

LAW RELATING TO MONEY LAUNDERING: A CRITICAL ANALYSIS FOCUSING SRI LANKAN LAW

Shanthi Segarajasingham*

ABSTRACT

Money laundering is an organized crime that is performed through the process of laundering of ill-gotten money. It is not a single crime by itself, but involves other criminal activities such as drug trafficking, human trafficking and terrorism. Not all types of criminal activities have an impact on banking system. However, money laundering does have a very serious impact on the nations' financial system. The origin of money laundering is said to be the Watergate scandal and there had been a few reported cases thereafter. It involves large amount of finances and therefore countries have enacted laws to combat the crime of money laundering. The EU has its directives and likewise the US and the Asian countries, including Sri Lanka enacted statutes to combat money laundering. The UN General Assembly Special Session addressed the issue far back in 1998. Nevertheless, there seems to be no reduction in money laundering related activities. Every piece of Directive and legislation is on its own and has very little practical impact. The lessons learnt clearly show that the crime of money laundering cannot be fought by one single country. This paper will initially define the important terms to understand the topic and then move to the history of the crime. The actual perils with illustrations are discussed as well. The existing statutes in Sri Lanka and the United Kingdom are given in detail with an analysis of decided cases. The initiatives taken by the UN in this regard have also been discussed. The practical problems the countries are faced with in proving such criminal cases will also be touched upon. This paper will also analyse the reasons for the failure in combating with the crime, if any, on the part of governments that are selected for the purpose of comparison.

This is an exploratory research and the writer will use qualitative method.

1. Introduction

The world has become a global village that has inter links among countries. The broad objectives of countries are common and one of those is the creation of a crime-free society that can lead to rapid economic growth. The development in the field of information technology has contributed tremendously to economic growth. However, in the same information technology has been the cause for the easy committing of white collar crimes.

Money laundering is a crime against the administration of criminal justice. It can be categorised not only as a white collar crime but also as an organised crime that are mostly international or cross-border transactions. Money laundering is the main cause for all the mass criminal activities taking place globally. All the illegal money derived from activities such as bribery, drug trafficking, human trafficking, terrorism etc are laundered and the culprits disguise themselves as gentlemen. Since it is a solemn peril that has serious repercussions, stern thought has been given by countries to combat with it. Though there are laws in place, there haven't been much decrease in money laundering activities.

2. What is Money Laundering?

The answer to the above question is in the understanding of the following terminologies and phrases. Those are money, laundering, money laundering, white collar crime, organised crime and international or cross-border transaction.

The term 'money' is an economic term and therefore it is hard to find a legal definition. Originally, gold, silver, and some other less precious metal were included in the term 'money' which, in the progress of civilization and commerce, have become the common standards of value. In order to avoid the delay and inconvenience of regulating their weight and quality whenever passed, governments of the civilized world have caused them to be manufactured in certain portions, and marked with a stamp which attests their value; this was called money.¹

As commerce developed, bank notes, cheque, and negotiable notes were also so considered within the meaning of money. As a result, to support a count for money had and received, the receipt by the defendant of bank notes, promissory notes, credit in account, in the books of a third person, or any chattel, was sufficiently treated as money. Money is a medium of exchange; it is any object or record, which is generally accepted as **payment for goods and services** and repayment of **debts** in a socio-economic context.

Hence, money is not just an object, but has distinguished functions which are crucial for money laundering. It serves as a medium of exchange, it acts as a measure of value; it serves as a standard of deferred payment, and it provides means of storing wealth not immediately required for use.² In the electronic era, money primarily includes electronic transfers and electronic records maintained by financial institutions.

¹ legal-dictionary.thefreedictionary.com/money

² Britannica Ready Reference Encyclopaedia

In addition, the following view of Darling J is pertinent in the context of money laundering. "Money ... (is) that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment of commodities."³

Moreover, the Supreme Court of Canada held that, "Any medium which by practice fulfils the function of money and which everyone will accept as payment of a debt is money in the ordinary sense of the word even though it may not be legal tender."⁴

Laundering is a term known in its ordinary sense and it is not different in its legal sense too. Dirty or illegal money is laundered or cleaned to demonstrate it as legal money and such process is money laundering. This process involves conduct or acts designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of money to avoid a transaction reporting requirement under the law of any particular State or to disguise the fact that the money was acquired by illegal means.

The words money (and) laundering together are called what it is, because that perfectly describes what takes place. Ill-gotten money is put through a cycle of transactions, or washed, so that it comes out from the other end as legal, or clean, money. In other words, the source of illegally obtained funds is obscured through a series of transfers and deals in order that those same funds can eventually be made to appear as legitimate income.⁵

The phrase 'white collar crime' is a modern terminology. During historic era, criminals were easily identified by the way they dress and it has changed radically now. Wealthy people in the society who pose themselves to be high rank officers or entrepreneurs get involved in criminal activities and in most occasions, it is hard to believe when they are detected.

money laundering is a crimes that normally comes under the category of white-collar crimes. The term white-collar crime dates back to 1939. Professor Edwin Hardin Sutherland was the first to invent the term, and he hypothesized the different characteristics and motives of a white collar criminal that are different from typical street criminals who are more visible. Professor Sutherland defined his idea of 'white-collar crime' as "crime committed by a person of respectability and high social status in the course of his occupation".⁶ He noted that, in his time, less than 2% of the persons committed to prisons in a year belong to the upper-class or the white-collar category. Although the percentage is a bit higher today, numbers still show a large majority of those in jail are poor, "blue-collar" criminals, despite efforts by law enforcement authorities to crack down on white-collar criminals.

Organized crimes are criminal activities undertaken for the purpose of gaining profit, power or influencing and involving two or more people with substantial planning and organisation, or systematic and continuing activity.⁷ 'Organized crime' is understood to be the large-scale and complex criminal activity carried on by groups of persons, however loosely or tightly organized, for the enrichment of those participating and at the expense of the community and its members. It is frequently accomplished through ruthless disregard of any law, including offences against the person, and frequently in connection with political corruption.⁸

Laundering criminally derived proceeds can be a lucrative and sophisticated business and an indispensable element of organised criminal activities.⁹

Further, money laundering is a truly global phenomenon in today's context, and it is said to be helped by the International financial community by way of facilitating a 'round the clock' financial transactions. When one financial centre closes business for the day, another one is opened for business and the matters are pretty easy for any money launderer to wash off his dirty money. It is therefore an international crime or transnational crime. Transnational criminal activity may be defined as criminal activity which involves the collaboration of persons resident in different countries and/or which involves criminal activity extending beyond the borders of one country.¹⁰ A UN Report in 1993 noted that the basic characteristics of the laundering of the proceeds of crime, which to a large extent also mark the operations of organised and transnational crime, are its global nature, the flexibility and adaptability of its operations, the use of the latest technological means and professional assistance, the ingenuity of its operators and the vast resources at their disposal.¹¹

³ *Moss v Hancock*, 1899 2 QB 111, per Darling J

⁴ *Re Alberta Statutes*, 1938 SCR 100

⁵ Definition of Robinson as per www.laundryman.u-net.com

⁶ See: en.wikipedia.org/wiki/White-collar_crime

⁷ See: www.cmc.qld.gov.au/asp/index.asp?pgid=10751

⁸ United Nations 1975, 8

⁹ See: Alison S. Bachus, From Drugs to Terrorism: The focus shift in the International Fight Against Money Laundering after Sep 11 2001, 21 ARIZ J. Int'l Comp Law 835, 2004; James D Harmon, US Moey Laundering Laws: Int'l Implications, 9 NYL Sch J Int'l Comp L. 1,2 1988, cited by Provost A.Mark, Money Laundering, 46 American Criminal Law Review 837

¹⁰ Siriwardhana Chandrika, 'Transnational Criminality - Need for International Policing', Conference Presentation, Law Asia 93

¹¹ See: unstats.un.org/unsd/nationalaccount/AEG/.../m4reportillegalActivities.pdf

It is obvious that criminals will not wish to keep the proceeds of crime with them for the reason of easy detection. Criminals wishing to distance the proceeds of crime is not new. JD McClean observed that,

‘From the point of view of the criminals, it is no use making large profit out of criminal activity if that profit cannot be put to use.... Putting the proceeds to use is not as simple as it may sound. Although a proportion of the proceeds of crime will be kept as capital for further criminal ventures, the sophisticated offender will wish to use the rest for other purposes... if this is to be done without running an unacceptable risk of detection, the money which represents the proceeds of the original crime must be ‘laundered’: put in a state in which it appears to have an entirely respectable provenance.’¹²

Such laundering is not always possible locally and therefore done crossing the borders.¹³ The international dimension of money laundering was also evident in a study in Canada which revealed that over 80 per cent of all laundering schemes had an international dimension.¹⁴

3. History of Money Laundering

Researchers claim that money laundering can be traced back from 1931 with the conviction of Al Capone.¹⁵ Many methods were devised years ago to disguise the origins of money generated by illegal activities.

Money laundering is said to have originated from Mafia ownership of Laundromats in the US who had huge earning in cash from extortion, prostitution, gambling and illicit liquor and needed to show a legitimate source for these monies. One of the ways in which they were able to do this was by purchasing outwardly legitimate businesses and to dilute their illicit earnings with the legitimate earnings they received from these businesses. Laundromats were chosen by these gangsters originally because they were cash businesses and this was an undoubted advantage to people like Al Capone who purchased them.

Certain others contend that money laundering is an expression of fairly recent origin. The original citing was in Britain's Guardian newspaper reporting the Watergate scandal in the US in 1973, referring to the process as ‘laundering’.¹⁶ The expression first appeared in a judicial or legal context in 1982 in America in the case *US v \$4,255,625.39*.¹⁷

Another group says that money laundering as a crime only attracted interest in the 1980s, basically within a drug trafficking context. It was from an increasing awareness of the huge profits generated from this criminal activity of drug trafficking and a concern at the massive drug abuse problem to the society which created the impetus for governments to act against the culprits (who are individuals and sometimes, organisations) by enacting legislation that would deprive them of their illicit gains at all levels. In addition, another characteristic that the governments couldn't overlook was that the constant pursuit of profits which are tactfully laundered, will lead to the expansion of new areas of criminal activities, if not stopped.

4. The process of Money Laundering

The common factor identified in laundering operations is the need to change the form of the illicit proceeds in order to shrink the huge volumes of cash generated by the initial criminal activity or to dilute the illicit money with many other legal earnings. Both underground and official banking systems contribute to the techniques of effecting money laundering patterns. Underground banking may be exchange houses run by families or friends. These underground banks touch the legitimate financial system by

¹² International Judicial Assistance, 1992, cited by Hapgood Mark, *Paget's Law of Banking*, 11th Edi, 1996, p.83

¹³ There are 4 categories of money laundering and those are Domestic Money Laundering, Inward Money Laundering, Outward Money Laundering and International Money Laundering.

¹⁴ See Canadian Money Laundering Police files. See also ‘Operation Green Ice’ of 1992.

¹⁵ A conviction in the US in 1931 against one Al Capone for tax evasion was said to be the origin. Meyer Lansky (also called ‘the Mob’s Accountant’) was particularly affected by the conviction of Capone determined that the same fate would not befall him and he set about searching for ways to hide money. Soon he had discovered the benefits of numbered Swiss Bank Accounts. This was where the culture of money laundering would seem to have started, with the growth of Lansky as one of the most influential money launderers ever. The use of the Swiss facilities gave Lansky the means to incorporate one of the first real laundering techniques, the use of the ‘loan-back’ concept, which meant that hitherto illegal money could now be disguised by ‘loans’ provided by compliant foreign banks, which could be declared to the ‘revenue’ if necessary, and a tax-deduction obtained into the bargain. See: globalpolitician.com/print.asp?id=4153

¹⁶ In Watergate scandal, the US President Richard Nixon's "Committee to Re-Elect the President" is said to have moved illegal campaign contributions to Mexico, and then brought the money back through a company in Miami.

¹⁷(1982) 551 F Supp.314

way of using ordinary banking system and it is hard for early detection by authorities. In addition, there exist popular transactions (known as *Undiyal or Hawala*) which are illegal in certain countries.

Money laundering is not a single act but is a process or series of transactions that is skillfully handled. There are certain common processes relating to the wide range of methods used by money launderers when they attempt to launder their criminal proceeds. The process takes generally three stages which can be effected at the same time in the course of a single transaction, and they can also appear in well separable forms one by one as well. The steps are generally known as Placement, Layering and Integration.¹⁸

The following table will illustrate the above said process:

Placement	Layering	Integration
Cash paid into a banking system and diluted with proceeds of legitimate money (may be with connivance of bank employees)	ETF either by the use of shell companies or funds disguised as proceeds of legitimate money derived from business	False documentation either by loan repayments or invoices used as cover for laundered money
Exported	Cash deposited in overseas banking system	Complex web of transfers, locally and internationally as well to makes tracing of original source of funds impossible.
Cash used to buy goods of high value, land or business assets	Resale of goods, land or assets	Income from property or legitimate business assets appears as clean

The US Second Circuit Court of Appeal had the opportunity to analyse the process of money laundering in *United States v. Dinero Express Inc.*¹⁹ The court was required to decide whether the remittance scheme, viewed as an entire process, qualifies as ‘transfer’ under the specific statutory provision.²⁰ The defendant company was a licensed money remitter on behalf of US

¹⁸ Placement: The first stage is the washing cycle and in this initial stage the objective of the launderer is to conceal the origin and true ownership of the proceeds. In order to achieve this, the launderer will place the illicit money into a financial system or retail economy or will smuggle it out of the jurisdiction where it was earned to avoid detection from the authorities and then transform it into other asset, such as travelers’ cheques, postal orders, and the like. Layering: Once the illegal money is placed as aforesaid, the launderer needs to maintain control of the proceeds which is termed as layering. The objective of layering is to disassociate the illegal monies from the source of the crime by intentionally creating a complicated web of financial transactions, so that source and ownership of funds cannot be detected. In the course of layering the launderer will attempt to conceal or disguise of the original ownership of the funds by creating multifaceted layers of financial transactions designed to disguise and provide anonymity. This is done by moving monies in and out of the offshore bank accounts of bearer share shell companies through electronic funds transfer (EFT), complex dealings with stock, commodity and futures. Since the volume of daily transactions are massive, and the high degree of anonymity available, the chances of transactions being traced are very remote.¹⁸

Integration: This is the final stage of the money laundering process. By this stage the money is already integrated into the legitimate economy or financial system and is absorbed with all the other legal assets in the system. Integration of the washed money into the economy is accomplished by the launderer by making it appear to have been legally earned. Once this stage is accomplished it is extremely difficult for anyone to distinguish legal and illegal assets. Integration may be done by establishing of anonymous companies in countries where the right to secrecy is guaranteed. Launderers are then able to grant themselves loans out of the laundered money in the course of a future legal transaction. They may also claim tax relief on the loan repayments and charge themselves interest on the loan. Another common mode of integration is sending of false export-import invoices overvaluing goods and move money from one company and country to another with the invoices serving to verify the origin of the monies placed with financial institutions. Moreover, a simpler method is to effect EFT to a legitimate bank from a bank owned or controlled by the launderers.

¹⁹ 13F.3d 803, 806 (2d.Cir.2002)

²⁰ 18 U.S.C. § section 1956(a)(2) which reads as follows:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
(A)(i) with the intent to promote the carrying on of specified unlawful activity; or(ii)...

customers to Dominican Republic and Puerto Rico. The transaction in question involved receiving of deposits by defendant on 5% commission from known drug traffickers and transferring same to Dominican Republic and Puerto Rico. It involved a four-step process. First, money from the drug traffickers was delivered to the defendant by gradual depositing and the second, the defendant created fake invoices to pose that the transactions were made to the Dominican Republic. Third, arrangements were made with a local person of the Dominican Republic to advance local currency in the same amount as the deposits being made in New York and finally, the defendant would repay the local currency provider using wire transfer. The defendant's argument that, not even one of the individual steps involved in the direct wiring of money from the US to a place outside the US, a 'transfer', that will fall under the specific provision did not occur, was rejected. Court held that the conduct was a transfer, and no matter whether the transfer was a single-step transfer or a multi-step transfer. Conviction was made for international money laundering since the conduct of the defendant helped drug trafficker to move money.²¹

5. Perils Money Laundering cause

Money laundering is pure cash oriented deal which generates measureless amounts of cash from illegal activities such as street dealing of drugs, prostitution or supply of pornographic video where payment takes the form of cash, generally in small denominations. As such the most important danger to the whole world is that the illegal activities are on the increase since the perpetrators are confident that they can tactfully clean their illegal income. It is clear therefore that money laundering and other illegal activities are closely connected and, bringing to a halt of one will automatically discontinue the rest.

Estimates of the size of the money laundering problem world-wide totals more than \$500 billion annually nearly 5 years ago.²² According to UNODC, in 2018, the estimated amount of money laundered globally in one year is 2 - 5% of global GDP, or US\$800 billion - US\$2 trillion.²³ This is a staggering amount and detrimental by any calculation to the financial systems involved. The actual amount is unknown to all sources.

The Banking system is affected adversely by the increase level of money laundering. The banks have to comply with the legal requirements to detect money laundering activities.²⁴ This involves paper cost, human resources cost, high-tech equipment cost and time consuming as well. At the same time banks are under a duty to maintain secrecy and facilitate businesses. The conflicting duties of legal compliance and secrecy will have to be balanced by the banks for the purpose of economic growth. Concern was heightened by the realisation that the international banking system was being used by the drug barons to move and hold huge sums of money. A linked worry was the damage that could be caused to the reputation of the banking system.²⁵

It is well said in this regard by the Governor of the Central Bank of Sri Lanka that, 'As we all know, money laundering and terrorism promote criminal activities, endanger system stability and misallocate resources into non-productive investments.'²⁶

The following 1st and the 8th recital to the EU Third Directive may be cited to add to the perils;

'Massive flows of dirty money can damage the stability and reputation of the financial sector and threaten the single market, and terrorism shakes the very foundations of our society. In addition to the criminal law approach, a preventive effort via the financial system can produce results'.

-
- (B) knowing that the transaction is designed in whole or in part—
 - (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
 - (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced
 - (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
 - (A) with the intent to promote the carrying on of specified unlawful activity; or
 - (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—
 - (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
 - (ii) to avoid a transaction reporting requirement under State or Federal law,

²¹ See: Rebecca E. Hill, International Money Laundering Statute – US v. Dinero Express Inc., 31:2 Syracuse J.Int'l & Com, p.329

²² See: www.laundryman.u-net.com/page3_probl.html

²³ <https://www.unodc.org/unodc/en/money-laundering/globalization.html>. See also Central Bank of Sri Lanka Pamphlet Series 6 of 2006 on Preventing Money Laundering and Combating the Financing of Terrorism

²⁴ Legal requirements relating to money laundering will be discussed in the next sub-topic.

²⁵ Hapgood Mark, Paget's Law of Banking, 11th Edi, 1996, p.83

²⁶ From the keynote address of Dr.Ajith Nivard Cabral, Governor of the Central Bank of Sri Lanka at the Commonwealth Secretarial Programme on Financial Investigations Training, January 22-26, 2007, Colombo.

‘The misuse of the financial system to channel criminal or even to clean money to terrorist purposes poses a clear risk to the integrity, proper functioning, reputation and stability of the financial system. Accordingly, the preventive measures of the Directive should cover not only the manipulation of money derived from crime but also the collection of money or property for terrorist purposes’.²⁷

The launderers suddenly deposit and withdraw money in the process of laundering which is unpredictable. Hence it may affect the stability of a banking system and its liquidity. Further, launderers use other business entities for the purpose of laundering and those entities are called front companies. Such front companies do not care about profits and therefore it will affect the competitiveness of the market.

A true story narrated below is an illustration to understand core serious perils of money laundering: Franklin Jurado, a Harvard-educated Colombian economist, using the tools he learned at America's top University, moved \$36 million in profits, from US cocaine sales for the late Colombian drug lord Jose Santacruz-Londono, in and out of banks and companies in an effort to make the assets appear to be of legitimate origin. Jurado laundered the \$36 million by wiring it out of Panama, through the offices of Merrill Lynch and other financial institutions, to Europe. In three years, he opened more than 100 accounts in 68 banks in nine countries such as Austria, Denmark, the United Kingdom, France, Germany, Hungary, Italy, Luxembourg, and Monaco. Some of the accounts were opened in the names of Santacruz's mistresses and relatives while others under assumed European-sounding names. Keeping balances below \$10,000 to avoid investigation, Jurado shifted the funds between the various accounts. He established European front companies with the eventual aim of transferring the "clean" money back to Colombia, to be invested in Santacruz's restaurants, construction companies, pharmacies and real estate holdings. The scheme was interrupted when a bank failure in Monaco exposed several accounts linked to Jurado. Also in Luxembourg, endless noise from a money-counting machine in Jurado's house prompted a neighbour to alert the local police who initiated a wiretap in April 1990. Jurado was arrested two months later, convicted of money laundering in a Luxembourg court in 1992 and a few years later extradited to the United States. He pleaded guilty to a single count of money laundering in a New York federal court in April 1996 and was sentenced to seven and a half years imprisonment.²⁸

6. The Law

6.1 Legal framework in Sri Lanka

Although a specific statute was enacted to combat with money laundering in 2006, there were other Acts, such as Banking Act No.30 of 1988, Customs Ordinance and Exchange Control Act No.24 of 1953, which had indirect provisions to deal with the crime of money laundering.

6.1.1 Prevention of Money Laundering Act No.5 of 2006

Prevention of Money Laundering Act No.5 of 2006 of Sri Lanka (PMLA/SL) as amended was enacted to provide the necessary measures to combat and prevent money laundering and to provide for matters concerned therewith or incidental thereto. The Act is applicable to persons (including body of persons) resident in Sri Lanka, and institutions carrying on business in Sri Lanka and either incorporated or registered in Sri Lanka or either incorporated or registered as a branch of a bank incorporated or registered outside Sri Lanka which is used for the commission of the offence.²⁹ All the banks and financial institutions are sufficiently covered by this provision.

Engaging (directly or indirectly) in any transaction, receiving, possessing, concealing disposing, bringing into or transferring out of Sri Lanka in relation to any property which is derived or realised (directly or indirectly) from any unlawful activity or from the proceeds of any unlawful activity; or knowing or having reason to believe that such property is derived or realised as said above shall be an offence under the Act.³⁰ It is commendable that the term ‘property’ is properly defined to include movable and immovable assets of all kinds, tangible and intangible property and instruments in digital and electronic form. This property is derived or realised directly or indirectly from any unlawful activity.³¹ In a prosecution it may be difficult for the prosecution to prove that a property in question was derived from a criminal activity. In order to make this burden easy the Act provides that, for the purpose of any proceedings under the Act, it shall be deemed, until contrary is proved, that any movable or immovable property acquired by a person is derived from unlawful activity. The burden is shifted to the person charged to prove that the property in question was a part of known income.³² In order to show the gravity of the offence the provision imposes minimum sentencing of five years RI, minimum fine equivalent to the property involved in the transaction or both and forfeiture. Any person who attempts, conspires, aids or abets too shall be guilty of an offence under the Act.

²⁷ See 6.2

²⁸ Source: www.un.org/ga/20special/featur/laundry.htm [Jurado is a double degree holder from Harvard]

²⁹ S.2 PMLA/SL

³⁰ S.3 PMLA/SL

³¹ Unlawful activity is defined under s.35 whereby any act which constitutes an offence under a list of statutes included therein will be covered. The list includes *inter alia* Poisons Opium and Dangerous Drugs Ord, Bribery Act.

³² S.4 PMLA/SL

Since it is a criminal offence, the basic question of proof of *mens rea* beyond reasonable doubt while the *actus reus* was committed will normally arise. Any reader may misunderstand the following words used in the Act thinking that the statute is in line with the traditional proof: The said words are ‘...knowing or having reason to believe that such property is ...’. An answer to such a question is given in s. 3(3) which provides that a conviction for the commission by the accused of the unlawful activity shall not be necessary for the proof of the offence. Although the courts of Sri Lanka did not get an opportunity so far to interpret this provision, it is very clear that the court will imply the *mens rea* by the commission of the prohibited act, in the opinion of the writer. The US law contains similar wording and provides for the requirement of ‘knowledge of a specified unlawful activity’. Some circuit courts held that it is sufficient to prove that the defendant was wilfully blind to the specific unlawful activity and made the government’s burden of proof easy.³³

Further, divulging information, disclosing the identity of a person and falsifying, concealing or destroying records knowing or having reason to believe that an investigation is about to commence are offences under the PMLA/SL.³⁴ In addition, the Act imposes duty on any person who knows or has reason to believe from information or otherwise in the course of trade, profession, business or employment carried on by that person that any property had been derived from unlawful activity, to disclose his knowledge to the Financial Intelligence Unit (FIU/SL).³⁵ Banks and other financial institutions may be brought under this provision.

However, it is to be noted that the section provides ‘any person’ and the important term of ‘institutions’ is left out unlike s.2 of the Act. Over and above the said statutory provision, the bank may be liable for negligence in a suit against launderer for non-disclosure, if a civil suit is filed against a perpetrator, the writer opines.

Another novel provision is the power given to the police officers³⁶ to freeze any property. If there are reasonable grounds to believe that any person is involved in any prohibited activity and it is necessary to prevent further acts being committed in relation to such offence, he may issue a ‘freeze order’ prohibiting any transaction with regard to any account, property or investment which may have been used or to be used in connection with such offence.³⁷ If indictment is filed thereafter for the offence of money laundering, such freezing order will remain in force until the conclusion of the trial. The Act further declares that any transaction effected in violation of any such freezing order shall be null and void.³⁸

As a member of the United Nations, Sri Lanka is obliged to comply with the Resolutions issued by United Nations Security Council (UNSC). As per the United Nations Act No 45 of 1968, the Minister of Foreign Affairs is required to issue Regulations promulgating such resolutions of the UNSC. Once the Regulation issued by Minister of Foreign Affairs is tabled in the Parliament it becomes effective and required to be implemented by the relevant authorities as prescribed in such Regulation. As a result, the Financial Institutions and Designated Non-Finance Businesses and Professions (DNFBPs) have the obligation to implement financial restrictions/ financial sanctions by freezing all funds, financial assets and economic resources owned or controlled directly or indirectly by individuals or entities designated by the UNSC or persons acting on their behalf. In addition, the reporting institutions are also prohibited from providing any financial services to the designated individuals and entities. Guidance on the implementation required to be provided by the relevant authorities as required by the Regulation.³⁹

The duty of a banker with regard to secrecy of its customers is dealt with under the PMLA/SL. It is a breach of bankers’ duty of confidentiality of its customers to divulge confidential information. However, according to s. 16 of PMLA/SL, the Act shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by any law, and accordingly any disclosure of information in compliance with the provisions of the Act shall be deemed not to be a contravention of such obligation or restriction.

The PMLA/SL was enacted during a crucial period in which the country was facing civil disturbances and therefore considered as a timely one. However, arrest using provision of the Act is yet to be seen.

6.1.2 Financial Transaction Reporting Act No.6 of 2006

The main objective of the Financial Transaction Reporting Act No.6 of 2006 (FTRA/SL) is identifying customers of financial institutions. Hence the Act provided for collection of data relating to suspicious financial transactions and thereby facilitating

³³ For example, in *US v. Sayakhom*, 168 F.3d 928, 943 n.8 (9th Cir. 1999) conviction was made on actual knowledge; in *US v. Flores*, 454 F.3d 149, 155-156 (3^d Cir. 2006) an attorney who was wilfully blind to illegal source of client’s money was convicted of conspiring with the client to commit money laundering by opening bank accounts and conducting financial transactions for the client; the case of *US v. Corchado-Peralta*, 318 F.3d 255, 258 (1st Cir. 2003) held that wife’s knowledge of the source of husband’s money may be shown by wilful blindness. Also see Mark A. Provost, ‘Money Laundering’, 46 American Criminal Law Review, p.837.

³⁴ S.6 PMLA/SL

³⁵ S.5 PMLA/SL

³⁶ Police officer not below the rank of Superintendent of Police or in the absence of such rank, an Assistant Superintendent of Police may exercise this power as per s. 7 PMLA/SL.

³⁷ In case of any such freeze orders, the police officer making the order should seek confirmation of the High Court within 7 days of the order.

³⁸ S.9 PMLA/SL

³⁹ <http://fiusrilanka.gov.lk/unsr.html>

detection and investigation of money laundering and financing of terrorism, requiring financial institutions to undertake due diligence measures to combat money laundering and financing of terrorism and for the creation of Financial Intelligence Unit (FIU/SL), the authority (coming within the purview of the Central Bank of Sri Lanka) designated to monitor activities of all financial institutions.

The Act makes it mandatory for institutions to identify persons who open, operate and maintain accounts with them. As a result, anonymous accounts cannot be opened by any institution. This requirement of identification is further strengthened by 'know your customer' or KYC rule which is a part of corporate governance code issued by the Central bank of Sri Lanka. The Act requires institutions to maintain data, records and correspondence for a period of 5 years.⁴⁰ Any transaction of an amount in cash exceeding such sum as prescribed by the Minister shall be reported to the FIU/SL.⁴¹ Further, institutions are expected to conduct ongoing due diligence and scrutiny of customers that includes customers' business, their risk profile and source of funds.⁴² Institutions are protected from any criminal, civil or disciplinary proceedings if they act in good faith and in compliance with the provisions of the Act.⁴³ Similar to s. 16 of PMLA/SL, s. 31 of FTRA/SL provides for compliance notwithstanding anything to the contrary in any other law.

The FIU/SL was created under this Act for the first time. The Act sets about the functions of the FIU/SL that includes *inter alia* receiving reports relating to suspicious financial transactions, collecting information that it considers relevant, carrying out examination, instructing taking of appropriate action and issuing rules /guidelines, undertaking due diligence checks, conducting research into the trends and development in the area of money laundering and financing of terrorism and improving ways of detecting, preventing and deterring money laundering and financing of terrorism.⁴⁴ Where the FIU/SL has reasonable grounds to suspect that transaction or attempted transaction may involve the proceeds which are attributable to any unlawful activity or connected to the commission of money laundering offence, it may direct the Institution so connected not to proceed with the carrying out of that transaction for a period up to 7 days.⁴⁵ The FIU/SL may, thereafter, make an *ex parte* application to court to obtain an order endorsing their move. No action has been filed so far under the provisions of the FTRA/SL.

6.1.3 Convention on the Suppression of Terrorist Financing Act No. 25 of 2005

Convention on the Suppression of Terrorist Financing Act No. 25 of 2005 (CSTFA/SL) is another milestone towards the initiatives of the Sri Lankan government to combat money laundering. It is an Act to give effect to the International Convention on the Suppression of Terrorist Financing adopted by the General Assembly of the UN. It is a known fact that both the offences of money laundering and terrorist financing are closely connected to each other although it is unknown which one is committed first. Illegally earned money may be laundered tactfully and deposited for the purpose of terrorism or money earned through terrorism⁴⁶ may be laundered to pose as legal earning. Hence, as said earlier, blocking one will affect the other. Therefore, the CSTFA/SL makes it very clear that it is an offence for any person to provide or collect unlawfully and wilfully funds with the intention that such funds should be used or with the knowledge that they are to be used or having reason to believe that they are likely to be used in full or part in order to commit offences within the scope of the Conventions listed out in the Schedule 1 to the Act⁴⁷ or any other act that may result in causing death or bodily injury to any person.

Convention on the Suppression of Terrorist Financing (Amendment) Act, No. 41 of 2011 provides remarkable powers to police officers to issue freezing orders up to a period of 7 days. The CSTFA/SL is further amended in 2013 whereby wider definition to 'terrorists' and 'terrorists acts' are provided for. These amendments indicate the commitment of the government of Sri Lanka in combating money laundering.

6.1.4 The Directives of the Central Bank of Sri Lanka

The Central Bank has issued Directions on Corporate Governance for Licensed Commercial and specialized Banks in terms of s. 46(1) and 76 J(1) of the Banking Act No. 30 of 1988 which became effective from 1st January 2008.⁴⁸ These rules have been designed to promote a healthy and robust risk management framework for banks, with accountability and transparency through policies and oversight by the boards of directors who along with senior management, are responsible for the management of

⁴⁰ S.4 FTRA/SL

⁴¹ S.6 FTRA/SL. The amount prescribed by the Minister is SL Rs.500,000/- or approximately US\$ 4,500.

⁴² S.5 FTRA/SL

⁴³ S.12 FTRA/SL

⁴⁴ S. 15(1) FTRA/SL

⁴⁵ S. 15(2) FTRA/SL

⁴⁶ It may be selling illegal fire arms or explosives or contracts for killing and the like.

⁴⁷ The Schedule includes Conventions on the Suppression of unlawful seizure of Aircrafts, Suppression of Terrorists Bombing, Suppression of unlawful acts against safety of Maritime Navigation and the like.

⁴⁸ The main aspects covered are the broad responsibilities of the board, board's composition, criteria to assess the fitness and propriety of directors, management functions delegated by the board, separation of duties of the Chairman and Chief Executive Officer, board appointed committees in relation to integrated risk management, audit, nomination, and human resource and remuneration, related-party transactions and disclosure of financial statements.

banks. The implementation of these Directions also provides an opportunity to depositors, investors, and other stakeholders to monitor the performance of banks.

Another important move by the Central bank was the requirement to all banks to conduct due diligence on all customers involved in cross-border financial transactions and ensure that all requirements under the relevant statutes are complied with. Accordingly, effective from 19-01-2007 all licensed banks shall report any transaction of suspicious nature to the relevant authorities immediately.⁴⁹

6.1.5 The Banking Act No. 30 of 1988

A new section 83c was inserted to the Act by way of Banking (Amendment) Act No.2 of 2005. All persons are prohibited (directly or indirectly) from initiating, offering, promoting, advertising, conducting, financing, managing or directing a Scheme where a participant is required to contribute or pay money or monetary value and the benefits earned by the participant are largely dependent on either increase in number of participants or increase in the contribution made by the participants in the Scheme. The word 'Scheme' is indicated with a capital 'S' to express the prominence given to the said term. In this regard the officials of the Central Bank of Sri Lanka are empowered to search, examine documents and obtain copies including computer generated records. The provision further declares that the documents so obtained shall be admissible in evidence in court as prima facie evidence of the facts stated therein.

Although this provision sufficiently covers any alleged money laundering, the government has gone for separate statute to strengthen its commitment towards combating money laundering.

6.1.6 Monitoring mechanism of Sri Lanka

In 2006, the Asia/Pacific Group on Money Laundering (APG) conducted a mutual evaluation of Sri Lanka's Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT) regime against the Financial Action Task Force's (FATF) 40 recommendations and 09 special recommendations.⁵⁰ Of the 6 core recommendations (out of 40), Sri Lanka is compliant or largely compliant with none, partially compliant with 3, and noncompliant with 3. However, the mutual evaluation was completed just before Sri Lanka implemented major new AML/CFT laws (namely, PMLA/SL and FTRA/SL) and established an FIU within its Central Bank.

APG mutual evaluation report of 2006 stated that: (i) the country's penalty framework is not dissuasive and the relevant offenses are not fully implemented; (ii) the PMLA/SL, UN Regulation No. 1, and Convention for the Suppression of Terrorist Financing Act are not applicable to income, profits, or instrumentalities of crime. (iii) the freezing mechanism under the FTRA/SL is done with notice, and the Act contains no tracking procedures. (iv) there is no tool available for voiding fraudulent transactions; (v) the existing laws do not detail whether information collected by authorities can be shared domestically or internationally among relevant authorities; (vi) know-your-customer guidelines are not enforceable and the FTRA does not specify the different measures to be taken against individuals versus those against corporations. There are no requirements to identify beneficial owners or third parties, understand the ownership and control structure of the customer, obtain information on the purpose and nature of the relationship, or keep customer information up-to-date.⁵¹

Nevertheless, a 2010 report from the FATF noted that Sri Lanka has made progress, although certain deficiencies remain. It identified Sri Lanka as a jurisdiction with shortcomings in its AML/CFT framework and the weaknesses continued to be inadequate legal foundation and insufficient procedures to freeze assets. Notably, the criminalization of money laundering and terrorist financing remains inadequate, as do adequate procedures for the identification and freezing of assets. It is believed that the relevant authorities will consider these valuable comments given in both the reports and act accordingly.

The APG completed its assessment of Sri Lanka's AML/CFT system subsequently. The assessment is a comprehensive review of the effectiveness of Sri Lanka's AML/CFT system and its level of compliance with the FATF Recommendations. The report was formally adopted by at the APG Annual Meeting in July 2015. The findings of this assessment have also been reviewed and endorsed by the FATF. Accordingly, it is reported that Sri Lanka has a sound understanding of most of its money laundering threats and an acute understanding of terrorist financing risks, shaped by years of war between the Sri Lankan Government and

⁴⁹Central Bank of Sri Lanka document under reference 02/04/004/0012/001 dated 19-01-2007 referred to the statutes of PMLA/SL, FTRA/SL, CSTR/SL and the Exchange Control Act.

⁵⁰ The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

⁵¹Source:<http://www.estandardsforum.org/sri-lanka/standards/anti-money-laundering-combating-terrorist-financing-standard>

the LTTE, that ended in 2009. Sri Lanka possesses the foundation for an effective AML/FT system but to date there has been limited demonstration of effectiveness with only one money laundering conviction.⁵²

6.2 Legal framework in the United Kingdom

The UK has given notice very early, as far back in 1968, that third parties may be involved in facilitating the realization of property which has been obtained unlawfully, by way of s. 22(1) of the Theft Act 1968 which provides that a person handles stolen goods if (otherwise in the course of stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realization, by or for the benefit of another person, or if he arranges to do so. This provision, while being very wide-ranging in its effects, relates solely to goods which are or which represent the proceeds of stolen goods and covers a wide range of activities that are known as 'money laundering' in today's context when money or other realizable property is dishonestly handled.

Previously, the UK was largely driven by the law of the EU. In this regard the First Directive was enacted in 1991⁵³ and then the Second Directive in 2001.⁵⁴ The Third Directive called Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing issued in 2005⁵⁵ supersedes the First and the Second Directives. The Third Directive is not an isolated instrument, but focuses on measures to avoid the misuse of the financial system in the EU by money launderers and terrorist financiers and therefore, a first pillar legal instrument based on Art. 47(2) and 95 of the Treaty⁵⁶ says Salas.⁵⁷ The need for a legal definition to the term 'money laundering' was felt during this period and it was clear from the seventh recital which said that although initially limited to drug offences, there has been a trend in recent years towards a much wider definition of money laundering based on a broader range of predicate offences which facilitates the reporting of suspicious transactions and international cooperation in this area. However, the definition for 'money laundering' in Article 1 resembles the Article of the same number of the Third Directive. The Directive further defines 'criminal activity' and 'serious crime'.

Article 1(c) of the First Directive was the starting point with regard to the role of banks in policing money laundering.⁵⁸ It is the concept of *facilitating* the movement of the proceeds of crime which unavoidably places credit institutions at the forefront of the

⁵² <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-sri-lanka-2015.html>. A further report published in 2018 reveal that, since November 2017, when Sri Lanka made a high-level political commitment to work with the FATF and APG to strengthen the effectiveness of its AML/CFT regime and address any related technical deficiencies, Sri Lanka has taken steps towards improving its AML/CFT regime, including by issuing CDD rules for DNFBPs. Sri Lanka should continue to work on implementing its action plan to address its deficiencies, including by: (1) enacting amendments to the MACMA to ensure that mutual legal assistance may be provided on the basis of reciprocity; (2) issuing any necessary guidance and ensuring that implementation of the CDD rules has begun, by way of supervisory actions; (3) enhancing risk-based supervision and outreach to FIs and high-risk DNFBPs, including through prompt and dissuasive enforcement actions and sanctions, as appropriate; (4) providing case studies and statistics to demonstrate that competent authorities can obtain beneficial ownership information in relation to legal persons in a timely manner; (5) issuing a revised Trust Ordinance and demonstrating that implementation has begun; and (6) establishing a TFS regime to implement relevant UNSCRs related to Iran, and demonstrating effective implementation on this and the UN Regulation related to the DPRK. [<http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/fatf-compliance-february-2018.html#SriLanka>]. With regard to (5) above, Amendments have been introduced to the law governing trusts in Sri Lanka, the Trusts Ordinance, No. 9 of 1917, to mitigate the misuse of trusts in money laundering by increasing transparency of information relating to trusts created in Sri Lanka. In terms of the Trusts (Amendment) Act, No. 6 of 2018 upon creation of an express trusts under Section 6 of the Trusts Ordinance in relation to any immovable or movable property, the trustee of such trusts is required to obtain and maintain information as specified in the Regulation.

⁵³The Prevention of the use of Financial System for the Purpose of Money Laundering – 1991/308/EEC

⁵⁴The Second European Commission Money Laundering Directive – 2001/97/EC

⁵⁵Directive 2005/60/EU

⁵⁶The Treaty of Maastricht signed in 1992 by the members of the European Community in Maastricht, Netherlands.

⁵⁷Mariano Fernandez Salas, 'The third anti-money laundering directive and the legal profession', presentation made on 27 May 2005 at a conference organised by European Association of Lawyers, Brussels.

⁵⁸According to Art 1 (c) 'money laundering' means the following conduct when committed intentionally:-

- (i) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action,
- (ii) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity,

detection and prevention of criminal activity says Mark Hapgood.⁵⁹Onerous duties were imposed on credit institutions since without their interference proceeds of all criminal activities would be freely transferable.

The UK government gave effect to the First and the Second Directives by way of Proceeds of Crime Act 2002 (PCA/UK). Prior to this Act, where the tainted property represented the proceeds of drug trafficking, the offence was covered under the Drug Trafficking Act 1994⁶⁰ which largely derived from the Drug Trafficking Offences Act of 1986 and also to a lesser extent from the Criminal Justice (International Cooperation) Act of 1990. Criminal Justice Act of 1988 dealt with tainted property when it represented the proceeds of any other criminal conduct.⁶¹On the enactment of PCA/UK all proceeds of criminal activities were brought under one single group.

The PCA/UK defines money laundering as an act which constitutes an offence under sections 327-9⁶² and includes attempt, conspiracy, aiding, abetting, counselling and procuring the commission of the offence which are called principal offences. In addition, there exist non-reporting offences and tipping-off offences under the Act. The term 'criminal property' used often in these sections was defined to mean a property if it constitutes a person's benefit from criminal conduct or represents such a conduct and the alleged offender knows or suspects that it constitutes or represents such a benefit.⁶³The court of appeal had the opportunity of providing guidelines to the definition of 'criminal property' in *R. v. Gabriel*.⁶⁴ The court rejected the argument that profits made from trading in legitimate goods, without declaring the profits to HM Revenue and customs would convert the property into criminal property. This was endorsed later in *Loizou and others*⁶⁵ in which the court said that, 'the natural meaning of ... (criminal property) is that the property concealed, disguised, converted or transferred as the case may be is criminal property at the time it is concealed, disguised, converted or transferred. It means that no offence is committed if the property is not criminal property at the time of transfer.

Another controversial term under the PCA/UK is 'suspicion' which was considered in *R. v. Da Silva*⁶⁶, in the context of s.93A Criminal Justice Act 1988, to the effect that the defendant must think that there is a possibility which is more than fanciful that the relevant facts exist and a vague feeling of unease would not suffice. The learned judge pointed out in this case that the statute does not require the suspicion to be clear, firmly grounded and targeted on specific facts or based upon reasonable grounds. This test was followed in *K Ltd. v. National Westminster Bank plc (Revenue and Customs Prosecution office and Serious Organised Crime Agency Intervention)*⁶⁷ The same term of 'suspicion', in the context of s.328 of PCA/UK, was analysed in *Squirrel Ltd. v. National Westminster Bank plc*⁶⁸ by adopting the definition of Lord Devlin in *Hussein v. Chong Fook Kam*⁶⁹ that suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking and it arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. The outcome of the above cases is that there is no requirement under law that there should be reasonable grounds to form suspicion. Therefore, it seems that whenever a bank officer suspects of any transaction, it becomes his duty to inform the authorities. The suspicion is that of a subjective nature and the alleged offender will not be liable unless the property involved is in fact criminal property.

There are other types of money laundering offences (other than the offences of concealing non-reporting and tipping-off under PCA/UK) under the Terrorism Act 2000. This was amended by the Anti-terrorism, Crime, and Security Act 2001 and Terrorism Act 2006. A person commits an offence if he enters into or concerned with an arrangement that facilitates the retention or control of terrorist property.⁷⁰

In addition, Money Laundering Regulation 2003 was in force which implemented the Second Directive and covers a broad range of activities which are not limited to financial services. The phrase 'relevant business' used in the Regulation also included regulatory activity of accepting deposits. The Regulation further required the relevant business to establish such procedures of internal control and communication as may be appropriate for the purpose of forestalling and preventing money laundering. Another important regulation is identification of clients which requires maintenance of identification procedures that are reasonably practicable. This is now amended by Money Laundering Regulation 2007. In addition there is Money Laundering Regulation, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 in place in UK.

(iii) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity,

(iv) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs.

⁵⁹Mark Hapgood, *Paget's Law of Banking*, 12th ed., p.110.

⁶⁰Ss.49-53

⁶¹Ss.93A-D

⁶²Ss. 327-9 contain in Part 7 of the Act deal with concealing; arrangements; and acquisition, use and possession of criminal property respectively. Concealing offence includes concealing, disguising, converting, transferring or removing of criminal property while arrangement deal with any arrangements towards the above.

⁶³S.340(3) PCA/UK

⁶⁴[2006] EWCA Crim229; [2006] 4 AER 26

⁶⁵[2006] EWCA Crim 1719; [2006] 4 AER 215

⁶⁶[2006] EWCA Crim 1654; [2006] 4 AER 900

⁶⁷[2006] EWCA Civ 226; [2005] 4 AER 609

⁶⁸[2005] 2 AER 784

⁶⁹[1970] AC 942

⁷⁰S. 18 Terrorism Act 2000

Moreover, the Financial Services and Markets Act 2000 too plays a vital role in relation to combating money laundering. It is to be mentioned here that one of the regulatory objectives of the Financial Services Authority is reduction of financial crime⁷¹ and in that regard the authority is empowered to make rules to prevent and detect money laundering⁷² and prosecute offences relating to money laundering.

The latest in the process of development is the sanctions and Anti-Money Laundering Act 2018.⁷³

6.3 International Conventions

International efforts to curb money-laundering and the financing of terrorism are the reflection of a strategy aimed at, on the one hand, attacking the economic power of criminal or terrorist organizations and individuals in order to weaken them by preventing their benefiting from, or making use of, illicit proceeds and, on the other hand, at forestalling the nefarious effects of the criminal economy and of terrorism on the legal economy. The 1988 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances is the first international legal instrument to embody the money-laundering aspect of this new strategy and is also the first international convention which criminalises money-laundering. Later, in 2003 and 2005, the UN Convention against Transnational Organized Crime and the UN Convention against Corruption respectively came into force. Both instruments widen the scope of the offence of money-laundering by stating that it should apply to the proceeds of illicit drug trafficking, and proceeds of all serious crimes as well. The said Conventions urge States to create a comprehensive domestic supervisory and regulatory regime for all financial institutions. Conventions also mandate for the establishment of a Financial Intelligence Unit (FIU). In the meantime, the International Convention for the Suppression of the Financing of Terrorism came into force in 2002 and requires Member States to take measures to protect their financial systems from being misused by persons planning or engaged in terrorist activities.

The European Union adopted the first anti-money laundering Directive in 1990 in order to prevent the misuse of the financial system for the purpose of money laundering. It provides that obliged entities shall apply customer due diligence requirements when entering into a business relationship.

After the September 11, 2001 disaster in the US, the Member States endorsed the links between terrorism, transnational organized crime, the international drug trafficking and money-laundering, and require nations that had not done so to become parties to the relevant international conventions. In 2001, the UN Security Council adopted a Resolution⁷⁴ through which it imposed certain obligations on Member States, such as the prevention and the suppression of the financing of terrorist acts, the criminalization of terrorism-related activities and of the provision of assistance to carry out those acts, the denial of funding and safe haven to terrorists and the exchange of information to prevent the commission of terrorist acts.

A notable step in this regard is the EU Third Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing was issued in 2005.⁷⁵ Later in 2015, the EU adopted a modernised regulatory framework and those are:

- **Directive (EU) 2015/849** on preventing the use of the financial system for money laundering or terrorist financing (4th Anti-Money Laundering Directive)
- **Regulation (EU) 2015/847** on information on the payer accompanying transfers of funds – makes fund transfers more transparent, thereby helping law enforcement authorities to track down terrorists and criminals.

Both these instruments take into account the 2012 Recommendations of the Financial Action Task Force (FATF) (see MEMO/12/246), and go further on a number of issues to promote the highest standards for anti-money laundering and to counter terrorism financing.

- **5th Anti-Money Laundering Directive (Amendments to the 4th Anti-Money Laundering Directive)**

⁷¹S.2(2)(d)

⁷²S.146

⁷³ On 1 May 2018, the UK House of Commons, without opposition, passed the Sanctions and Anti-Money Laundering Bill, which will set out the UK government's intended approach to exceptions and licenses when the nation becomes responsible for implementing its own sanctions and will also require notorious overseas British territory tax havens such as the Cayman Islands and the British Virgin Islands to establish public registers of the beneficial ownership of firms in their jurisdictions by the end of 2020. The legislation was passed by the House of Lords on 21 May and received Royal Assent on 23 May. However, the Act's public register provision is facing legal challenges from local governments in the Cayman Islands and British Virgin Islands, who argue that it violates their Constitutional sovereignty.

⁷⁴Resolution 1373

⁷⁵Directive 2005/60/EU – already dealt with under 6.2

The 5th Anti-Money Laundering Directive was published in the Official Journal of the European Union on 19 June 2018. Accordingly the Member States must transpose this Directive by 10 January 2020.⁷⁶

In 1990, the Financial Action Task Force on Money-Laundering (FATF)⁷⁷ issued a set of 40 Recommendations for improving national legal systems, enhancing the role of the financial sector and intensifying cooperation in the fight against money-laundering. These Recommendations were revised and updated in 1996 and in 2003 in order to reflect changes in money-laundering techniques and trends. The 2003 Recommendations emphasized customer identification and due diligence requirements, suspicious transactions reporting requirements and seizing and freezing mechanisms. The FATF extended its mandate in 2001 to cover the fight against terrorist financing and issued 8 Special Recommendations on combating the financing of terrorism and a 9th Special Recommendation was adopted in 2004. These new standards recommend the criminalization of the financing of terrorism in accordance with the UN Convention for the Suppression of the Financing of Terrorism, address practices used by terrorists to finance their activities and call for the implementation of specific asset freezing, seizing and confiscation mechanisms. These 40 recommendations and 09 Special Recommendations together, as endorsed by the UN⁷⁸, provide a comprehensive set of measures for an effective legal and institutional regime against money-laundering and the financing of terrorism.

The 2009 Handbook for Countries and Assessors outlines criteria for evaluating whether FATF standards are achieved in participating countries. In 2012, the FATF codified its recommendations and Interpretive Notes into one document that maintains SR VIII (renamed "Recommendation 8"), and also includes new rules on weapons of mass destruction, corruption and wire transfers ("Recommendation 16").

In addition to FATF's "Forty plus Nine" Recommendations, in 2000 FATF issued a list of "Non-Cooperative Countries or Territories" (NCCTs), commonly called the FATF Blacklist. This was a list of 15 jurisdictions that, for one reason or another, FATF members believed were uncooperative with other jurisdictions in international efforts against money laundering (and, later, terrorism financing. As of October 2006, there are no Non-Cooperative Countries and Territories in the context of the NCCT initiative. However FATF issues updates as countries on High-risk and non-cooperative jurisdictions list have made significant improvements in standards and cooperation. The FATF also issues updates to identify additional jurisdictions that pose Money Laundering/Terrorist Financing risks.https://en.wikipedia.org/wiki/Financial_Action_Task_Force_on_Money_Laundering_-_cite_note-NCCT-8⁷⁹

The effect of the FATF Blacklist has been significant, and arguably has proven more important in international efforts against money laundering than has the FATF Recommendations. While, under international law, the FATF Blacklist carried with it no formal sanction, in reality, a jurisdiction placed on the FATF Blacklist often found itself under intense financial pressure.⁸⁰https://en.wikipedia.org/wiki/Financial_Action_Task_Force_on_Money_Laundering_-_cite_note-Impact-9

The Law Enforcement, Organized Crime and Anti-Money-Laundering Unit of UNODC is responsible for carrying out the Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism, which was established in 1997 in response to the mandate given to UNODC through the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The Unit's mandate was strengthened in 1998 by the Political Declaration and measures for countering money-laundering adopted by the General Assembly at its 20th special session, which broadened the scope of the mandate to cover all serious crime, not just drug-related offences. The broad objective of the Global Programme is to strengthen the ability of Member States to implement measures against money-laundering and the financing of terrorism and to assist them in detecting, seizing and confiscating illicit proceeds, as required pursuant to United Nations instruments and other globally accepted standards, by providing relevant and appropriate technical assistance upon request.⁸¹

⁷⁶ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/anti-money-laundering-and-counter-terrorist-financing_en

⁷⁷ This is an intergovernmental organization founded in 1989 on the initiative of the G7 to develop policies to combat money laundering.

⁷⁸ Resolution 1617 (2005) of the UN Security Council and the Annexed Plan of Action of Resolution 60/288 of the UN General Assembly (20 Sept 2006), stress the importance of the implementation of the FATF 40 Recommendations and the 9 Special Recommendations on terrorist financing.

⁷⁹ Source: <http://www.fatf-gafi.org/about/>

⁸⁰ As of 2018 FATF consists of 38 member jurisdictions and two regional organisations, the European Commission and the Persian Gulf Co-operation Council. The FATF also works in close co-operation with a number of international and regional bodies involved in combating money laundering and terrorism financing.

⁸¹ Source: <http://www.unodc.org/unodc/en/money-laundering/index.html?ref=menuside>

6.4 Certain Legal Issues

Money laundering laws⁸² impose numerous mandatory obligations on financial institutions with criminal sanction. These obligations include setting up procedures for -

- verifying the identity of clients;
- record-keeping for evidence of identity and other transactions;
- internal reporting for suspicions;
- the appointment of specially trained officers for Money Laundering Reporting or an Intelligence Unit.

The financial business community argues that adopting the above said procedure in administration, training, supervision and legal sectors, involves massive expenditure for them. Nevertheless, there is a counter argument to this to the effect that the compliance can be easily done by computers if properly programmed. No financial institution is running at a loss and therefore, compliance may increase their administrative cost slightly is another argument in favour of regulators who thrive hard to fight money laundering. The fact that the new generation is properly trained in the IT field will add to the counter argument. This means that training cost will be reduced in the years to come. Information technology can never be a replacement for a well-trained investigator, say responsible bank officers. As money laundering techniques getting more and more sophisticated, so does the technology that is used to fight with it. Therefore, anti-money laundering software filters of customer data that classifies according to level of suspicion may be put in place and monitored.

Further, Know Your Customer requirement may have an impact on the number of customers and the volume of work of any financial institution. On the other hand institutions that already have well-developed procedures in these areas will find that the costs of compliance will be relatively less. The World has accepted the fact that KYC rule has severely curtailed the activities of many money launderers.

A hindrance to the regulatory authorities is the existence of underground banking called 'parallel' banking. These systems tend to reflect more conventional banking practices, highly efficient and widely used methods of transferring money around the world. The top known among them are the *Chop*, *Hundi*, and *Hawallah* which enables the evasion of any conventional paper records and do not require the actual movement of money but nonetheless facilitate the payment of funds to another party in another country in local currency, drawn on the reserves of the overseas partner(s) of the *Hawallah* banker. The system is based on trust and sometimes the receipt for a transaction being something as harmless as a playing card or post-card torn in half, half being held by the customer and half being forwarded to the overseas *Hawallah* banker. The launderer then presents his receipt in the target country to obtain his money, and thereby escape from exporting illegal cash out of the country.

Another system known as SWIFT is also a peril to the authorities. The **Society for Worldwide Interbank Financial Telecommunication** (SWIFT), handles the registration of certain Business Identifier Codes that are approved by the ISO. Although the banks require authenticities documents to effect SWIFT it is impossible to differentiate between a genuine customer and a launderer and as a result there are chances for laundering through legal SWIFT.

7. Conclusion

"If you want to steal, then buy a bank", says Bertolt Brecht. Exponents say that the best method of both stealing and laundering money is to own a bank. Although banks are at risk group in relation to their main functions, what can be done against this crime if the bank is international and is in complicity with vast numbers of its depositors? When the CIA moved money via the BCCI it called it "facilitating the national interest", while it is called money laundering when the Mafia do it. One investigator quotes in the Kerry Report says that BCCI had 3,000 criminal customers and every one of those 3,000 criminal customers is a page 1 story. So if you pick up any one of [BCCI's] accounts you could find financing from nuclear weapons, gun running, narcotics dealing and you will find all manner and means of crime around the world in the records of this bank. Further, as Powis (1992) said, "money laundering becomes a relatively easy thing to do when a banking institution and a number of its key officials cooperate in the laundering activity".⁸³

The primary purpose of any business, whether legal or illegal, is to make profits and to re-invest it in future activity. For a criminal, who is well organized and who is also with the same objective will attempt to distance him from the source of crime to avoid detection and laundering becomes an essential part for him. This makes the issue crystal clear that, until and unless all crimes are eradicated, there will be money laundering.

Criminal networks functioning globally neither has respect for national or international legal boundaries nor for human suffering. As such, the criminal activities are on the increase despite numerous legal frameworks in place. The killing of Bin Laden or the

⁸²Laws include statutory provisions, articles of Conventions and Regulations

⁸³ Source: www.laundryman.u-net.com/page9_bus_prone_ml.html

arrests of any Mafia leader in single actions will not help combat money laundering. It is necessary to have international cooperation as well as coordination to run any effective mechanism to combat this epidemic.

Specialist knowledge is needed among the staff of FIU to do a timely detection which is lacking in developing nations. It seems that the authorities do not seem to accept that criminals are master minds. It is said that criminals do not stay in one place because chances of detection or arrest are more when they are stagnated. Therefore, anyone can assume that a money launderer is a frequent traveler. Hence there should be mechanisms to connect number of overseas travel to number of money transfers without causing hardship to the genuine business community.

Moreover, the general public needs to act responsibly and react appropriately, or they may be helping a money launderer who may be an international criminal. Therefore, awareness programmes in this regard by the FIU is necessary.

The magic trick for wealth creation by the drug dealers, fraudsters, smugglers, arms dealers, terrorists, extortionists and tax-evaders must be stopped. Money laundering is one of the most painful problems facing the international economy, and from the available information it can be seen that while the fundamentals of this crime remains largely the same, modern information technology has offered, and will continue to offer a more sophisticated and circuitous means to convert ill-gotten proceeds into legal tender and assets, which should be blocked by the use of same technology.

Countries should continue to strengthen their international ties and partnerships with regard to the financial sector. Maintaining relationship on a periodic way with counterparts in the financial centers globally is a must. All countries must, not only be urged to ratify the UN Convention but also to enact laws at domestic levels with more effective money laundering detection mechanism and forfeiture practices. Finally, jurisdictions must continue to identify the spots where the money is most vulnerable and continue to identify what they can jointly and effectively do in a practically feasible manner to separate criminals from their illegal achievements.

The law should cater for detection and provide for deterrence. Sri Lanka has its laws in par with international standards. However, the court of Sri Lanka is yet to get an opportunity to give a deterrence message.

* * *

Shanthi Segarajasingham*