since it includes ML as one of the offences that could be judged on the basis of the universal principle of justice. Specifically, article 301 (4) of the Spanish Penal Code states that: ‘The offender shall equally be punished even if the crime from which the assets derive, or the acts punished in the previous paragraphs [the crime of ML] has

been committed, either *entirely* or partially, abroad’ (emphasis added).⁷²⁸ Therefore, ML offences may be judged by Spanish courts, regardless of the nationality of the offender, the victim, or, furthermore, the country or territory where both the predicate offence and the ML offence took place.

Spanish scholars, such as José Manuel Palma Herrera,⁷²⁹ argue that it would have been more convenient to place article 301 (4) within the offences that are mentioned in article 23 of the Organic Statute of the Judicial Power, which lists the international crimes to which the principle of universality is granted. Article 23 (4) of the Spanish law on judicial power (in Spanish, ‘*Ley organica del poder judicial*’, LOPJ, No. 6/1985 of 1 July 1985) sets forth:

‘The Spanish jurisdiction shall be equally competent to judge the acts committed, either by Spanish citizens or foreigners, outside the national territory, which are capable of being categorized, under the Spanish Law, as any of the following crimes: a) Genocide, b) Terrorism, c) Piracy and illegal seizure of aircraft, d) Counterfeiting of foreign currency, e) Crimes related to prostitution, f) Illegal trafficking of psychotropic, toxic and narcotic drugs, and g) any other crime that, according to International Treaties and Conventions should be pursued in Spain’.⁷³⁰

Concerning the principle of universality the Spanish Supreme Court, Constitutional Tribunal, holds that this principle resulted in a ‘teleological reduction’ of the central aim of the notion of universal jurisdiction upheld by the Spanish legal order. They also argue that it was the legislator’s intention to make Spain a country that observes the principles of unconditional universal jurisdiction for the prosecution of the most egregious and serious crimes. Thus, no additional link other than the nature of the crime is required to proceed and prosecute these crimes based on the universal

⁷²⁸ The translation of article 301 (4) of the Spanish Penal Code from the Spanish to the English is mine.

⁷²⁹ José Manuel Palma Herrera (2000) 818.

⁷³⁰ The translation of article 23 (4) of the LOPJ, from the Spanish to the English language is mine.

principle.⁷³¹ Based on these comments, it could be said that Spanish legislation considers ML offences one of the ‘most egregious and serious crimes’. This opinion is in line with the wording of article 3 (5) of the Vienna Convention, which referred to ML offences as ‘serious’ crimes that concerns the international community.

The Spanish literature reflects different views on the convenience of including the universal jurisdiction for ML offences. For instance, Machado Pelloni believes that this is an unnecessary and exaggerated provision, going far beyond the principles that are suggested not only by international conventions and recommendations but also by a comparative law analysis of the issue.⁷³² This is especially true bearing in mind that Spain seems to be the only country in the world that explicitly included ML as one of the crimes that could be investigated and convicted on the basis of the principle of universal jurisdiction.

Other Spanish scholars, however, had a different interpretation. Zaragoza Aguado, for instance, believes that the inclusion of the universal clause is positive in all senses.⁷³³ This scholar claims that the inclusion of universal principles will facilitate the toughest prosecution of ML that is not always punished because it includes complex stages and its sphere of action often extends beyond one or two countries and territories.⁷³⁴ Moreover, according to this author, the globalization of the economy and the technological development had a direct impact on the manner and space in which

⁷³¹ See Spain Supreme Court, Constitutional Tribunal (*Supremo Tribunal Espanol, Tribunal Constitucional*), 26 September 2005, available in Spanish online at: www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-html. In this case, the STE, Tribunal Constitucional, reversed the decision of the Central Criminal Court (Audiencia Nacional), 13 December 2000; Supreme Court (Tribunal Supremo), 25 February 2003, both available online in English at: www.derechos.org, accessed 3 January 2011.

⁷³² See Fernando Machado Pelloni, ‘Derecho Penal internacional: un estudio a propósito de su presente y de su futuro’, JA 23/02/2005.

⁷³³ Javier Alberto Zaragoza Aguado, ‘El blanqueo de bienes de origen delictivo’, in ‘*Combate del lavado de activos desde el sistema judicial*’, (CeCPLA, Uruguay 2003).

⁷³⁴ Ibid.

the hidden process of ML is perpetrated. Globalization allows launderers to practise trans-border and more complex ML operations that are extremely difficult to be investigated and convicted. Thus, the implementation of universal principles is necessary to avoid existing impunity in many jurisdictions, especially in the denominated 'tax haven' jurisdictions.⁷³⁵

In this same line of reasoning, Jose Manuel Palma Herrera⁷³⁶ supports the inclusion of universal principles for ML offences, but only when the proceeds derive from drug trafficking activities. In particular, he says that drug trafficking criminal groups engaged in ML operations do not have a nationality and do not recognize territorial borders. In the context of globalization, drug trafficking criminal groups usually try to elude domestic legal regimes and investigations by moving from State to State or engaging in acts of laundering within the territories of more than one State. Thus, the inclusion of universal principles for drug-trafficking ML offences is founded on the idea that the principle of territoriality, itself, is insufficient to prosecute ML in an efficient and consistent way. As a result, he argues that one alternative to consistently prevent and prosecute drug trafficking groups that deal with criminal assets and perpetrate trans-border ML operations is through the exercise of universal jurisdiction over ML offences at the domestic level. Moreover, in so doing, countries expect to improve the prosecution of ML operations linked with drug trafficking enterprises.⁷³⁷

The weakness of the above argument, however, is that ML offences may be committed by a single criminal or, moreover, by any type of organized criminal enterprises (e.g., organized crime and terrorist groups), which are not drug-trafficking

⁷³⁵ For a description of tax haven jurisdictions in the context of trans-border ML operations, see above, chapter I, section 3.

⁷³⁶ José Manuel Palma Herrera (1999) 818.

⁷³⁷ For a similar position and argument see: Juana Del Carpio Delgado, '*El delito de blanqueo de bienes en el nuevo Código Penal*' (Tirant lo Blanch, Valencia 1997) 400-404.

groups. Therefore, as explained in previous chapters, the justification to criminalize ML operations is on the total amount and monetary value of the proceeds of crime involved, rather than on the quality and special conditions of the individuals that committed the predicate offence of ML. Based on this assessment, this work is proposing to punish ML, but only if the value of the property involved in the ML operation is over a limited monetary value, in a single act, or through the repetition of different related acts. Put differently, this dissertation is proposing to only punish large-scale ML operations, regardless the quality and number of the individuals that performed the predicate offence of ML. I will further refer to this argument in due course.

Even though it could be positive and possible in theory, Fabián Caparrós argues that, in practice, the adoption of the universal principle for the crime of ML will cause countless conflicts between jurisdictions which shall only be solved through international treaties and agreements.⁷³⁸ I agree with this author in that the application of the principle of universality may give rise to jurisdictional conflicts, since this theory does not grant exclusive jurisdiction to a State. However, the opinion of this scholar is incomplete. It should also be noted that the adoption of universal jurisdiction is inconsistent with the right not to be placed in double jeopardy (in Latin, the *non bis in idem* or *ne bis in idem*). The *legal ratio* offered for the double jeopardy rule takes into account both the psychological effects on individuals subjected to repeated prosecutions, and also the need to prevent abuses of State power. If two or more different States, with all their power and resources, are allowed to bring repeated

⁷³⁸ Fabian Caparros (1998) 559.

charges against a person for the same crime, this would be objectionable as compelling this person to live in a continuing state of insecurity.⁷³⁹

Aranguéz Sanchez also believes that the adoption of universal jurisdiction over ML offences will cause countless conflicts between jurisdictions. Then, he believes that if the goal of the Spanish legislator was to guarantee jurisdiction to prosecute ML operations that took place in several jurisdictions around of the world, they could have simply defended the ubiquity criterion.⁷⁴⁰ I will refer to the theory of ubiquity in the next section. For the moment, it is sufficient to say that this theory is a flexible and expansive interpretation of the principle of territoriality. Under this theory an offence is deemed to have taken place on the territory of a State as soon as an element of this offence has taken place on that territory. Therefore, an e-mail, fax, telephone call or the deposit of money in a bank account, might create enough links between these conducts and the territory of a State to exercise jurisdiction over these facts. For instance, the theory of ubiquity provides that if a person physically situated in the territory of Germany orders the transfer of criminal money, which is deposited in a Spanish bank account, to another bank account in the Cayman Islands, then any of these three countries could have jurisdiction to judge the crime of ML. Germany could invoke jurisdiction arguing that the order to transfer was issued in its territory and both Spain and Cayman Islands could claim that the proceeds of crime are deposited in bank accounts open in these two jurisdictions.

As a result of the above analysis, it could be said that Aranguéz Sanchez's argument also fails. The ubiquity theory is not a valid alternative of the principle of universality, as proposed by this author. None of these theories grant exclusive

⁷³⁹ The spirit of the right against double jeopardy emerges, for instance, in article 14 (7) of Protocol No. 7 of the ECHR.

⁷⁴⁰ Aranguéz Sanchez (2000) 310.

jurisdiction to a State; so, they equally pose serious challenges to the sovereignty of other States and may violate the right not to be placed in double jeopardy.

4.3. The United States case study: the leading case ‘Pasquantino et al. v. the United States’.

In general, the United States adopts the principle of territory (and, exceptionally, the passive or active nationality principle) to establish the jurisdiction of their courts over criminal offences, such as ML. For instance, Section 1957 (b) of the USC (United States Code) states jurisdiction of the US Courts, when the ML offence takes place in the US territory or the predicate offence of ML takes place outside the territory of this country. But the 18 USC 1956 (c)(7)(B) stipulates that only some of the predicate offences contained in the list or catalogue are predicate offences for ML if they occurred in a foreign country. Examples of these offences are, the crime of participation in an organized criminal group and racketeering, as well as illicit trafficking in stolen and other goods and a fraud (which is not a fraud against a foreign bank).⁷⁴¹

Having said the above, it should be noted that, from the case ‘*Pasquantino v United States*’,⁷⁴² the Supreme Court of this country extended the jurisdiction of their criminal courts to judge economic crimes such as ML offences. In particular, the Supreme Court decided—by 5 votes in favour and 4 votes against—to enlarge the US jurisdiction in those circumstances where: (i) the US would have a reasonable and founded interest with regard to offences that substantially occurred in a foreign country; (ii) but, this is, as long as, at any moment since the beginning of the commission of the

⁷⁴¹ See FATF, ‘Third Mutual Evaluation Report on the United States of America’ (Report, 23 June 2006) 33.

⁷⁴² *Pasquantino v. United States*, the US Supreme Court, 26 April 2006.

crime, a mail and wire system of this country is used (i.e., the mail and wire fraud statute).

In order to deeply understand the importance of this decision we should make a brief comment of this case's background. In the case *Pasquantino* the US Supreme Court had to decide over a conflict of interpretation of the law and jurisdiction submitted by the US Court of Appeals for the First Circuit, in the case '*US v Francis Boots et. al.*' and the US Court of Appeals for the Second Circuit, in the case entitled '*US v Trapilo et. al.*'. Both courts disagreed about whether the mere use of the US mail and wire systems in the commission of a crime that substantially took place abroad, was enough for the US Courts to request jurisdiction over this offence.

The case involved Carl Pasquantino, David Pasquantino and Arthur Hiltz who were convicted by the District Court of the State of Maryland for ordering by phone large quantities of discounted liquor from liquor-stores in the United States and transporting the liquor across Canadian borders. The liquor entered Canada without being declared to Canadian Customs Officers, thus evading special customs duties which, at that time, would have been approximately twice the liquor's purchasing price. Defendants appealed the first and second instance sentences until the case was taken up by the US Supreme Court.

It is clear that the Supreme Court of the United States in the *Pasquantino* case is invoking the theory of ubiquity to establish jurisdiction over the US courts. As explained in the first case study, the principle of ubiquity is usually invoked to establish jurisdiction over the principle of territoriality. Under the ubiquity theory, a crime is deemed to have taken place on the territory of a State, as soon as an element of this offence has taken place on that territory. However, someone could argue that, at least in the *Pasquantino* case, the principle of ubiquity applies and acts, in practice, as a

modality of an extra-territorial jurisdictional basis. In this case, there is no need for an extensive physical connection between the conduct and the US territory in order to assert jurisdiction on basis of the principle of territoriality. A simple telephone call was sufficient for the US court to recognize conducts in question under the US penal laws, even though they may have been committed, substantially, outside of the US territory, and regardless of whether the people criminally liable or the victim is a citizen of the US.⁷⁴³

This seems to be the view of Judge Ruth Ginsburg, one of the dissenting voices in this case, who suggested that jurisdiction, in the *Pasquantino* case, is based on very tenuous territorial links, such as a simple e-mail or telephone call.⁷⁴⁴ Therefore, it is clear that this interpretation of the ubiquity theory may create more problems than solutions, since it will be too frequent and easy for US courts to have jurisdiction over numerous criminal economic cases, which substantially occurred in foreign jurisdictions.

Other courts adopted a different and more prudent interpretation and application of the principle of ubiquity to establish territorial jurisdiction over economic crimes, such as ML offences. For instance, the Supreme Court of Canada in *R. v. Libman*, held that ‘all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada’.⁷⁴⁵ Then, pursuant to this case, it is sufficient that there be a ‘real’ and

⁷⁴³ Although someone may disagree with the fact that the principle of ubiquity is, in this case, a modality of an extra-territorial principle, my claim is that the two types of jurisdictional basis have the same rationale. I do not see, in practice, a main difference between this broad interpretation of the principle of ubiquity and extra-territorial jurisdiction, since the application of both principles allow States to exercise jurisdiction in cases where there is no real and substantial link/connection between the offence and the territory of that State. Of course, a link based on a fax or a simple e-mail, as proposed in *Pasquantino case*, is not a real and significant link with the State.

⁷⁴⁴ *Pasquantino v. United States* (2006) p. 43.

⁷⁴⁵ *R. v. Libman* (1995) 2 S.C.R. 178.

‘substantial’ nexus between an offence and this country, to establish jurisdiction over economic crimes, such as ML offences. Of course, the determination of what a ‘significant portion’ or a ‘real’ and ‘substantial’ link will depend on the particular factual situation. However, it seems to be clear that a simple e-mail or telephone call, when the offence was committed substantially in a foreign jurisdiction, cannot mean an extensive and sufficient physical connection between the offence and the territory of a State. So, the interpretation of the principle of ubiquity in the case *R. v. Libman*, in order to establish jurisdiction within the principle of territoriality, seems to be better and more prudent, compared to the broad interpretation held in the case *Pasquantino*.

4.4. Some final thoughts.

In favour of including extra-territorial jurisdictional basis over ML offences in the analyzed domestic case studies (i.e., the Spanish and the US cases), someone could argue: first, that it is questionable whether the US might not have some affirmative obligation or right to prevent its assets or wire systems from being used for criminal purposes; and, second, that the universal approach adopted by the Spanish legislation could also be justified, based on the idea that countries have a responsibility to prevent harm to another State, when they might be harmed from the advance of high-scale and trans-border ML operations.

Nevertheless, the weakness of these arguments is founded on the following two main assessments. First, the analyzed US/Spain case studies could create several conflicts of law. Both the universal and the ubiquity doctrine, as interpreted in the *Pasquantino* case, may give rise to jurisdiction conflicts in the sense that neither of

these theories grant exclusive jurisdiction to a State. The combination of the universal principle and the ubiquity doctrine is therefore likely to result in a multiplication of jurisdictional claims over the same money laundering scheme and, at the same time, the damage and challenge to the sovereignty of the countries where the act of laundering was substantially committed.⁷⁴⁶ Secondly, the analysis of these two case studies is showing that the prosecution of ML offences, in this context, could clash with the respect of the right against double jeopardy.

5. The crime of money laundering within the jurisdiction of a specialized international penal court.

5.1. Introduction

In section 3, it was shown that many States based their jurisdiction over ML offences primarily on the territorial principle, even when the predicate offence was committed in a foreign jurisdiction. In section 4, the increasing globalization was marked as one of the factors that favours the use of extra-territorial jurisdictional basis. However, it is clear from the analysis in previous sections that the inclusion of extra-territorial principles to establish jurisdiction over ML offences *at the domestic level* might challenge the sovereignty of other countries and violates the right against double jeopardy.

⁷⁴⁶ It should be noted that the sovereignty and the principle of non-intervention in the domestic affairs of other States in the context of ML investigations is covered, e.g., in article 4 (1) of the Palermo Convention: ‘State Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States’.

But this might not be the case, if extra-territorial principles are included at the jurisdiction of an international criminal court in charge of large-scale ML offences. In order to solve conflicts and mitigate exorbitant assertions of jurisdiction, my claim is to include extra-territorial jurisdictional bases for serious and transnational ML offences, but at the international level; in particular, within the scope of a specialized international tribunal. Of course, the application of this international jurisdiction must be limited in different ways. Later, I will detail some of these limited provisions.

The inclusion of serious ML offences at an international court conformed by independent and international judges would guarantee fair trials with due respect for the defendant's legal and constitutional principles, such as the principle of due process. Moreover, giving international jurisdiction over ML could have positive ramifications for domestic criminal law, enriching the jurisprudence of national courts and challenging prosecutors and judges to display greater zeal in the prevention and the repression of ML.

The idea of including ML offences under the jurisdiction of an international tribunal is not new. In 1994, a group of experts that elaborated the so-called 'International Law Commission's Draft Statute of an International Criminal Tribunal' (ILC) suggested that the proposed International Criminal Court (ICC) could be given jurisdiction, among others, over serious drug trafficking offences, including drug trafficking-ML, which poses an international dimension.⁷⁴⁷ However, leading industrialised nations, including the US and the UK, resisted this concession with the result that the Treaty of Rome, as approved in mid-1998, excludes such matter from its

⁷⁴⁷ See, e.g. Crawford 'The ILC's Draft Statute for an International Criminal Tribunal' (1994) *American Journal of International Law*, p. 140, and W. Gilmore, 'The Proposed International Criminal Court: Recent Developments' (1995) *Transnational Law and Contemporary Problems*, p. 264.

subject-matter jurisdiction.⁷⁴⁸ More recently, the issue was reconsidered in the so-called Kampala Review Conference, which took place in Kampala, Uganda, in June 2010. Among other important contributions, the Review Conference defined the ‘crime of aggression’ and reconfirmed the jurisdiction of the ICC over the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. Jurisdiction over ML offences, however, was not discussed during the negotiations of the Kampala Review Conference.⁷⁴⁹ At this time, therefore, no international criminal courts have jurisdiction over the crime of ML. I will return to the ILC’s innovative proposal in due course. At this time, I will argue against the inclusion of ML offences before the current structure of the ICC.

Against the inclusion of ML offences within the jurisdiction of the International Criminal Court (ICC), it could be alleged the following: the ICC would probably not be particularly delighted about adding cases to its workload. This is specially true given that the inclusion of ML offences would strongly deviate from the current business of the ICC. The main focus of the ICC is the investigation of ‘core’ international crimes, such as genocide/crimes against humanity, rather than investigating economic and treaty based crimes of ML. Then, a valid alternative might be to call for the creation of a specialized international criminal court for high-scale ML purposes. This seems, at least, slightly more reasonable than submitting ML cases to the ICC. This same conclusion was reached by other scholars, such as Norman Mugarura, who also

⁷⁴⁸ W. C. Gilmore (2004) 239.

⁷⁴⁹ For further details about the results of the Kampala Review Conference see: Daniel David Ntanda Nsereko, ‘The Kampala Review Conference: The Capstone of the Rome System’ (2011) *Criminal Law Forum* 22:511-518.

proposed the inclusion of serious crimes of ML at the jurisdiction of a specialized international court.⁷⁵⁰

It could be said that this same legal strategy was supported, recently, by the UN Security Council Resolution 1918 (2010),⁷⁵¹ which proposed the creation of an international specialized penal court to deal with the international crime of piracy, rather than proposing the hearing of additional crimes by the ICC. Interesting for our analysis, this UNSC Resolution calls on UN member States to criminalize the international crime of piracy under their domestic law and urging the UN Secretary General to consider the creation of a specialized international tribunal for prosecuting piracy.

Having said the above, it is clear that the ICC's general organization and experience might help us and other scholars to establish and design the appropriate limitations that should contain the proposal of including ML offences over a specialized international criminal court. This is the topic explained below.

5.2. How is the International Criminal Court (ICC) organised?

The ICC was lauded as a triumph of international justice and the beginning of the end of impunity for heinous international 'core' crimes. The Preamble of the Rome Statute provides that State Parties are 'resolved to guarantee lasting respect for and enforcement of international justice' by accepting the Rome Statute and establishing the international justice.⁷⁵² Under article 1 of the Rome Statute, the ICC has jurisdiction over 'serious'

⁷⁵⁰ See e.g., Norman Mugarura, 'The Global anti-money laundering court as a judicial and institutional imperative' (2011) *Journal of Money Laundering Control* Vol. 14, No. 1, 60-78.

⁷⁵¹ UN Doc. S/Res/1918 (2010) (by the UN Security Council at its 6301st Meeting on 27 April 2010).

⁷⁵² See Preamble, Rome Statute.

cases that ‘concern’ the whole international community. In addition, the Rome Statute sets forth that the Court has jurisdiction over the crimes of genocide, crimes against humanity, the crime of aggression (article 5), as well as war crimes in particular when it is committed as part of a plan or policy or as part of a large-scale commission of such crimes (article 8 (1)), together with the so-called offences against the ‘administration of justice’, which could arise during the ICC’s investigations (article 70).

The Preamble of the Rome Statute of the ICC also recalls that it is ‘the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’, emphasizing ‘that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’. Under the system of complementarity, defined in article 17 of the Rome Statute, the Court may only proceed with a case when the State responsible for the prosecution can be shown to be ‘unwilling or unable’ to proceed. This principle intends to encourage States to initiate their own proceedings before national judicial institutions. The idea is that the ICC should only undertake investigations when there is a clear case of failure to act by the State or States concerned. Moreover, the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States.⁷⁵³

The Court has three chambers.⁷⁵⁴ The Pre-Trial Chamber assesses the validity of charges and is involved in the investigation (or the situation) phase.⁷⁵⁵ The Trial Chamber conducts the trial in accordance with those charges (the prosecution phase).⁷⁵⁶

⁷⁵³ See Draft Paper on Some Policy Issues before the Office of the Prosecutor, for Discussion at the Public Hearing in The Hague on 17 and 18 June 2003.

⁷⁵⁴ Rome Statute, articles 34, 39.

⁷⁵⁵ *Ibid*, articles 56-57.

⁷⁵⁶ *Ibid*, article 64.

The Appeals Chamber hears appeals from both the Prosecutor and the Defense on errors of law or fact.⁷⁵⁷ Victims may make representations at all stages, in accordance with the Rules and Procedures of Evidence, including issues of jurisdiction and admissibility.⁷⁵⁸ Their representations must be limited to the issues that the relevant Chamber is considering and must demonstrate how their personal interests are affected.⁷⁵⁹

At the moment, the Prosecutor has opened investigations regarding seven conflicts: the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Uganda, Sudan, the Republic of Kenya, Cote d'Ivoire and Libya; and is considering at least four others at present. These are other conflicts in Georgia, Colombia, Kenya, Chad and Afghanistan.⁷⁶⁰ Three of the current cases are based on referrals from the States themselves (DRC, CAR and Uganda cases),⁷⁶¹ two (Darfur, Sudan⁷⁶² and Libya)⁷⁶³ are a Security Council referral and two begun *proprio motu* by the Prosecutor (Kenya and Cote d'Ivoire).

Some doctrine has attempted to justify the exercise of universal jurisdiction for the so-called 'core' international crimes (e.g., genocide and crimes against humanity) on the protection of universal interests (*'repression universelle'*). From this viewpoint, these 'core' crimes are considered to be breaches of obligations *erga omnes*, owed to every State and which, thus, every State has an interest in prosecuting, even without a

⁷⁵⁷ Ibid, article 81.

⁷⁵⁸ Ibid. articles. 15 (3), 19 (3), 53.

⁷⁵⁹ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

⁷⁶⁰ See ICC, Press Release, ICC-OTP-20080820-PR346.

⁷⁶¹ Under the Rome Statute, article 13 (b).

⁷⁶² UN Doc. S/RES/1593 (31 March 2005).

⁷⁶³ UN Doc. S/RES/1970 (26 February 2011).

concrete link with the State.⁷⁶⁴ It is usually invoked, in contrast, that the authority to exercise universal jurisdiction over treaty-based crimes, such as the treaty crime of ML, is not intended to protect universal interests like in the so-called ‘core international’ crimes, but rather interests that States have in common with each other (*‘repression internationale’*). This ‘common interest rationale’ acknowledges that the conduct of those who perpetrate serious international/treaty crimes in one State has an impact on other States: such conduct poses a potential threat to all States and, thus, all States have an interest in prosecuting the wrongdoer.⁷⁶⁵

According to Cedric Ryngaert, this common interest rationale is not very helpful to justify the exercise of universal jurisdiction and concern over ‘core’ crimes against international humanitarian law, such as genocide or crimes against humanity.⁷⁶⁶ Instead, the common interest rationale lends itself to justification over treaty-based crimes, such as drug-trafficking and money laundering. He founded this assessment on the fact that perpetrators of these last crimes are very likely to repeat their crimes because those found their origins in asset generation, rather than in the political, historical and social environment of a particular territory.⁷⁶⁷ This assumption, however, is by no means self-evident. Thus, my objection is that Ryngaert does not provide any empirical evidence to support his point of view. Moreover, even if this argument is assumed, Ryngaert’s opinion is incorrect. As described in previous chapters, the so-called treaty-based crimes (e.g., ML offences) consist of violations only to treaty provisions where such crimes are defined; while the so-called ‘core’ international crimes (e.g., genocide) consist of

⁷⁶⁴ Cedric Ryngaert, *‘Jurisdiction in International Law’* (Oxford monographs in international law, OUP 2008) 106 – 110.

⁷⁶⁵ *Ibid.*, 106.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Ibid.*

violations of both international customary rules and treaty provisions.⁷⁶⁸ Consequently, it seems to be clear that the main distinctive argument to justify universal jurisdiction over treaty-based crimes and international ‘core’ crimes seems to be related to the violation of customer rules, rather than to the motivation to commit acquisitive crimes for asset generation, as argued by Ryngaert.

5.3. The crime of ML as a serious and transnational crime that concerns the international community.

As pointed out above, the ICC only has jurisdiction over ‘serious’ cases that ‘concern’ the whole international community (Preamble and article 1 of the ICC Statute). Therefore, it could be logical to say that ML shall be seen as a serious and transnational crime that concerns the international community, to justify its inclusion under the jurisdiction of an international tribunal, such as the ICC. In the following lines, I will explain in which circumstances ML offences shall be seen as ‘serious’ and ‘transnational’ offences that concern the international community; so that they may be included and judged within the jurisdiction of an international criminal tribunal.

First, ML is a serious crime. As concluded in chapter III, the crime of ML is a ‘serious’ and ‘multi-offensive’ crime, because it must protect three main social interests: the value protected by the predicate offence, the administration of justice and the socio-economic system. We also concluded in chapter 3 that ML offences do not safeguard the security of the nations as a social value, since this is an exaggeration. However, we are not ignoring by this conclusion that ML operations are often connected with organized criminal enterprises, such as organized crime and terrorism. Moreover, we do not ignore that criminal assets involved in ML activities may be used to commit other

⁷⁶⁸ See above, chapter II, section 6.1.

crimes or, what is worse, to enhance the structure of organized criminal enterprises in the legal economy. The accumulation and laundering of substantial amounts of criminal profits promotes the expansion of organized criminal groups and allows them to continue accumulating wealth and power, so that they may continue damaging the socio-economic system, the administration of justice and the social value protected by the predicate offence.

Secondly, ML is, often, *a transnational crime*. I will try to explain when ML could be seen and considered a transnational crime. The following analysis of the transnational character of ML offences is inspired in and based on the definition of ‘transnational offence’ offered in article 3 (2) of the Palermo Convention:

an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.

A ML offence is domestic when all the elements of this crime are displayed or practiced in one jurisdiction. On the contrary, a ML offence is transnational or international when two or more jurisdictions are involved throughout the commission of this crime; that is, for instance, the jurisdiction where the predicate offence was perpetrated and the ill-gotten assets accumulated and one or two jurisdictions where the proceeds of crime are transferred to be laundered and reinvested in the legal economy. An example is a drug-trafficking criminal group that commercializes drugs and changes to larger denominations street-level drug cash money to reduce the bulk and enhance portability in country A, and later, after physically transporting this cash money to country B decides, finally, to consume and invest these ill-gotten profits in the formal economy of country C.

Money laundering offences could be transnational, even if the offence has been totally completed within the territory of one country, provided that certain preparatory works of the crime have taken place in another territory. An example could be a drug-trafficking criminal group that usually operates in country A, and from this country A usually plans how to practice the concealment and cleaning process of ML in countries B and C.

The ML offence could also be deemed transnational if the crime was perpetrated domestically in one jurisdiction but involved an organized criminal group that typically operates across different countries. This could be the case of an organized criminal group that is firmly rooted in a country A, where they often dominate certain criminal activities and where they practice ML activities but, at the same time, they take advantage of the facilities of the global economy by colluding with other ML criminal groups situated in countries B and C.

A ML offence is also transnational when all the elements of this crime were committed domestically, but it has substantial effects on the territory of another country. In cases where the operation of ML involves sums that represent a significant monetary value and also when the perpetrator of ML is a high-scale organised criminal group, the offence of ML could be seen as a crime that produces substantial effects in other countries, even if the ML offence is perpetrated in one jurisdiction. This is because money or any other criminal asset can be laundered in one jurisdiction and brought in as clean in a different jurisdiction. In other words, proceeds of crime might be recycled in country A; but after the process of ML is complete, that is, when the proceeds are already transformed and invested in the formal economy of country A, they could be moved as clean and invested in the formal economy of country B and later invested and consumed, again, in the formal economy of countries C and/or D. Conclusion: the

laundering of ill-gotten assets in country A, produced substantial effects in countries B, C and/or D. In this context, ML promotes the expansion of the organised criminal group in all these jurisdictions; and, moreover, the proceeds were invested, used and converted in jurisdictions A, B, C and D, as well; affecting the administration of justice, as well as the fair competence, not only in country A, but also in other countries B, C and D.⁷⁶⁹

In addition to these two important features of ML offences (i.e., serious and transnational crimes), it may be said that States should have an inherent mission to put into practice the ideals of justice, and not only to protect their own narrowly-defined interests. And the inclusion of ML offences under the jurisdiction of an international penal trial for limited and serious cases that concern the international community, is a demonstration of a clear intention to realize these ideals of justice.

This is specially true in the context of globalization in which we are immersed. As Pedro David observes, globalization 'instead of being a model with universal characteristics is a new paradigm with international characteristics mainly for the benefit of the dominant sectors'.⁷⁷⁰ Nowadays, one of the dominant sectors that is benefiting from globalization is that composed of criminal(s) and organized criminal enterprises that deal with ML. In this vein, it could be also said that the inclusion of ML offences before the international judiciary might facilitate the prevention and punishment of ML operations; especially when they are perpetrated by organized criminal enterprises.

⁷⁶⁹ See above, in chapter II, section 3, a similar explanation.

⁷⁷⁰ Pedro R. David, '*Globalización, prevención del delito y justicia penal*' (Zabalia, Buenos Aires 2004) 28.

5.4. National v. international jurisdiction for the prosecution of high-scale ML offences.

The principle of complementarity defined in Article 17 of the Rome Statute provides that the ICC only undertakes investigations where there is a clear case of failure to act by the State or States concerned. Thus, it is time to analyze if national jurisdictions may be inactive, unwilling, or unable to proceed with ML cases of sufficient gravity. This discussion will help us to justify the inclusion of ML offences within the jurisdiction of a specialized international court, but this should be ‘complementary’ to the domestic jurisdiction.

In some cases, authorities of a country may think it is beneficial to turn a blind eye to ML operations in their own jurisdiction, arguing that ML brings revenues.⁷⁷¹ This could be the case when countries adopt the so-called ‘Seychelles fiscal strategies’, trying to attract foreign investments regardless of their origin.⁷⁷² This fiscal strategy usually guarantees tax incentives and immunity from criminal tax and ML proceedings for the repatriation of undeclared funds, which are invested in the formal economy of a country, no matter what their origin is.⁷⁷³ Of course, governments that implement this fiscal strategy will be inactive or unwilling to proceed with ML cases of sufficient gravity.

⁷⁷¹ E. Takats, ‘Internacional Enforcement Issues’, in D. Masciandaro and others (Eds.) *Black Finance: The Economics of Money Laundering* (EE Publishing, Cheltenham 2007) 228.

⁷⁷² Unger called this fiscal strategy the ‘Seychelles strategy’ after the State of Seychelles — a small island in the Indian Ocean — attracted international investment in 1995 by guaranteeing immunity with a no-question-asked policy regarding the origins of the investments, as long as they exceeded the sum of USD 10,000 (unless the investor had committed acts of violence or drug trafficking in Seychelles itself). See: B. Unger, ‘International Economics’ in D. Masciandaro and others (eds.) *Black Finance: The Economic of Money Laundering* (EE Publishing, Cheltenham 2007) 90-91.

⁷⁷³ For an overview of the ‘Seychelles’ fiscal strategy see: R.C.H. Alexander, *Insider Dealing and Money Laundering in the EU: Law and Regulation*, (Ashgate, London 2007) 27, and Guy Stessens (2000) 92.

A similar situation may arise when corrupt dictators are in power. Suharto of Indonesia, Mobuto of Zaire (ex-Congo), Abacha of Nigeria, and Marcos of the Philippines, leaders who have laundered billions of dollars abroad, certainly have no interest in prosecuting their own crimes of laundering the proceeds of their crimes.⁷⁷⁴ In this context, prosecution of ML could remain ineffective or incapable, as well as unable of being impartial and balanced. And, of course, there will not be a political decision to investigate ML, if the perpetrators remain in power.

In other countries, legal authorities could be impartial in the prosecution of ML offences, but they might not have the technical support or conditions to do so in an effective way. Small and weak States may not have enough economic resources, for instance, to train their law enforcement authorities in a professional way. In this context, again, law enforcement authorities, criminal courts and prosecutors are powerless and outdated on many occasions, to prosecute ML in an effective and efficient way.

Other countries might have judicial or legal authorities with enough technical conditions to prosecute ML with effectiveness; however, difficulties may appear in cases of trans-border and complex ML operations. In this vein, William Gilmore believes that ML convictions have proven to be difficult to secure in most jurisdictions, including the world's richest industrialized countries.⁷⁷⁵ There is no doubt that it is one thing to reach to an agreement on paper and quite another to secure effective operation in practice. For instance, according to the cross-case analysis of eleven relevant ML cases that belong to the Argentine jurisdiction,⁷⁷⁶ only case study No. 3 received a

⁷⁷⁴ E. Takats (2007) 228.

⁷⁷⁵ See, W. C. Gilmore, *'Dirty Money: the evolution of international measures to counter Money Laundering and Financing of Terrorism'* (3rd edn, Council of Europe Publishing, Germany 2004) 74.

⁷⁷⁶ See Appendix 1.

definitive and final conviction.⁷⁷⁷ This feature shows that Argentine criminal courts are not efficient at prosecuting ML cases. But difficulties in the investigation of ML could be a worldwide problem, even for the world's richest industrialized countries. For example, in the period 1987 to 1998 there were only 357 prosecutions for ML in the UK and 136 convictions.⁷⁷⁸ Since then, the numbers of criminal prosecutions have increased in the UK, although conviction rates have remained low.⁷⁷⁹ At the same time, Italy had only 538 prosecutions in 1995, while there were 2034 in the US.⁷⁸⁰ Between 2003 and 2007, 786 individuals were prosecuted in Hong Kong and China for ML offences, of which 465 (over 59%) were convicted.⁷⁸¹ In 2005, India had 6 prosecutions and a total absence of any ML conviction.⁷⁸²

The unpleasant reality described above is even more apparent taking into account the peculiar and professional nature of ML, which appears to be lawful, having scarce visibility or crime appeal, with almost no social reaction as, on many occasions, no direct and concrete victim of ML can be identified. The socio-economic system, as well as the administration of justice and, sometimes, the value protected by the

⁷⁷⁷ The only (final) conviction was decided in the case 'Sessia, Luis Felipe and others' [2006], (The National Court of Criminal Cassation of Argentina, Room 1). Although there are not official reports showing how many ML cases have been prosecuted in Argentine criminal courts, the FATF Mutual Evaluation Report on Argentina estimates that, since 2000—the year the new crime of ML came into force in this country, Law No. 25,246—there are only four ongoing prosecutions and no conviction for ML. See: FATF-GAFI and GAFISUD 'Mutual Evaluation Report on Argentina' (Report) (22 October 2010) 36.

⁷⁷⁸ Cabinet Office Performance and Innovation Unit Recovering the Proceeds of Crime (2000) Stationery Office.

⁷⁷⁹ The conviction rate in 1998 was 44% for ML offences as opposed to an overall Crown Court conviction rate of 76% per Digest 4 (Home Office RDS). Cited in Ian Smith (ed.) 'Asset Recovery: Criminal Confiscation and Civil Recovery' (Lexis Nexis, London 2003) 498.

⁷⁸⁰ Cabinet Office Performance and Innovation Unit Recovering the Proceeds of Crime (2000) Stationery Office, paragraph 9.8.

⁷⁸¹ FATF, 'Mutual Evaluation Report on Hong Kong and China' (Report) (27 June 2008) 29.

⁷⁸² FATF and Asia/Pacific Group on Money Laundering, 'Mutual Evaluation Report on India' (Report) (25 June 2010) 43.

predicate offence are seriously harmed as a consequence of substantial amounts and monetary values of criminal assets subject to ML operations. This might be specially true when complex and transnational ML operations are linked with organized criminal enterprises. Large organized criminal groups engaged in ML activities might have a technological power and a lobbying capacity that are even greater than those of certain weak States.

How shall we live with high-scale ML offences? How shall we respond to massive and high-level ML activities sustained either by State actors or by others with the consent and tolerance of their governments? ML is often a complex and trans-border process and, if it involves high amounts of proceeds of crime, probably, it will not be committed without the acquiescence and participation of many people. There are those who plan and those who commit crimes. There are those who lend material resources to those experts who actually perpetrate the operations of ML. There are also a host of people who may cooperate by omission. Prosecutors, for example, may refrain from conducting proceedings that could stop ML operations. Even regular people or authorities can turn a blind eye to high-scale ML operations.

5.5. Examples to include ML offences before the international judiciary.

I imagine two different examples in which this proposed specialized international penal court could have jurisdiction over the crime of ML. The first example is what I call a ‘narrow alternative’, which proposes the inclusion of ML offences within the jurisdiction of an international court, but only when ML is associated with drug trafficking criminal organizations. The second example is the ‘broad alternative’, since I

propose the inclusion of high-scale ML offences, regardless of the qualities of the individuals that commit the predicate offence of ML.

- *First example: ML offences within a specialized international trial, when associated with drug trafficking*

ML offences associated with drug-trafficking was the proposal put forward by the International Law Commission (ILC). In 1989 the UN General Assembly remitted the task of considering ‘the question of establishing an international criminal court or other international trial mechanism’ to the ILC. In 1992, the ILC decided to create a working group, which was entirely devoted to the question of the possible establishment of an international criminal jurisdiction. By 1994, the Working Group had finished with a highly detailed report containing the so-called ‘1994 Draft Statute prepared by the ILC’.

Although an in-depth examination of that complex text goes beyond the scope of this work, it is worth recalling some of its key features related to the identification of the crimes falling within the jurisdiction of the expected court.

Article 20 of the 1994 Draft Statute reads in full as follows:

The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) the crime of genocide; (b) the crime of aggression; (c) serious violations of the laws and customs applicable in armed conflict; (d) crimes against humanity; (e) crimes established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.⁷⁸³

The Annex embraces, among others: ‘Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3 (1) of the UN Vienna Convention, that calls on States to incriminate ML activities when these relate to illicit drug trafficking’.

⁷⁸³ Report of the International Law Commission on the Work of its Forty-Sixth Session, article 20.

Reference to article 3 (1) of the UN Vienna Convention, in the 1994 Draft Statute, has been welcomed by some members of the international community. These include, among others, those small States which have actively supported the initiative taken by Trinidad and Tobago in the late 1980s. The Prime Minister of this country proposed the possibility of establishing an international adjudicative body with jurisdiction over illicit drug trafficking and drug trafficking-ML, in order to focus attention on the special problems faced by small or otherwise vulnerable members of the international community.

As one member of the ILC has acknowledged:

An important source of pressure for the Commission to consider an international criminal jurisdiction has come from Caribbean and Central American states that are having major problems dealing with drug trafficking, and whose criminal justice systems are under threat from organized criminal gangs engaged in such trafficking.⁷⁸⁴

The main problem with this proposal is that the predicate offence of ML can be perpetrated by a single criminal, a group of criminals or by any kind of criminal enterprise (e.g., drug-trafficking groups, terrorism or organized crime); not just by organized criminal groups. Then, a better and more appropriate proposal, as explained below, might be to include an autonomous and multi-offensive crime of ML.

- *Second example: autonomous high-scale ML offences within the jurisdiction of a specialized international criminal court.*

As concluded in previous chapters, one of the key ingredients to justify the penalization of ML is based on the monetary value of the sums or other criminal assets involved in ML, rather than ascertaining how many criminals committed the predicate offence.

⁷⁸⁴ Cited in James Crawford, *The ILC's Draft Statute for an International Criminal Court* (1994) 88 AM J. International Law 140-141.

Then, when a criminal agent or an organized criminal enterprise (e.g., organized crime, drug trafficking group or terrorism) launders criminal assets that represent significant monetary values, the following independent social values are often harmed: firstly, the value protected by the predicate offence; secondly, the administration of justice; and, thirdly, the socio-economic system.⁷⁸⁵

Of equal importance, it was also concluded in previous chapters that ML offences should be seen and drafted not only as multi-offensive crimes, but also as autonomous offences; since this crime safeguards independent social values, that go beyond the social and community interests protected by the predicate offence, the crime of concealment and any other criminal offence.⁷⁸⁶

As a result of these conclusions, my proposal is to include, not only transnational and high-scale ML offences, but also autonomous ML offences within the jurisdiction of this specialized international criminal court. An example, might be the new definition of the international crime of ML that this work is proposing. This is specially true, bearing in mind that this new definition is a longer, narrower and harmonized definition, which is in line with sound principles of criminal law and criminal procedure.

In addition, it should be noted that the scope of the power to punish ML delegated to this specialized international court should be narrower than that of individual States. In this direction, at least *three* restrictions must be established. *First*, to be sure that this global trial would only have jurisdiction over serious ML operations that really concern the international community, the monetary limit (i.e., quantitative limitation) stated in this autonomous ML offence should be much higher than the monetary limit stated in the definition of the ML offence that we are drafting in this dissertation to be adopted at both the international and domestic level. Remember that

⁷⁸⁵ See above, chapter III, section 3.

⁷⁸⁶ See above, chapter III, section 4.

the *seriousness* of ML offences should be evaluated in light of the monetary value of the funds or property involved in the ML process.

Secondly, the jurisdiction of this specialized court should be complementary to the domestic criminal jurisdiction. This means that this international court will be triggered only if the State which has jurisdiction over a ML case is unwilling or unable genuinely to carry out the investigation or prosecution. Therefore, what justifies its power to punish transnational and serious ML offence is the consent of States which would have authorized it to exercise jurisdiction over certain ML case when committed in their territory.

Finally, to continue reducing the scope and size of this specialized international court, it should lack the power to punish nationals of non-party States, even if the ML offence is committed on the territory of a State Party. This restriction has already been addressed for the ICC's jurisdiction.⁷⁸⁷

6. Concluding comments.

Among other reasons, I am in favour of including serious and transnational ML offences in the jurisdiction of this global tribunal, given the desire to live in a civilised world with a fair and transparent socio-economic system, among other critical social values that should be protected by international and domestic criminal law. Moreover, prosecuting ML is a very complex issue that requires international cooperation, as well as the creation of an international jurisdiction to prevent and curb the advance of high-scale and hidden ML operations. This sad reality makes it even more important for nations to gather together, find consensus and decide to include serious and high-scale

⁷⁸⁷ See, e.g.: Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (OUP Oxford 2010) 129-130.

ML operations—that causes a clear international dimension and impact—within the jurisdiction of a specialized international penal court.

CONCLUSIONS AND POLICY IMPLICATIONS

By studying the principle-based and due process limitations of ML offences, from an international-comparative angle, this work reveals that the current definition of the treaty-based crime of ML contains two main legal problems. First of all, it was seen that the international crime of ML is a broadly drafted offence, producing an abusive increase in penalization (i.e., an overcriminalization). This is true, when the definition allows the adoption of a broad scope of predicate offences of ML (see above chapter IV); and, moreover, when it allows the penalization of negligent ML operations (see above chapter V). Second, the definition offers too many moving parts and options concerning the adaptation of key elements of the crime at the domestic level and, in some parts, it is poorly defined. The inclusion of a less ambiguous, more integrated and longer definition of this crime at both the international and national level, would benefit investigation and prosecution efforts and lead to efficiency in international cooperation on criminal matters linked to ML.⁷⁸⁸

In order to remedy these deficiencies and inconsistencies, this thesis is proposing the adoption of a new, more detailed, narrower and more integrated definition of this criminal offence—one model of law—that could be adopted universally by any country. This new definition is, of course, consistent with sound human rights principles. In particular, this new definition contains the following characteristics:

- It is drafted as an autonomous and multi-offensive crime, which simultaneously safeguards the following main social values and interests: first, the right and social value protected by the predicate offence of ML; secondly, the

⁷⁸⁸ See above, chapter II, section 6.3.

administration of justice; and, finally, the fair competition of the economic market. That is to say, a crime of ML independently modelled from the predicate and the concealment offence.

- A ML offence that penalizes all the conducts of laundering the proceeds of crime as they are drafted in the three definitions of money laundering criminal offences covered in hard law instruments (i.e., first, the conversion or transfer of proceeds of crime for the purpose of concealing or disguising these proceeds; second, the concealment or disguise of proceeds; and, third, the acquisition, possession or use of proceeds).
- The definition of the word ‘property’ that represents the ‘proceeds of crime’ must be broad enough to include any object, asset or economic value of any kind, either money or any other property, right, among other corporeal or incorporeal assets. Such property is to be considered proceeds, whether it was derived from or obtained directly or indirectly from a crime.
- The ML criminal offence should adopt the model that refers to ‘all criminal offences’ as predicate offences; but only punishable if the value of the property involved in the ML operation exceeds a limited monetary value, in a single act or through the repetition of different related acts.
- It must ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite or a pre-condition for bringing charges, as well as for a conviction of ML. The autonomous crime of ML should be investigated independently of the predicate offences proceedings. However, ML charges shall include sufficient indications of the existence of a predicate offence. This means that the ML prosecution cannot demonstrate the existence of a predicate offence based on mere indicia or presumptions. Instead, the court handling down

a sentence of ML should reach the ‘beyond a reasonable doubt’ standard of proof. All the procedural guarantees, such as the right to be presumed innocent, shall be respected at the time of proving, beyond a reasonable doubt, that funds or property are the proceeds of crime.

- A ML offence that ensures a conviction for ML when it is proved that property represents a criminal acquisition, by showing: (a) the link between the property involved in ML and a specific predicate offence; (b) the evidence of the circumstances in which the property is handled, which are such as to give rise to the irresistible inference that it can only be derived from crime. Within both alternatives, it is not necessary to establish who committed or participated on the commission of the predicate offence.
- Concerning the mental or *mens rea* element, a ML offence that is only prosecuted when ML is carried out with intent/actual knowledge. The definition, however, should include a flexible standard of *mens rea*; admitting the actual knowledge (*dolus directus*) and recklessness or suspicion (*dolus eventualis*) about the criminal origin of the assets and, when applicable, the specific/ulterior intent to conceal or disguise the proceeds of crime.
- In order to draw a clear line between the ‘actual suspicious’ level of mind (which is recklessness/*dolus eventualis*) and ‘reasonable ground to suspect’ (which is negligence) a detailed and unequivocal definition of the word ‘suspicion’ about the criminal origin of the assets should be included in the definition of the international crime of ML. The detailed definition suggested in the *Da Silva* case⁷⁸⁹ might be an excellent example.

⁷⁸⁹ (2007) 1 W.L.R. 303; (2006) 2 Cr. App. R. 35.

- The knowledge, intention or aim required as element of the ML offence, may be inferred from objective factual circumstances of the case. However, the use of circumstantial or indirect evidence should be sufficient and compelling enough to reach the ‘beyond a reasonable doubt’ standard of proof.
- The autonomous ML offence must apply to the person who committed the predicate offence; admitting, therefore, the penalization of self-laundering. That is to say, a crime of ML autonomously modelled from the predicate offence and the traditional crime of concealment (also called a crime of ‘hiding/handling stolen goods’).
- A ML offence that imposes on State Parties the obligation to assert jurisdiction on the usual basis of territoriality. However, States might invoke jurisdiction even when the predicate offence occurred in a foreign country, but imposing the condition of dual criminality (i.e., when the predicate offence committed in another State, constitute an offence in that foreign State, and which would have constituted a predicate offence had it occurred domestically, in the State where ML is judged). Moreover, it should be clear that the adoption of extra-territorial jurisdiction over ML offences at the domestic level, cannot pose a challenge to the sovereignty of other countries and the right against double jeopardy.
- Finally, ML is a complex, hidden and transnational problem. All of this, and more, is taken to propose the creation of a specialized international penal court to prosecute serious and transnational ML offences.

This thesis has brought to light issues which have not yet been resolved by legal discourse, in terms of identifying the legal impediments and problems that entail the

implementation of ML offences. The thesis thereby contributes to both a legal and a theoretical analysis of ML offences from an international-comparative perspective.

However, there are a number of related questions which could form the basis of projects on the same subject matter. For instance, reference to the AML preventive/regulatory system has been alluded to throughout this thesis but not discussed in depth. Chapter II, section 5, explained that the State burdens the private sector with tasks that traditionally were carried out by them. This delegation process has been described by several scholars as a process of privatization of law, where the private sector acts as a real ‘policeman’ of their customers. It will be interesting to investigate the correct and fair limits that this tendency should move in further elements of this AML preventive/regulatory system.

There is also scope for research about the weaknesses and strength of the definition of the international crime of FT. Or, to put it differently, to study whether or not FT offences are consistent with sound principles of criminal law and adequate in terms of responding to the phenomenon of FT. Despite its place in international criminal law since the UN Convention for the Suppression of the Financing of Terrorism in 1999, there has been very little discussion on FT criminal offences in the academic legal writing. Finally, there is also scope for research about the inclusion of serious crimes of ML over the jurisdiction of a specialized international penal court. Despite the fact that this proposal was included in the so-called ‘1994 Draft Statute prepared by the ILC’, there has been little discussion on this topic in the academic writing.

Appendix I

Argentine Money Laundering Case Studies

Case and Year	Case Name	Criminal Courts	Predicate Offence (PO) ML Stages and techniques	Status of the investigation
1 1989/ 1990	'Raul Vivas and others'	Federal Oral Courts, City of Buenos Aires, Room 5 (2003).	Predicate offence: Drug trafficking activities in the US. 1 st stage: 'dirty' money converted into financial instruments in the US. 2 nd stage: financial concealment mechanisms implemented in Uruguay. 3 rd stage: real estate purchases in Argentina.	Closed. Federal Oral Courts ordered the dismissing of Rivas and the others accused for 'not enough evidence connecting the ML operation and the predicate offence of drug trafficking'. Raul Vivas was arrested and sentenced to 501 years of prison for ML offence by the US Courts.
2 1990	'Mario Caserta, and others'	Federal High Criminal Courts, City of Buenos Aires, Room 1 (1992). Reviewed by The National Court of Criminal Cassation of Argentina, Room 1 (2006). Supreme Court of Argentina (present).	PO: Drug trafficking activities in the US. 1 st stage: physical cash transfers in 'suitcases', mailed from New York, Miami and Andorra to Uruguay and Argentina. 2 nd stage: banking and IVTS transfers from Argentina to Uruguay. 3 rd stage: real estate purchases in Argentina and Uruguay.	Open. Mario Caserta (preventive arrest for 3 years, afterwards released and indicted); Jose Lezcano Patiño (sentenced to 10 years in prison in the US), Anello, Collazo, Baliate, and others (indicted); Amira Yoma (dismissed)
3 1995	'Seccia, Luis Felipe and others'	Federal High Criminal Courts, City of San Martin, (1999). Reviewed by Federal Oral Courts No. 2 of San Martin (2003). The National Court	PO: Drug trafficking activities from Italy. 1 st and 2 nd stages: IVTS from Italy to Argentina. 3 rd stage: purchase of jewellery, gold and antiques, among other assets of high value but subject to no system of registration of	Closed. The president of a financial institution and two collaborators were sentenced to fines and imprisonment for 3 years (2003).

		of Criminal Cassation of Argentina, Room 1 (2000 and 2006).	title; in Argentina.	
4 1995/ 1999	‘Santos Caballero, Maria, and others’.	Federal High Criminal Courts, City of Buenos Aires, Room 2 (2000). Reviewed by The National Court of Criminal Cassation of Argentina, Room 3 (2001). Federal Oral Courts No. 6, City of Bs. As. (2005).	PO: Drug trafficking from Medellin Cartel, Colombia. 1 st and 2 nd stages: IVTS from Colombia and Uruguay to Argentina. 3 rd stage: real estate, luxury cars and other assets purchased in the name of ‘off shore’ and ‘shell’ companies domiciled in Uruguay.	Open. Indictments and preventive arrests (2000). Federal Oral Courts ordered the annulment of the prosecutor’s accusation, requesting a new investigation (2005).
5 1996/ 2000	‘Di Tullio, Nicolas A., Carrillo Fuentes, Amado, and others’.	Federal High Criminal Courts, City of Buenos Aires, Room 1 (2002). Reviewed by The National Court of Criminal Cassation of Argentina, Room III (June 2002 and July 2007)	PO: Drug trafficking from Juarez Cartel, Mexico. 1 st stage: IVTS from Uruguay and the US to Argentina, and physical cash transfers in ‘suitcases’ and mailing. 2 nd stage: bank account opened upon the name of ‘straw men’. 3 rd stage: real estate purchases, including farms, hotels, apartments, shares, rural machines, among other assets.	Open. Nicolás Antonio Di Tullio (preventive arrest warrant for 3 years; later released from prison and finally indicted). Amado Carrillo Fuentes—alias ‘ <i>El Señor de los Anillos</i> ’—(indicted, but he finally died in 1997), and other five businessmen (indicted).
6 1999/ 2000	‘Gil Suarez, Humberto Nicanor y otros’.	High Federal Criminal Courts, City of San Martin (2002)	PO: Drug trafficking activities committed in the Republic of Surinam. 1 st and 2 nd stages: statement of <i>off-shore</i> companies in Uruguay. 3 rd stage: purchase of real estate and the sale and re-sale of assets subject to no system of registration of title (e.g., antiques and jewellery).	Closed. Preliminary Courts ordered indictments and arrest warrants. Later, High Courts considered that ‘there is not enough evidence to demonstrate the link between the invested assets and the predicate offence of drug trafficking committed in the Republic of Surinam’.

<p>7 2000</p>	<p>'G.R.J. and others'.</p>	<p>High Federal Criminal Courts, City of Buenos Aires, Room 2 (2004)</p>	<p>PO: proceeds derived from the crime of fraud perpetrated in Argentina.</p> <p>1st stage: deposit of money collected in Argentina and transferred to an 'escrow' account domiciled in the UK Virgin Islands.</p> <p>2nd and 3rd stages: several 'back to back' movements through off-shore companies domiciled in the UK Virgin Islands, aiming to conceal the funds derived from the fraud.</p>	<p>Closed. High Courts ordered the dismissal of all the indicted defendants, alleging that the intention to commit the crime of ML was not sufficiently proved; not reaching the standard of evidence 'beyond a reasonable doubt'.</p>
<p>8 2001/ 2002</p>	<p>'Geosur S.A. Company'</p>	<p>Federal Criminal Courts, City of Rawson, Chubut. Ordinary Criminal Courts, City of Rawson, Chubut. Reviewed by Supreme Court of Argentina (2003)</p>	<p>PO: Bank fraud from Argentina.</p> <p>1st stage: fractioned/<i>smurfing</i> banking operations in name of 'straw men'.</p> <p>2nd stage: transfer of the criminal assets to an escrow bank account opened in the US Virgin Islands.</p> <p>3rd stages: N/A (Non applicable).</p>	<p>Open. Supreme Court of Argentina resolved a jurisdiction dispute between two Argentinean Courts.</p>
<p>9 2002/2004</p>	<p>'Orentrajch, Pedro, and others s/article 278 Argentine Penal Code'.</p>	<p>Federal High Criminal Courts, City of Buenos Aires, Room 2 (2005). Reviewed by The National Court of Criminal Cassation of Argentina, Room I (March 2006)</p>	<p>PO: drug trafficking from Yugoslavia and Spain, apparently committed by Dejan Trsic and Dragoslav Ilic (Yugoslavian citizens) and Nicholas Brewer and Philip Dragic (Great Britain citizens).</p> <p>1 stage: transfer of proceeds of crime from Yugoslavia and Spain to Argentina.</p> <p>2nd stage: criminal funds were deliberately mixed with legitimate funds, through investments in a jewellery store named '<i>Orentrajch</i>'. The jewellery was used as a façade/fronting of recycling operations.</p> <p>3 stage: sale and re-sale of assets subject to no system of registration of title (e.g., antiques and jewellery).</p>	<p>Open. Preliminary Courts ordered indictments and arrest warrants of Pedro Orentrajch, Andrés Orentrajch and Neria Larroque (2005). Later, High Courts confirmed the three indictments and the orders of arrests. Finally, the National Cassation Court confirmed the indictments, but ordered the release of the arrested offenders (2006).</p>

<p>10 2005/ 2007</p>	<p>‘M. E. Rodriguez and other s/art. 278 CP’</p>	<p>Federal Oral Courts No. 2, City of Cordoba (Dec. 2009)</p>	<p>PO: street level trade of cocaine and marihuana in the City of Córdoba, made by Guillermo Altamira (alias, ‘<i>el Gallo</i>’ or ‘<i>El Narco</i>’) — leader of a drugs-dealer group.</p> <p>1st stage: accumulation and change to larger denomination of street-level drug cash money. 2nd stage: criminal funds were deliberately mixed with legitimate funds, through the purchase of nominee holdings/bearer shares in a trust/escrow. The trust was used as a commercial vehicle to manage a restaurant/bar named ‘<i>Como en Familia</i>’. 3rd stage: with the fictitious incomes derived from the trust/escrow, they purchased two apartments, a house, a store named ‘J&M’, an <i>estancia</i>, vehicles, and other non-registry assets, such as TVs, stereos, and a pool-table.</p>	<p>Open. Final conviction for María Eugenia Rodriguez, her husband Julio Guillermo Vallejo and her brother in law Gonzalo Maximiliano Vallejo. They were sentenced for fines and imprisonment (December 2009). The defence appealed these convictions before the National Cassation Court, as well to the Supreme Court of Argentina (2010).</p>
<p>11 2006/2008</p>	<p>‘Ana María Altuna and others, s/ art. 278 CP’</p>	<p>Federal Oral Courts No. 5 of San Martin, Province of Buenos Aires (2010).</p>	<p>PO: drug-sale of cocaine, made by Osvaldo R. Altuna (a leader of drug-trafficking group, linked with other Cartels in Colombia and México).</p> <p>1st stage: accumulation of street level drug cash money, and money-handling operations. 2nd/3rd stages: purchase of two companies named ‘<i>Quemu-Quemu</i>’ and ‘<i>Fortinera Neuquina</i>’; both in the Province of Neuquen, Argentina. Purchase of vehicles, among other assets.</p>	<p>Closed. It was demonstrated that Ana María Altuna (sister of Osvaldo Altuna), committed the crime of money laundering as defined in article 278(1)(a) of the Argentine Penal Code. However, Courts issued a <i>probation</i> in favour of Ana María Altuna, arguing that she did not have criminal records (2010).</p>

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