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INTRODUCTORY NOTE

It is with pride that the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community the Resource Material Series No. 58.

This contains the work produced in two UNAFEI international training programmes: the 116th International Training Course (conducted from 28 August to 15 November 2000) and the 117th International Seminar (conducted from 15 January to 16 February 2001). The main themes of these training programmes were “Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes”, and “Current Situation and Countermeasures against Money Laundering”, respectively.

Bearing in mind that transnational organized crime is a serious problem in various countries of the world, and that the United Nations Convention against Transnational Organized Crime was adopted by the UN General Assembly in November 2000, UNAFEI has decided to undertake a series of training programmes in the coming years under the general subject of “transnational organized crime”. The above-mentioned training programmes were part of UNAFEI’s continuing commitment to this internationally important theme. The 116th International Training Course explored the ways and means of strengthening and improving investigative methods in the fight against transnational organized crime. The 117th International Seminar tried to develop more effective countermeasures against money laundering, an activity which is perpetrated under the influence of transnational organized crime.

In this issue, papers contributed by visiting experts selected individual presentation papers from among the Course and Seminar participants, and the reports of the Course and Seminar are published. I regret that not all the papers submitted by the Course and Seminar participants could be published. Also, I must request the understanding of the selected authors for not having sufficient time to refer the manuscripts back to them before publication.

I would like to pay tribute to the contributions of the Government of Japan, particularly the Ministry of Justice and the Japan International Cooperation Agency, and the Asia Crime Prevention Foundation for providing indispensable and unwavering support to UNAFEI international training programmes.

Finally, I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series; in particular, the editors of Resource Material Series No. 58, Mr. Hiroshi Iitsuka (Chief of Training Division) and Ms. Rebecca Findlay-Debeck (Linguistic Adviser), who so tirelessly dedicated themselves to this series.

December 2001

A handwritten signature in black ink, reading "Mikinao Kitada". The signature is written in a cursive, flowing style.

Mikinao Kitada
Director of UNAFEI

PART ONE
RESOURCE MATERIAL SERIES
No. 58

Work Product of the 116th International Training Course
“EFFECTIVE METHODS TO COMBAT TRANSNATIONAL ORGANIZED CRIME IN
CRIMINAL JUSTICE PROCESSES”

UNAFEI

VISITING EXPERTS' PAPERS

COMPONENTS OF AN EFFECTIVE ANTI-MONEY LAUNDERING REGIME

*Peter Yam Tat-wing **

I. INTRODUCTION

Organized crime cannot be tackled effectively unless there is an efficient and effective partnership between the different bodies within a jurisdiction tasked with law enforcement - in its widest sense. Once the organized crime becomes transnational in nature, this partnership becomes both more important and more complex, necessitating co-operation not only between different law enforcement bodies but also between different jurisdictions. This is particularly so in perhaps the most transnational of all crimes today - money laundering.

This paper examines the individual components necessary to provide a jurisdiction with an effective money laundering regime. Effective, in this context, means a regime which allows for the confiscation of the proceeds of crime and the prosecution of those criminals who undertake money laundering, whether for themselves or on behalf of other criminals.

The paper will draw heavily on the experience gained by law enforcement bodies in the Hong Kong Special Administrative Region. Hong Kong passed its first anti-money laundering legislation in 1989, making it one of the first jurisdictions in Asia to do so. Since that time, the legislation has been continually developing as practical experience reveals its deficiencies. Both prosecutors and police in Hong Kong have gained

experience, not only in enforcing the law and dealing with their overseas counterparts, but in dealing with private bodies and Government regulators which have a no less important role to play. Using this background, the paper will draw out some of the best practices which have been identified in both Hong Kong and other jurisdictions. Other practices will offer a contrast in approaches to certain problems. The best method to combat so called underground banks, for example, is still being debated and a number of different approaches have been or are being tried in various jurisdictions around the world.

To this end, the paper will examine the following areas:

- Legislation
- The role of a financial intelligence unit
- The role of regulators
- International co-operation
- Investigation of money laundering

Before examining any of these areas, however, it is necessary to look briefly at the size of the problem - how much money is being laundered and where is it coming from?

II. ESTIMATING THE MAGNITUDE OF MONEY LAUNDERING

It is almost impossible to put an accurate figure on the amount of money being laundered each year; criminals, after all, do not publish accounts. Estimates of the revenue generated from narcotics trafficking in the USA alone range from US\$40 billion to US\$100 billion¹.

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The Financial Action Task Force (FATF) estimates that narcotics trafficking is the single largest source of criminal proceeds, followed by the various types of fraud¹. Smuggling, gambling and, increasingly nowadays, trafficking in human beings also generate significant amounts of criminal proceeds. Often overlooked, however, is the huge amounts of money generated by tax evasion. Many people do not think of tax evasion as being a source of criminal proceeds; indeed, in some jurisdictions tax evasion is not a crime *per se*. However one only has to consider the huge industry which has grown up around so called tax havens, or off-shore financial centres, to realise that tax evasion - and its legally ambiguous sibling, tax avoidance - is big business.

In summary, therefore, whilst it is not possible to accurately quantify the amount of money laundering going on in any one country or region, it is possible to conclude that the amount of money being laundered is huge.

III. REQUIREMENTS FOR EFFECTIVE LEGISLATION

Effective anti-money laundering legislation must address a number of points. The following are regarded as essential:

- Money laundering must be a criminal offence;
- The law must allow for the confiscation of a criminal's assets, and must allow for terms of imprisonment to be imposed where assets have been placed beyond the reach of the courts;

- Jurisdictions must be able to apply for the confiscation of assets held abroad and to reciprocate on similar requests from abroad;
- There must be some provision made for asset sharing between jurisdictions where there has been a successful joint prosecution and confiscation;
- There must be a system in place for the reporting of financial transactions, whether suspicion or threshold-based, to a financial intelligence unit (FIU);
- There must be regulation of financial service providers commonly used for money laundering such as banks, securities brokerages, remittance agents and company formation agents.

In addition to these, legislation may be considered to allow for the civil confiscation of assets.

A. The Money Laundering Offence

The money laundering offence should ideally consist of two elements - firstly, some form of dealing with the proceeds of crime and, secondly, the criminal intent with which it is done. It must also list the predicate offences which generate the proceeds of crime.

Money laundering can be viewed in two ways. What may be termed the 'traditional' definition of money laundering involves some form of complicated and sophisticated process by which the proceeds of crime are hidden, disguised or made to appear as if they were generated by legitimate means. Using this definition in law, however, would cause immense problems in trying to prove the criminal's intent to, say, disguise the proceeds; if police subsequently find the proceeds, would that then mean that they were not disguised and therefore the offence was not committed? Obviously this

¹ Financial Action Task Force Annual Report 1999-2000

² Financial Action Task Force Annual Report 1999-2000

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possibility must be avoided.

The 'legal' definition of money laundering used in Hong Kong is far wider and simpler than the 'traditional' definition. It means, simply, any transaction involving the proceeds of crime. This is inclusive of both the 'traditional' definition and also of any transaction involving the proceeds of crime in which there has been no attempt to hide or disguise its source. Thus the drug dealer who receives money and deposits it in his/her own bank account is money laundering, as he/she is carrying out transactions knowing they involve the proceeds of crime.

Experience in Hong Kong has shown that the most difficult part of a money laundering case is in proving the criminal intent of the money launderer. Clearly, a person who deals with the proceeds of crime without knowing, or at least suspecting, the illegal origin of those proceeds should not be guilty of an offence. Setting the level of criminal intent at too high a level, however, can cause problems for the investigator. For example, a law that requires proof that the money launderer *knew* the property with which he/she was dealing was the proceeds of crime will result in very few prosecutions as evidence of such knowledge is difficult to come by in the absence of a confession. It can be argued that there is very little point in having a law which is almost impossible to use in practice. The net result is that the criminals continue money laundering as the law is unable to prosecute them or even act as a deterrent. The relevant section of the Hong Kong law is worded as follows:

"...a person commits an offence if, *knowing or having reasonable grounds to believe* that any property, in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he

deals with that property.³ [italics added]

Judicial decisions on this section of the law have construed *having reasonable grounds to believe* as meaning that a reasonable person, knowing the circumstances which the defendant knew, would have believed that the property was the proceeds of crime. This is an advance on having to prove the defendant's actual knowledge or belief as it allows for the prosecution of someone who had turned a wilful blind eye to the possible origins of the property in question.

It has been proposed that a further offence be created under Hong Kong law to deal with those people who deal with the proceeds of crime, *suspecting* them to be such but falling short of having a reasonable person's *belief*. If the proposal is passed into law, this lower mental element would be reflected by a lower sentence than that imposed on those with reasonable grounds to believe.

A final consideration when drafting an effective money laundering law is the need for the law to apply to as wide a range of predicate offences as possible. Obviously the law must apply to all serious crimes such as drug trafficking, fraud, kidnapping etc., which generate substantial criminal proceeds. Additionally, in recent years there has been a growing awareness that tax evasion should be included as a predicate offence. If it is not included, the problem then arises of money launderers claiming that they handled crime proceeds in the belief that they were dealing in the proceeds of tax evasion - and are therefore not guilty of the offence of money laundering.

³ S.25A, Organized & Serious Crimes Ordinance, Chapter 455, Laws of Hong Kong

B. Restraint & Confiscation of Assets

In addition to a money laundering offence, effective legislation must also provide for the restraint and confiscation of a criminal's assets. The provisions for restraining assets must allow for restraint without the suspect becoming aware of it - in the common law system, this is done by way of an ex parte application, without the presence of a defence representative. This allows for the restraint order to be served on financial institutions as soon as the investigation turns overt, thus depriving the suspect or his associates of an opportunity to dispose of the assets. Knowingly failing to comply with a restraint order should be a criminal offence.

The provisions for confiscating assets should ideally allow not just for the confiscation of the assets which investigators find, but also those assets which the defendant may have successfully hidden. Thus a defendant with only US\$2 million in located assets, but whom it can be proved has benefited from crime by over US\$10 million, can be ordered to pay back the full amount of his/her profits. If the balance is not subsequently paid, the law should allow for a custodial sentence to be imposed in lieu of payment.

C. Overseas Confiscation Orders

The trans-national nature of organized crime is reflected in the fact that criminals will often keep their assets in different countries. It is essential, therefore, that legislation provides for this by allowing for confiscation orders issued in overseas jurisdictions to be enforced domestically. In this regard, the FATF recommends:

“There should be authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate proceeds or other property of

corresponding value to such proceeds, based on money laundering or the crimes underlying the laundering activity.”⁴

D. Asset Sharing

Once an overseas confiscation order is enforced domestically, fairness dictates that the overseas jurisdiction be allowed to share the confiscated assets. Provision must therefore be made, both by law and by policy, for assets to be shared between jurisdictions. This may not always be practicable where only a small amount of property has been confiscated, as the administrative costs involved would outweigh the value of the assets to be shared. Government policy, therefore, should set a realistic threshold over and above which foreign governments may be allowed to apply for and receive a share of the assets commensurate with the work done by each side in that particular case.

E. Reporting of Financial Transactions

Most jurisdictions which have enacted money laundering legislation have incorporated a requirement for some form of reporting of financial transactions to a central body - usually a financial intelligence unit (see Part IV below). The reporting requirement can take one of three forms:

- Mandatory reporting of certain transactions over a particular value threshold - for example, cash transactions and international remittances over US\$10,000;
- Suspicious transaction reporting;
- Both threshold and suspicious transaction reporting.

Both threshold and suspicion based reporting have pros and cons; the former

⁴ FATF Recommendation No. 38

picks up a wealth of detail about an individual's spending habits which can be useful to an investigator conducting a financial profile or asset tracing on a suspect. It also, however, results in a great many reports which, because of the sheer volume, are rarely examined in any detail and present administrative problems due to the large numbers received. Suspicious transaction reporting does not provide the vast database of financial transactions which threshold reporting provides but can allow investigators to better concentrate their resources on genuinely suspicious activity.

Another factor to consider are the categories of people or institutions which are required to report financial transactions. Reporting of transactions over a certain threshold would entail all businesses being required to make such reports if their customers exceed the threshold. Suspicious transaction reporting can be more selective - although Hong Kong law requires all persons to report suspicious transactions, other jurisdictions require only banks and other financial institutions to make such reports.

F. Regulation of Financial Services Providers

An effective law must also provide for the regulation of those companies which provide financial services to the public. Most jurisdictions will have comprehensive laws and regulations to govern the operation of financial institutions such as banks, insurance companies and stock brokers. Less well regulated, but equally important in the battle against money laundering, are what may be termed intermediaries.

An 'intermediary' is a person or company which introduces a third party's money to the regulated financial system. The most widely recognised form of intermediary is

the company formation agency, which will allow a customer to purchase a 'shell' or 'shelf' company and will then operate the company - and, more importantly, its bank account - on the customer's behalf. Often the identity of the beneficial owner of the shelf company is not disclosed to the bank and, as the signatories to the shelf company's bank account are the staff of the company formation agency, the bank has no record of the real owner of the bank account. Not surprisingly, this arrangement has proved attractive to money launderers the world over as it allows for effective anonymity on the part of the beneficial owner of the shelf company and its bank account.

Some of the more responsible off-shore tax havens, where the bulk of company formation agents operate, are considering legislation to regulate the activities of such agents. Usually this legislation takes the form of a licensing regime under which company formation agents are only allowed to operate if they demonstrate that they apply basic anti-money laundering measures to their business practices.

Another form of intermediary is the remittance agent - also known as underground banks. Different jurisdictions around the world have approached the problem of remittance agents in different ways. In some jurisdictions their activities are completely illegal; in others they are left completely unregulated. Hong Kong has recently passed legislation requiring remittance agents to register with the Government, verify the identity of certain customers and make and retain records of certain transactions. It is hoped that the new law will, at the least, ensure that remittance agents will keep records which will allow investigators to trace an audit trail and identify the persons involved. The new law is also expected to act as a deterrent as it will make the remittance

sector less attractive to money launderers.

G. Civil Confiscation of Assets

The confiscation of assets described above concerns the assets of convicted criminals. Some jurisdictions, however, have also incorporated a form of civil confiscation into their legislation. Civil confiscation allows for the confiscation of property where it can be shown *on the balance of probabilities*, that is, a lesser standard of proof than the criminal standard of *beyond reasonable doubt*, that the property was the proceeds of, or was used in connection with, or was intended to be used in connection with, a crime. Confiscation is not dependant upon anyone being convicted of any crime.

IV. THE ROLE OF A FINANCIAL INTELLIGENCE UNIT

Financial Intelligence Units (FIUs) can be part of a police force or customs agency, a separate Government agency or a department of a central bank. Whichever form they take, their role should at least include the following:-

- Collection, collation and dissemination of transaction reports (whether they be threshold or suspicion based);
- Provision of feedback and training to makers of suspicious transactions reports.

Collection, collation and dissemination of reports can be done in a number of different ways and will not be discussed here.

The provision of feedback and training is an often overlooked, but vital, part of an FIU's duties. The effectiveness of a suspicious transaction reporting system relies on both the quantity and quality of the reports made. This in turn depends on

how well staff of financial institutions (which in practice make the vast majority of reports) can identify transactions which are genuinely suspicious. Without proper training, both the quantity and quality of the reports will remain at a low level. Although banks and other financial institutions provide basic training to their staff, input from the FIU is vital if they are to be kept up to date on the latest trends and methodologies for laundering money. The following practices can be considered when planning training and feedback:

- Lectures to bank compliance officers and front line staff;
- Provision of training material or vetting of a bank's training material to ensure it is up to date and covers all relevant legislation;
- Provision of real life sanitised cases to illustrate particular methods of money laundering and highlight suspicious activity indicators;
- Working groups consisting of members of both financial institutions and the FIU to highlight best practices;
- An FIU web site to increase public awareness of the legal requirements to report suspicious transactions;
- Qualitative and quantitative analyses of suspicious transaction reports made by individual institutions.

In addition, makers of suspicious transaction reports should be informed, whenever practical, of the progress and ultimate outcome of the investigation generated by their report, particularly where the report has led to a successful case.

V. THE ROLE OF REGULATORS

Banks and other financial institutions recognise the dangers which money

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laundering can present to the financial system. More importantly, they are aware of the damage which could be caused to their reputations if they were to be found laundering money due to their own negligence or lax procedures; the recent Bank of New York scandal illustrates this point. Whilst most financial institutions are very responsible, not all of them devote sufficient time, effort or resources to combating money laundering. This is where regulators of financial institutions have a vital role to play.

The role of a regulator, in an anti-money laundering context, is three-fold. Firstly, to draw up anti-money laundering guidelines for financial institutions to follow. These guidelines should include such matters as establishing the true identity of account holders, record keeping, training and reporting of suspicious transactions (if required by law). Secondly, the regulator should ensure that the financial institutions have appropriate policies and practices in place which conform with the guidelines. Thirdly, the regulator should check that the guidelines are being adhered to through regular visits to the financial institutions and spot checks. Prior to visiting a financial institution, the regulator should also liaise with the financial intelligence unit to check that the institution's rate of suspicious transaction reporting is in line with expectations, bearing in mind the type and size of the financial institution.

A range of measures should be available to the regulator to sanction those financial institutions which fail to comply fully with the regulator's guidelines.

VI. INTERNATIONAL CO-OPERATION

International co-operation, in the form of enforcement of external confiscation

orders and asset sharing, has already been touched upon in Part III above. This form of co-operation relates to cases where a suspect has already been arrested and his or her assets restrained. Equally, if not more important, is international co-operation during the investigation phase.

FATF Recommendation no. 32 states:

“Each country should make efforts to improve a spontaneous or “upon request” international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities”.

Recommendation No. 37 goes on to state:

“There should be procedures for mutual assistance in criminal matters regarding the use of compulsory measures including the production of records by financial institutions and other persons, the search of persons and premises, seizure and obtaining of evidence for use in money laundering investigations and prosecutions and in related actions in foreign jurisdictions.”

There is a distinction to be made here between the exchange of *intelligence* in money laundering matters and the rendering of assistance to another jurisdiction in obtaining *evidence*. The swift exchange of intelligence between enforcement agencies and FIU's of different jurisdictions at the investigation phase is vital if trans-national money laundering is to be tackled effectively. Treaties governing mutual legal assistance in criminal matters are designed primarily for collecting evidence for use in a court of law, not the swift exchange of intelligence.

VII. INVESTIGATION OF MONEY LAUNDERING

Experience in Hong Kong has shown that whilst confiscating the assets of a criminal is usually a relatively straightforward, albeit time consuming process, proving a case of money laundering is a good deal harder. Although the exact wording of money laundering laws varies from jurisdiction to jurisdiction, there will generally be two elements to the offence which have to be proved:-

- Dealing in property;
- Knowing or believing the property to be the proceeds of crime.

The first element, dealing in property, is normally the easiest to prove, although investigators should be aware that just because someone's bank account is being used does not mean that person is conducting the transactions - a 'stooge' is a person paid to open an account and then hand over the account books to a second person for their use. This MO is common in loan sharking syndicates. ATM cards and telephone banking are other examples of banking facilities which can be used by persons who are not the account holder.

It is, however, the second element, *knowing or believing*, that presents most problems. A money launderer will seldom admit that he or she knows or believes the property was the proceeds of crime. However, skilful investigation and the use of circumstantial evidence can negate a defence of ignorance as to the illicit origin of the property.

A. Investigation Techniques

1. Surveillance

Surveillance can be useful to prove that a suspect had no apparent legitimate source of income. For example, he/she was never seen going to work in a company,

factory, etc. Surveillance can also be useful in identifying where a suspect keeps his/her assets - financial transactions that the suspect performs whilst under surveillance, such as visiting a bank or an ATM, may identify which bank the suspect has an account with.

2. Telephone Intercepts

Lawfully obtained telephone intercepts which can be used in evidence can provide invaluable assistance to the investigator in proving that a suspect was aware of the criminal nature of the funds with which he/she was dealing.

3. Undercover Operations

As with telephone intercepts, use of undercover agents can provide direct evidence of a suspect's knowledge or belief as to the illicit source of the money. These operations can be relatively simple ones, targeting remittance agents or company formation agents, or they can be as sophisticated as setting up a 'shop front' operation to launder money on behalf of criminals.

4. Controlled Deliveries

The use of controlled deliveries in drug operations, whereby a drug shipment is delivered from one country to another under the control of the authorities, is a well established tactic. Controlled deliveries of money is less common but can be similarly effective when combined with other resources such as surveillance and telephone intercepts.

B. Circumstantial Evidence

Circumstantial evidence, whereby proof of guilt can be inferred from indirect evidence, can also be crucial in proving a money laundering case. The investigator may be able to show, for example, that a defendant had no legitimate income, that he/she often performed his/her transactions using cash, that his/her banking habits

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were not those to be expected from a normal person and that he/she was associated with people he/she knew to be criminals. None of these facts on their own would be enough to establish guilt, but if they are put together and presented to a court, the jury may feel that the inescapable inference is that the defendant was guilty of money laundering.

VIII. CONCLUSION

Tackling money laundering will never be easy. The ease with which money can be moved around the world, the ingenuity of money launderers in finding new ways to disguise their ill gotten gains, the prevalence of tax havens and shelf companies and the excessive secrecy of certain jurisdictions all combine to ensure that tracing the flow of dirty money and prosecuting the money launderer will remain one of the hardest tasks in criminal investigation. This task will be made somewhat easier, however, if the various anti-money laundering components mentioned above are welded together to form a cohesive anti-money laundering strategy. A workable and comprehensive law, close international co-operation, an effective FIU and strong regulation of the financial sector, combined with imaginative and thorough investigation, are vital if money laundering and its inherent dangers to society are to be effectively combated.

FIGHTING HONG KONG'S ORGANIZED CRIME, THE ORGANIZED & SERIOUS CRIME ORDINANCE

*Peter Yam Tat-wing **

I. BACKGROUND

Historically Hong Kong's organized crime were often seen to be associated with activities of triad societies active in the territory. It was therefore no surprise that apart from the array of criminal offences under its Common Law Jurisdiction which dealt with specific acts of the crime, Hong Kong's legal arsenal against triad and organized crime was only to be found in its Societies Ordinance which dealt with the threat of triad societies by declaring them unlawful and outlawing their activities; thus targeting the problem from an organizational perspective.

The Societies Ordinance has been effective in suppressing the growth of triad societies in Hong Kong. Whilst it is widely acknowledged that our triad threats have been contained, the recent decades have seen criminals transcending the traditional boundary of triad societies, forming themselves into organized crime groups. Whereas some members of these organized crime groups may be triads themselves, triad membership is no longer a pre-requisite for joining such criminal enterprise. To effectively deal with these organized crime groups, a new law was needed. Hong Kong first started working on the new legislation by publishing a discussion document in 1986 seeking public views on how to deal with the threats posed by these organized crime groups. A further discussion document on organized crime was published in 1989. The two formed

the basis of the public consultation exercise. These culminated in the introduction of the Organized Crime Bill in 1991 and the revised Organized and Serious Crimes Bill in 1992.

October 1994 marked the enactment of the Organized and Serious Crimes Ordinance in Hong Kong after lengthy discussion and some 70 amendments. Nevertheless, this provided the police with the new weapon which it needed to deal with these newly emerged organized crime groups which could not otherwise be dealt with effectively under the Societies Ordinance. The Ordinance came into full effect in 1995.

II. THE ORDINANCE AT A GLANCE

In the absence of any applicable international protocol or convention, the Ordinance was modeled upon our earlier Drug Trafficking (Recovery of Proceeds) Ordinance enacted in 1989 and other similar legislations available in countries having also Common Law Jurisdiction to facilitate harmonization. It was enacted to :

- (i) Create new powers of investigation;
- (ii) Provide for confiscation of proceeds of crime;
- (iii) Enhance sentencing of certain offenders; and
- (iv) Create new offences of dealing with proceeds of crime.

It created a schedule of offences (Schedule 1) which would become

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organized crime, once they were linked to the activities of triad societies, as well as other organized crime groups which set out to commit such offences in repetition and others which otherwise planned to endanger life, to inflict serious injury or to inflict serious loss of liberty.

The net casted by the Organized and Serious Crimes Ordinance is much wider and the powers provided are much more extensive than the earlier legislations. Dedicated units in the Police and the Department of Justice work together to ensure that this Ordinance is used correctly and effectively in the fight against organized crime.

III. THE INVESTIGATIVE POWER

A. Section 3 - Witness Order

This Section permits the Attorney General to apply to High Court for an order which compels a person to provide information to Police or Customs & Excise officers conducting an investigation of an organized crime. Non-compliance with the order is an offence and is punishable with a fine of up to \$500,000.- and 3 years imprisonment. Effectively, this section removes a person's right of silence and is therefore an exceptional power. Elaborate procedures are in place to guard against abuse. This Section has only been used on 24 occasions by the Police and in the most needed cases since the implementation of the Ordinance. Of note is its recent application in the investigation of a number of Loco-London Gold fraud cases whereby directors of bogus Loco-London Gold trading companies are compelled to provide information on the running of these companies.

B. Section 4 - Production Order

This section permits the Attorney General, the Police or Customs & Excise to apply to the High Court for a production

order which requires a person in possession or control of material, in Hong Kong or overseas, to produce that material to Police or Customs & Excise officers for investigation of an organized crime; proceeds of an organized crime; and proceeds of specified offence included in Schedule 2 of the Ordinance. The creation of Schedule 2 specified offences extends the scope of this investigative power beyond what is defined as organized crime and is therefore a very useful piece of legislation. This is the most widely used Section and has been used in a broad range of offences - from typical triad related offences to money laundering, to tax evasion on totally 342 occasions since the implementation of the Ordinance.

C. Section 5 - Search Warrant

This Section permits the High Court or District Court to issue search warrants for the same types of investigations as found in Section 4 on application by Police or Customs & Excise officers. This Section has since been used on 69 occasions. The offence for unauthorized disclosure of information and for prejudicing the investigation under Section 7 provides Section 3, 4, 5 with additional clout which is not normally found in other legislations. The maximum penalty under Section 7 is a fine of \$500,000.- and imprisonment for 7 years.

D. Section 6 - Disclosure of Information

The Organized and Serious Crime Ordinance is designed to deal with organized crime at both a national and transnational level. Section 6 of the Ordinance permits disclosure of information obtained under Section 3 to 5 to other investigative authorities both in Hong Kong and overseas, thus allowing the sharing of information in the fight against organized crime.

IV. CONFISCATION OF PROCEEDS OF CRIME

A. Section 8 - Confiscation Order

Section 8 permits the High Court or District Court where a person has been convicted of a specified offence defined under this Ordinance including both Schedule 1 and 2 offence, to make a confiscation order in relation to the person's proceeds of that specified offence where the proceeds exceed \$100,000.-. This threshold being in place to disable the use of such provision in lesser offence. By including Schedule 2 offences this covers most serious crimes as well as organized crime.

If a person is convicted of an organized crime and the proceeds from that offence exceed \$100,000.-, then the court can order the confiscation of the value for all the person's proceeds from organized crime, the amount is not limited to the proceeds of the actual crime with which the person is charged. There are statutory assumptions under Section 9 for assessing the proceeds of crime which can go back 6 years from the date the person is charged. There is also Restraint Order under Section 15 and Charging Order under Section 16 to help ensure that the criminal charged or to be charged with the specified offences are not able to dispose of their realizable property and that any earnings from these property are paid to the Government before any applications for Confiscation Orders are determined. Since implementation, around \$10 million have been confiscated; \$107 million have been restrained/charged; and \$24 million discharged subsequently in favour of victims.

B. Section 13 - Enforcing Confiscation Orders

Whenever the High Court or the District Court makes a confiscation order it will also make an order fixing a term of imprisonment which the defendant is to

serve if any of the amount which he is liable to pay under the confiscation order is not duly paid or recovered. Depending on the amount the additional sentence can range from 12 months to 10 years. This provides a strong incentive for the defendants to handover their proceeds of crime. There has only been 1 instance since the introduction of the Ordinance where the defendant refused to pay up, the proceeds having been transferred overseas. He served an additional sentence of 3 years as a result.

V. ENHANCED SENTENCING

Section 27 permits prosecuting counsel to present information in the High Court or District Court in respect of a person convicted of a specified offence for the purpose of having the court impose a greater sentence than would otherwise have been imposed. The information may relate to such matters as it being an organized crime; it being triad related; its prevalence; its impact upon the victim or the community; or otherwise its pecuniary significance. The additional sentence imposed can be as much as one third of the usual tariff. At the same time that there are provision in the Ordinance to deal with proceeds of crime, this provision provide further deterrence to would be criminals. Since its implementation, the police has secured enhancing sentencing in 25 cases involving 68 defendants.

VI. DEALING WITH PROCEEDS OF CRIME

Section 25 makes it an offence for a person to deal with another person's proceeds of an indictable offence. This further expands the scope of the Ordinance beyond organized crime and specified offence, creating the offence of money laundering as long as the property represent proceeds of an indictable offence. Section 25A further makes disclosure of

knowledge or suspicions that property represent proceeds of indictable offence mandatory and creates an offence for prejudicing the investigation. To protect the confidentiality of such disclosures, Section 26 provides restriction on revealing disclosures under Section 25A in both civil and criminal proceedings. The maximum penalty for money laundering under Section 25 is a fine of \$5 million and imprisonment for 14 years. A total of 35 defendants in 30 cases have since been convicted of money laundering offences.

VII. OVERALL EVALUATION

The Organized and Serious Crime Ordinance has provided law enforcement officers in Hong Kong with the powers to deal with organized crime of both a national and transnational nature. The Police investigative capability to combat triads and organized crime groups has been enhanced by these new provisions. The power to compel the production of documents and statements from victims and witness has been particularly useful in breaking through 'the wall of silence' which hitherto has hampered the Police efforts in their investigations. The confiscation of proceeds of crime from these criminals not only served to restore justice but also crippled the operation of these criminal fraternities which could otherwise continue to thrive on their wealth. Enhanced sentences for those criminals convicted in connection with triad and organized crime offences not only removed them from the streets for much longer periods, but also act as a deterrent to those who would otherwise follow in their footsteps.

VIII. CONCLUSION

Whilst Hong Kong accumulates its experience in the use of this new legislation, there are lessons which we have learned from drafting the legislation to implementing the provisions. The many amendments to the Ordinance since its enactment is testimony to this learning process. There are still other amendments which we will introduce to the legislature next year in order to enhance the effectiveness of this very important legislation. It is the wish of the author that such valuable experience are shared and that this paper has taken the matter one step further in the right direction.

Appendix A

ORGANIZED AND SERIOUS CRIMES ORDINANCE

SCHEDULE 1 OFFENCES

Common law offences

1. murder
2. kidnapping
3. false imprisonment
4. conspiracy to pervert the course of justice

Statutory offences

<u>Offence</u>	<u>Description</u>
5. Import and Export Ordinance (Cap. 60) section 6A section 6C section 6D(1) and (2) section 6E section 18	import and export of strategic commodities import of certain prohibited articles export of certain articles in Hong Kong carriage, etc. of prescribed articles in Hong Kong waters importing or exporting unmanifested cargo
6. Immigration Ordinance (Cap. 115) section 37D(1) section 38(4) section 42(1) and (2)	arrange passage to Hong Kong of unauthorized entrants carrying an illegal immigrant false statements, forgery of documents and use and possession of forged documents
7. Dangerous Drugs Ordinance (Cap. 134) section 4(1) section 4A(1) section 6(1)	trafficking in dangerous drugs trafficking in purported dangerous drugs manufacturing a dangerous drug
8. Gambling Ordinance (Cap. 148) section 5 section 7(1)	operating, managing or controlling gambling establishment bookmaking

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Appendix A

9. Societies Ordinance (Cap. 151)
- section 19 penalties on an office-bearer, etc. of an unlawful society
 - section 21 allowing a meeting of an unlawful society to be held on premises
 - section 22 inciting etc., a person to become a member of an unlawful society
10. Money Lenders Ordinance (Cap. 163)
- section 24(1) lending money at an excessive interest rate
11. Crimes Ordinance (Cap. 200)
- section 24 threatening a person with intent
 - section 25 assaulting with intent to cause certain acts to be done or omitted
 - section 53 causing explosion likely to endanger life or property
 - section 54 attempt to cause explosion, or making or keeping explosive with intent to endanger life or property
 - section 55 making or possession of explosive
 - section 60 destroying or damaging property
 - section 61 threats to destroy or damage property
 - section 71 forgery
 - section 75(1) possessing a false instrument with intent
 - section 98(1) counterfeiting notes and coins with intent
 - section 100(1) custody or control of counterfeit notes and coins with intent
 - section 105 importation and exportation of counterfeit notes and coins
 - section 118 rape
 - section 119 procurement of person by threats
 - section 120 procurement of person by false pretences
 - section 129 trafficking to or from Hong Kong in persons
 - section 130 control over person for purpose of unlawful sexual act or prostitution
 - section 131 causing prostitution of person
 - section 134 detention of person for unlawful sexual act or in vice establishment
 - section 137 living on earnings of prostitution
 - section 139 keeping a vice establishment

Appendix A

12. Theft Ordinance (Cap. 210)
- | | |
|-----------------------|--|
| section 9 | theft |
| section 10 | robbery |
| section 11(1) | burglary |
| section 16(A) | fraud |
| section 17 | obtaining property by deception |
| section 18 | obtaining a pecuniary advantage by deception |
| section 18D | procuring false entry in certain records |
| section 19 | false accounting |
| section 23(1) and (4) | blackmail |
| section 24 (1) | handling stolen goods |
13. Offences against the Person Ordinance (Cap. 212)
- | | |
|------------|---|
| section 17 | shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm |
|------------|---|
14. Firearms and Ammunition Ordinance (Cap. 238)
- | | |
|------------|--|
| section 13 | possession of arms or ammunition without licence |
| section 14 | dealing in arms or ammunition without a licence |

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Appendix A

- 14A. Trade Descriptions Ordinance (Cap. 362)
- section 9(1) and (2) offences in respect of infringement of trade mark rights
import or export of goods bearing forged trade mark
- section 12
(provided that for the purpose of this Ordinance, an offence under section 12 of the Trade Descriptions Ordinance does not include an offence relating only to false trade description) being accessory to certain offences committed outside Hong Kong
- section 22
(provided that for the purpose of this Ordinance, 'offence under this Ordinance' referred to in section 22 of the Trade Descriptions Ordinance only means an offence under -
(a) section 9(1) or (2) of that Ordinance;
or
(b) section 12 of that Ordinance, excluding any offence relating only to false trade description)
15. Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405)
- section 25(1) assisting another to retain the benefit of drug trafficking
16. Organized and Serious Crimes Ordinance (Cap. 455)
- section 25(1) assisting a person to retain proceeds of indictable offence
17. Weapons of Mass Destruction (Control of Provision of Services) Ordinance (Cap. 526)
- section 4 providing services that assist the development, production, acquisition or stockpiling of weapons of mass destruction

Appendix A

18. Copyright Ordinance (Cap. 528) section 118(1), (4) and (8) (provided that for the purpose of this Ordinance, 'infringing copy' referred to in section 118(1) and (4) of the Copyright Ordinance does not include a copy of a work which is an infringing copy by virtue only of section 35(3) of that Ordinance)
- offences relating to making or dealing with infringing copies
- section 120(1), (2), (3) and (4) (provided that for the purpose of this Ordinance, 'infringing copy' Referred to in section 120(1) and (3) of the Copyright Ordinance does not include a copy of a work which is an infringing copy by virtue only of section 35(3) of that Ordinance)
- offences relating to making infringing copies outside Hong Kong

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Appendix B

ORGANIZED AND SERIOUS CRIMES ORDINANCE

SCHEDULE 2 OFFENCES

Common law offences

1. manslaughter
2. conspiracy to defraud

Statutory offences

<u>Offence</u>	<u>Description</u>
3. Import and Export Ordinance	
section 14	(Cap. 60) alteration of vessels, aircraft or vehicles for the purpose of smuggling
section 14A	construction, etc., of vessels for the purpose of smuggling
section 18A	assisting, etc., in export of unmanifested cargo
section 35A	assisting, etc., in carriage of prohibited, etc., articles
4. Immigration Ordinance (Cap. 115)	
section 37DA(1)	assisting unauthorized entrant to remain
5. Dangerous Drugs Ordinance (Cap. 134)	
section 5 (1)	supplying or procuring a dangerous drug to or for unauthorized persons
section 9(1), (2) and (3)	offence relating to cannabis plant or opium poppy
section 35(1)	keeping or managing a divan for the taking of dangerous drugs
section 37(1)	permitting premises to be used for unlawful trafficking, manufacturing or storage of dangerous drugs
6. Gambling Ordinance (Cap. 148)	
section 14	providing money for unlawful gambling or for an unlawful lottery
section 15(1)	permitting premises to be used as gambling establishment

RESOURCE MATERIAL SERIES No. 58

Appendix B

7. Registration of Persons Ordinance (Cap. 177)
 - section 7A possession of forged identity cards

8. Crimes Ordinance (Cap. 200)
 - section 72 copying a false instrument
 - section 73 using a false instrument
 - section 74 using a copy of a false instrument
 - section 76 making or possessing equipment for making a false instrument

 - section 99(1) passing, etc., counterfeit notes and coins
 - section 101 making or custody or control of counterfeiting materials and implements

9. Prevention of Bribery Ordinance (Cap. 201)
 - section 4(1) bribery of public servant
 - section 5(1) bribery for giving assistance, etc., in regard to contracts

 - section 6(1) bribery for procuring withdrawal of tenders
 - section 9(2) bribery of agent

10. Theft Ordinance (Cap. 210)
 - section 12(1) aggravated burglary
 - section 18A obtaining services by deception

11. Offences against the Person Ordinance (Cap. 212)
 - section 19 wounding or inflicting grievous bodily harm

12. Criminal Procedure Ordinance (Cap. 221)
 - section 90(1) doing an act with intent to impede apprehension or prosecution of offender

Appendix C

ORGANIZED & SERIOUS CRIME ORDINANCE

INTERPRETATION

1. "organized crime" means a Schedule I offence that -
 - (a) is connected with the activities of a particular triad society;
 - (b) is related to the activities of 2 or more persons associated together solely or partly for the purpose of committing 2 or more acts, each of which is a Schedule 1 offence and involves substantial planning and organization; or
 - (c) is committed by 2 or more persons, involves substantial planning and organization and involves -
 - (i) loss of the life of any person, or a substantial risk for such a loss;
 - (ii) serious bodily or psychological harm to any person, or a substantial risk of such harm; or
 - (iii) serious loss of liberty of any person.
2. "Schedule 1 offence" means -
 - (a) any of the offences specified in Schedule 1;
 - (b) conspiracy to commit any of those offences;
 - (c) inciting another to commit any of those offences;
 - (d) attempting to commit any of those offences;
 - (e) aiding, abetting, counselling or procuring the commission of any of those offences.
3. "specified offence" means -
 - (a) any of the offences specified in Schedule 1 or Schedule 2;
 - (b) conspiracy to commit any of those offences;
 - (c) inciting another to commit any of those offences;
 - (d) attempting to commit any of those offences.
 - (e) aiding, abetting, counselling or procuring the commission of any of those offences;
4. "triad society" includes any society which -
 - (a) uses any ritual commonly used by triad societies, any ritual closely resembling any such ritual or any part of any such ritual; or
 - (b) adopts or makes use of any triad title or nomenclature.

Appendix D

MILESTONE OF THE ORGANIZED & SERIOUS CRIMES ORDINANCE

21 October 1994	OSCO enacted
2 December 1994	Provisions relating to money laundering and enhanced sentencing came into force
28 April 1995	Other provisions relating to investigative powers and confiscation of crime proceeds took effect
27 July 1995	Organized and Serious Crimes (Amendment) Ordinance 1995 which improves the confiscation and money laundering provisions of the OSCO was passed by the Legislative Council
1 September 1995	Organized and Serious Crimes (Amendment) Ordinance 1995 brought into operation
27 June 1997	Offence under S.4 of the Weapons of Mass Destruction (Control of Provision of Services) Ordinance [Cap. 525] were added into Schedule 1 of OSCO following the enactment of Cap. 525
16 July 1999	'Fraud' under S. 16(A) of the Theft Ordinance was added into Schedule 1 of OSCO following the amendment of the Theft Ordinance
12 January 2000	Offences under the Trade Descriptions Ordinance [Cap. 362] and Copyright Ordinance [Cap. 528] were added into Schedule 1 of OSCO
27 January 2000	Organized and Serious Crimes (Amendment) Ordinance 2000 which requires any person or company involved in remitting money into or out of Hong Kong to be registered with police and to keep proper records of all transactions for the amount over HK\$ 20,000 was passed by the Legislative Council
1 June 2000	Organized and Serious Crimes (Amendment) Ordinance 2000 came into force

TRIADS

Peter Yam Tat-wing *

I. INTRODUCTION

Triad societies are criminal organisations and are unlawful under the Laws of Hong Kong. Triads have become a matter of concern not only in Hong Kong, but also in other places where there is a sizable Chinese community. Triads are often described as organized secret societies or Chinese Mafia, but these are simplistic and inaccurate descriptions. Nowadays, triads can more accurately be described as criminal gangs who resort to triad myth to promote illegal activities.

For more than one hundred years triad activities have been noted in the official law and police reports of Hong Kong. We have a long history of special Ordinances and related legislation to deal with the problem. The first anti-triad legislation was enacted in 1845. The Hong Kong Special Administrative Region (HKSAR) has, by far, the longest history, amongst other jurisdictions, in tackling the problem of triads and is the only jurisdiction in the world where specific anti-triad law exists. It must be pointed out that legal enactments alone cannot solve the problem. This has to be supplemented by effective police enforcement action, proper education and publicity campaigns to remind people of the undesirable consequences of associating with triads and the importance of coming forward to report triad-related crimes and more importantly to testify in courts.

This paper will draw heavily on the experience gained by law enforcement bodies in the HKSAR in tackling the triad problem. Emphasis will be placed on anti-triad law and Police enforcement tactics. Background knowledge on the structure, beliefs and rituals practised by the triads is important in order to gain an understanding of the spread of triads and how triads promote illegal activities by resorting to triad myth. With this in mind the paper will examine the following issues:

- History and Development of Triads
- Triad Hierarchy and Structure
- Characteristics of Triads
- Differences between Triads, Mafia and Yakuza
- Common Crimes Committed by Triads
- Current Triad Situation in Hong Kong
- Anti-triad Laws in Hong Kong
- Police Enforcement Strategy
- International Cooperation

II. HISTORY AND DEVELOPMENT OF TRIADS

The term “Triad” is a relatively modern English word describing the sacred symbol of the secret societies, a triangle enclosing a secret sign derived from the Chinese character HUNG (洪) depicting a union of heaven, earth and man. The origin of triads is unclear, being a mixture of facts and myth. It is generally believed that in the mid-17th century, when the Manchurians from the northern part of China conquered the whole of China, overthrowing the Ming Dynasty and establishing the Ching Dynasty, some

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supporters of the former Ming Dynasty formed politically motivated secret societies with a declared goal to overthrow the ruling Manchurians who were considered as “foreigners” by the Han people. One of these societies was the HUNG League (洪門), which is now regarded as the original triad society, from which today’s triad societies have originated.

Over the years the original society has fragmented into numerous separate societies. With the political developments in China, the original political objectives have long been lost and these once “patriotic” secret societies have degenerated into present day criminal gangs. Nowadays, triad societies exist only for the pursuit of criminal activity for monetary gain. A common modern term - “Dark Society” or “Dark Association” (黑社會) is used to describe all triads, and represents the public feeling that triads are sinister and evil rather than a mystic brotherhood.

III. TRIAD HIERARCHY AND STRUCTURE

The traditional triad societies adopted a military style and had a well-organized rank structure, not dissimilar to present day guerrilla organizations. They had a rigid rank structure of members and officials, called “office bearers”. Each rank had specific responsibilities. Many of the traditional rank terms are still used today. As well as a title, an office bearer would have an auspicious number. The traditional rank structure of a triad society can be seen at Appendix A.

To enhance efficiency, increase flexibility and to avoid police detection, the present day triad societies in Hong Kong have adopted a flattened organizational structure. Apart from a few exceptions,

each triad society is generally presided over by the Chairman and Treasurer who are often elected for a fixed term, normally two years, by a group of senior members and/or area leaders of that triad society. Usually, the most influential area boss, who has the largest group of followers or the most wealth, is elected. In some triad societies, the same person holds both posts. It must however be emphasized that these days the Chairman and Treasurer are honorary positions without actual power. Appendix C shows the present day structure of a typical triad society in Hong Kong.

IV. CHARACTERISTICS OF TRIADS

Contrary to what the movies may portray, triad societies are in fact a collection of loose-knit groups or gangs who operate independently. They are mainly local area gangs, each active in certain areas and activities. Their disputes sometimes result in fighting and it is not uncommon that gangs within the same triad society often fight with each other over a disputed interest or territory.

Despite the fact that today’s triad members do not belong to one organization, some of them continue to use triad jargon, rank structure etc. This is to convince a new recruit that he has indeed joined an elite and is used to instil fear into members of the public. Cooperation between triad groups in criminal activities is normally based on personal acquaintance and mutual interest. The chairpersons do not usually direct gang members’ criminal activities but are only ‘ceremonial heads’ and ‘mediators’ of disputes.

There is a recognized Chinese triad presence in a number of countries. These overseas groups may bear the same triad names as those in Hong Kong but apart from that, they have no connection and

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little in common. Although there have been occasions when overseas triad members perpetrated crimes together with triads in Hong Kong, the triad membership was merely incidental. When an opportunity arises to make a profit, criminals will establish a joint venture.

Triad identity is not a pre-requisite to establish a criminal joint venture except to serve as a reference to the criminal background of that person. It is thus a gross simplification to associate organized crimes in Hong Kong with triad societies. Drug trafficking and smuggling are typical

examples of organized crimes. However, triad membership is not a prerequisite for joining a drug syndicate. It is experience, expertise, contacts or money that count. Whilst it may be true that many drug traffickers have triad connections, triad membership does not enhance one's position in a drug organization. The same applies to other organized crime groups, which specialise in such activities as illegal gambling, prostitution, loan sharking and fraud. It is not uncommon to find major organized crime syndicates with members from several different triad societies working together.

V. DIFFERENCES BETWEEN TRIADS, MAFIA AND YAKUZA

The table below depicts the major differences between Triads, the Mafia and Japanese Yakuza.

<u>Triads</u>	<u>Mafia / Japanese Yakuza</u>
<ul style="list-style-type: none">• Loose-knit group (gangs)• Independent power base• Horizontal organization• Chairperson - limited influence, honorary post• Full autonomy• Profit belongs to individual gangs• Disputes settled through negotiations and fights• Made up of criminal fraternities	<ul style="list-style-type: none">• Monolithic criminal organization• Power diffused from a central core• Rigid chain of command• Chairperson - the 'Godfather' post• Central leadership• Profit goes to organization• Disputes adjudicated by core leadership• A criminal enterprise

VI. COMMON CRIMES COMMITTED BY TRIADS

Triad gang activities are mainly territorial and fall into one or more of the following categories:

- Extortion and protection racketeering;
- Monopoly of certain business and services;
- Street-level drug trafficking;
- Illegal gambling activities;
- Prostitution and pornography;
- Loan sharking and debt collection;
- and,

- Other opportunistic crimes, such as selling of pirated and contraband goods, smuggling, dealing in counterfeit currency and credit cards.

Experience in Hong Kong, however has shown that triads are extremely adaptive and versatile. They will make use of every opportunity to make money, whether legal or illegal. In tackling current and future triad activities, there is a need to be vigilant of emerging trends.

Over the years, some of the criminal groups have established legitimate fronts so as to cover their criminal activities. More sophisticated triad members, referred to as second or third generation triads, have received the best education paid for by money generated through illegal means. Many of them are trained as professionals such as lawyers and accountants. They are also involved in legitimate business and part of the profit from legitimate sources can be used to fund triad activities so as to create an environment favourable for their business. They may present themselves as reputable entrepreneurs and mix with reputable socialites. Since they rarely involve themselves in crimes, they are becoming known as the “untouchables”. Such a practice is typical in the development of organized crime. Control of and investigation into their activities becomes increasingly difficult.

At the lower level, triads are shifting from hardcore criminals to service providers. Their services include the supply of bouncers to entertainment businesses, car jockeys for valet parking, debt collectors and regulators to ward off business competitors. Those at the receiving end of the service are willing hirers, which may include reputable commercial corporations, making attempts to shrink the income of triads difficult or even futile.

VII. CURRENT TRIAD SITUATION IN HONG KONG

In 1999, there were 76,771 crimes reported and the crime rate (the number of crimes per 100,000 of the population) was 1,121.9. As a result of sustained police efforts in Hong Kong the ratio of triad involvement in overall crimes, in the past few years, has been contained at below 4%. Appendix D contains charts showing the total number of reported crimes, the total

number of reported triad-related crimes and the percentage of triad-related crimes in total reported crimes between 1990 and 1999.

At present there are around 50 known triad societies in Hong Kong, of which about 15 regularly come to Police attention through overt criminal activities. This does not mean that the remaining societies are inactive, but possibly only that their activities go unreported for a variety of reasons. The clandestine nature of triad activity precludes an accurate assessment of the triad membership. The accumulated number of people convicted for triad membership since 1936, including recidivists, is about 32,000 and accounts for 5% of all convicts. It serves as a rough indication of the size of triad population. San Yee On, 14K, Wo Shing Wo, Wo Hop To and Wo On Lok are the five most active triad societies and they together account for the majority of triad-related crimes in Hong Kong.

VIII. ANTI-TRIAD STRATEGY IN HONG KONG

In Hong Kong, we adopt a four-pronged approach to tackle triad activities, namely:

- (a) Legislation
- (b) Enforcement
- (c) Education
- (d) Rehabilitation

A. Legislation

Hong Kong is determined to combat triad activities. The first anti-triad legislation dates back to 1845. Relevant anti-triad laws were consolidated subsequently under Societies Ordinance, which was enacted in 1949. Hong Kong has the most effective and strictest legislation aimed at tackling triad activities:

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1. The Societies Ordinance

Under the Societies Ordinance, Cap 151, Laws of Hong Kong, and its subsequent amendments, all triad societies are deemed to be unlawful societies in Hong Kong. It includes a series of criminal offences relating to triad membership, recruitment and activities. Any person convicted of professing or claiming to be an office-bearer or managing or assisting in the management of a triad society is liable to a maximum fine of HK\$1 million and to imprisonment for 15 years. A person convicted as a triad member may be fined a maximum of HK\$250,000 and jailed for 7 years.

The courts usually regard a charge of Triad membership alone as not being particularly serious and accordingly the penalties awarded range from being 'Bound Over' to being placed on probation. However, in respect of recruitment and office bearer offences, a more serious view is taken and up to one year's imprisonment is not uncommon. In addition, most courts are less inclined to leniency if other offences such as blackmail, wounding or intimidation are involved. In a recent trial an officer bearer was convicted of the offence of managing a triad society and some other related offences under the Societies Ordinance. He was sentenced to three and a half years' imprisonment.

The enactment of the Societies Ordinance has to a great extent assisted us in the fight against triads in the last couple of decades. However, the greatest difficulty faced by Police in combating triad activity is the reluctance of victims and witnesses to report crimes and to testify in subsequent trials. This has largely stemmed from the perceived fear of triads and possible triad revenge. In addition, in many triad crimes, there are simply no "victims" because they have become "satisfied customers". Typical examples

are Public Light Bus drivers engaging triads to monopolize profitable routes and decoration contractors using triads to drive out competitors in the Public Housing decoration sector. Victim reassurance is therefore important to encourage people to come forward and report triad activities. Additionally, coercive power is required to enhance the police's ability to uncover evidence of triad criminal activities.

2. The Organized and Serious Crimes Ordinance (OSCO)

The OSCO was enacted in 1994. "Organized Crime" is defined as any one of a wide range of criminal offences listed in Schedule I of the Ordinance and includes those, which are connected with the activities of a particular triad society.

The objectives of the Ordinance are fourfold:

- (i) To provide powers under sections 3, 4 and 5 to investigate organized crimes and the proceeds from organized crimes or serious offences, including the power to compel a person to attend an interview, to supply information or to produce material for inspection. The person is deprived of his right of silence though his admission cannot be used against him;
- (ii) To provide for confiscation of proceeds of crimes;
- (iii) To create a general "money laundering" offence under section 25 to cover those who deal with property, knowingly or having reasonable ground to believe that it represents proceeds of an indictable offence; and,
- (iv) To enable the prosecution to submit to the courts, information concerning the nature and impact of serious crimes and for the courts to impose more stringent sentences in appropriate cases under section

27.

It is assessed that the police force's investigative capability to combat triads and organized crime syndicates has been enhanced by these new provisions. The power to compel the production of documents and statements from victims and witnesses has been particularly useful in breaking through "the wall of silence" which effectively hampered police efforts to fight this scourge of society.

The creation of a money laundering offence is a step forward in tracking and cracking down on the financial source of the triads. Through the successful application of this new provision, the laundering of dirty money by triads can be stopped, preventing its use for funding further triad activities.

It is also notable that the enhanced sentences for those convicted in connection with triad and organized crime not only remove more criminals from the streets for much longer periods, but also act as a deterrent to those who would otherwise follow in their footsteps.

By far the most powerful and effective elements of the Ordinance are the confiscation provisions, which empower the court to restrain criminal assets whilst under police investigation and also to order its forfeiture upon conviction of the offender. Depriving the criminal of his ill-gotten gains is the greatest hurt that can be done to him and also stops the money from being used to corrupt officers as well as for rebuilding the criminal enterprise upon the discharge of the triad member from prison.

3. Witness Protection Ordinance

As mentioned earlier, the greatest difficulty faced by Police in combating triad activity is the reluctance of victims and

witnesses to report crimes and testify in subsequent trials. The Witness Protection Ordinance was passed in June 2000. It provides a legal framework for the Witness Protection Programme, which has been operating since 1992. It reassures witnesses, especially accomplice witnesses, of their own and their family members' safety, such as giving a new personal identity after trial.

B. Police Enforcement Strategy

1. Three-Tier Structure

The fight against triads and organized crimes in Hong Kong is spearheaded by a three-tier structure within the Hong Kong Police Force. The Hong Kong Police has dedicated units at headquarters level (e.g. Organized Crime and Triad Bureau, Criminal Intelligence Bureau) to collate intelligence and to take proactive action against the triads, such as using undercover agents to infiltrate into the triads, as well as the establishment of a Witness Protection Unit to provide support and protection to vulnerable witnesses and family members.

There are also designated crime units at the Regional and District levels to interdict those mid-level and street-level triad personalities and activities. They are supported by Intelligence Sections in the Regions and Districts.

In each Police District, there is a school liaison team to deal with the triad activities amongst school children. Criminal investigation units at all levels also investigate criminal activities involving triads.

2. Intelligence Gathering and Undercover Infiltration

Given that vulnerable victims are reluctant to report triad-related crimes and testify at court because of the fear of revenge, the deployment of police officers

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to infiltrate triad groups to gather intelligence and to collect evidence for prosecution purposes has proved an effective tactic.

Many successful Police anti-triad operations were the result of proactive undercover infiltration actions. There have been successful deployments of undercover police officers in schools, resulting in the arrest of triad elements that intimidate and recruit students to join triad societies.

3. High Profile Operations

Apart from investigation and intelligence, operations are mounted from time to time at various levels of the Hong Kong Police Force, to suppress and neutralise triad activities, particularly at their source of income.

Triads prosper from the threats and fears that they instil in their victims. It is very important therefore that, in successful police operations, every opportunity should be taken to publicise arrests, in order to remove the fear that the public may have of triads.

4. Witness Reassurance/Protection

Support from members of the public is vital in our fight against crime. A lot of Chinese however are reluctant to report crimes either because they thought it was not their business, or because of the fear of revenge. The Hong Kong Police has made efforts to assure witness protection in many ways, such as allowing witnesses to live in safe houses, omitting addresses in witness statements etc. Recently, new legislation has been passed to further enhance witness protection - The Witness Protection Ordinance.

A police hotline for reporting triad activities has also been set up. The purpose of the hotline is to encourage members of the public who might be victims of, or

witnesses to triad related crimes, to report to the police in the first instance. The identity of complainants is protected. Anonymous complaints are also handled expeditiously.

5. Triad Research and Triad Experts

The clandestine and mythical nature of triad activities has made a general understanding of the triads difficult. A lot of their activities including their structure, rituals, ceremonies, hand signs and insignia are unknown to members of the public. A thorough understanding of triads is vital both in detecting triad activities and in the subsequent prosecution in the courts. The Hong Kong Police have set up a research unit, specializing in triad research. The research unit is responsible for conducting research into triad activities and training the Force Triad Expert Cadre. The Triad Expert Cadre assists, both in the investigation of triad-related crimes and in the giving of expert evidence in court trials. Regular seminars are held to keep the Triad Experts abreast of current trends.

C. Education

There is no doubt that public support and awareness are essential in combating triad activity. The Junior Police Call (JPC) is a scheme administered by the Police, which apart from providing recreational activities, also serves as a well-established network for disseminating anti-triad messages to youngsters. Regular school talks are conducted on the adverse effects of triad membership. As portrayed in the movies and television, there is always an over-glorification of triads. The JPC Scheme develops a better understanding of the police by the youngsters and fosters youth values to make them more resistant to triad influence.

More importantly, through various publicity campaigns we continue to strive to show the public that triad societies are simply criminals, not legitimate problem

solvers or business people, and certainly not role models for our youth.

The continuous and sustained effort by the Hong Kong Government through education and publicity campaigns in the past decades has witnessed a change in people's attitudes towards triads in recent years. People come forward more than they did in the 60's and 70's. Yet there is no room for complacency because triads still exist and that our method of dealing with these groups should be continually evolving.

D. Rehabilitation

In Hong Kong, outreach social workers have been employed to counsel vulnerable youngsters to stay away from triad personalities and activities. A legally sanctioned warning system administered by a senior police officer can be used instead of a young person attending court. After being warned, the young person will be advised by police officers as to follow-ups for their rehabilitation. Following prison release, triad offenders like other criminals will be supervised by after-care services by the Correctional Services Department.

IX. INTERNATIONAL CO-OPERATION

Since 1995, the Triad Course for Overseas Law Enforcement Officers has been conducted annually by the Hong Kong Police Force. Apart from sharing knowledge of triads and experience in tackling triad crimes, the participants are able to build up an intelligence network that fosters future exchange of information on triad activities. Apart from that we also organize Triad Courses in other countries. Two such courses were organized in Canada before and two will be organized in Australia later this year.

The Hong Kong Police Force undoubtedly enjoys the close and productive relationship with many Overseas Law Enforcement Agencies, especially those with liaison officers posted to Hong Kong, such as National Police Agency of Japan, FBI, DEA, INS, Customs Service, Secret Service and Internal Revenue Service of the US, RCMP of Canada, AFP of Australia, the Korean National Police and the UK Customs.

From time to time Japanese delegates visit the Hong Kong Police Force. During the visit topics of common interest are discussed and experiences in combating crimes shared. Since the beginning of this year, two such visits have been arranged.

The Hong Kong Police Force will continue to be committed in forging closer cooperation with our counterparts, exchanging intelligence, mounting joint operations, sharing experience, returning fugitives where Mutual Legal Assistance is applicable and attending international conferences.

X. CONCLUSION

While Hong Kong has enacted special laws to deal with the triad menace, as has been explained earlier, triad-related crime is no different from any organized crime and can be effectively tackled by legislation targeting the latter activities. Anti-money laundering and asset forfeiture laws, for example, are considered effective measures to tackle triad activities.

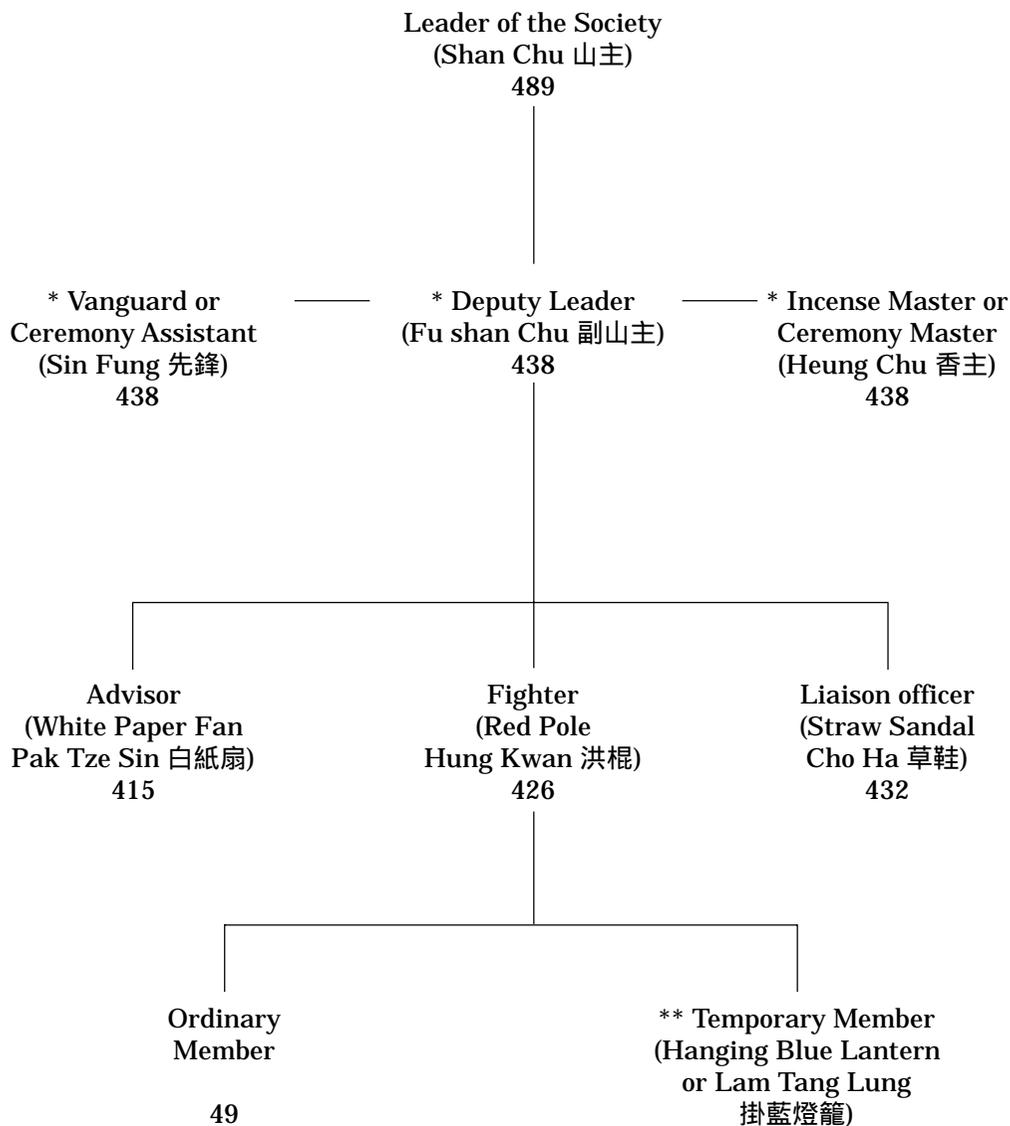
However, a good working knowledge of what triads are, their structure and methods of operation are essential. Equally important is an understanding of the Chinese culture and establishing an effective means of communication with the local Chinese community so as to encourage the reporting of triad activities.

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As in the case of organized crime, it is not expected that triads could be totally eradicated even with the rigorous application of enforcement and judicial measures. Hong Kong has been tackling the triad problem for many years and we are more than willing to share our experience with the other law enforcement agencies.

Appendix A

TRADITIONAL STRUCTURE OF A TRIAD SOCIETY



Note: A fuller explanation of the roles and numerical figures can be found at Appendix B1

- * = In the smaller triad societies all the 438 posts are filled by one individual
- ** = A member that has not been initiated

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Appendix B

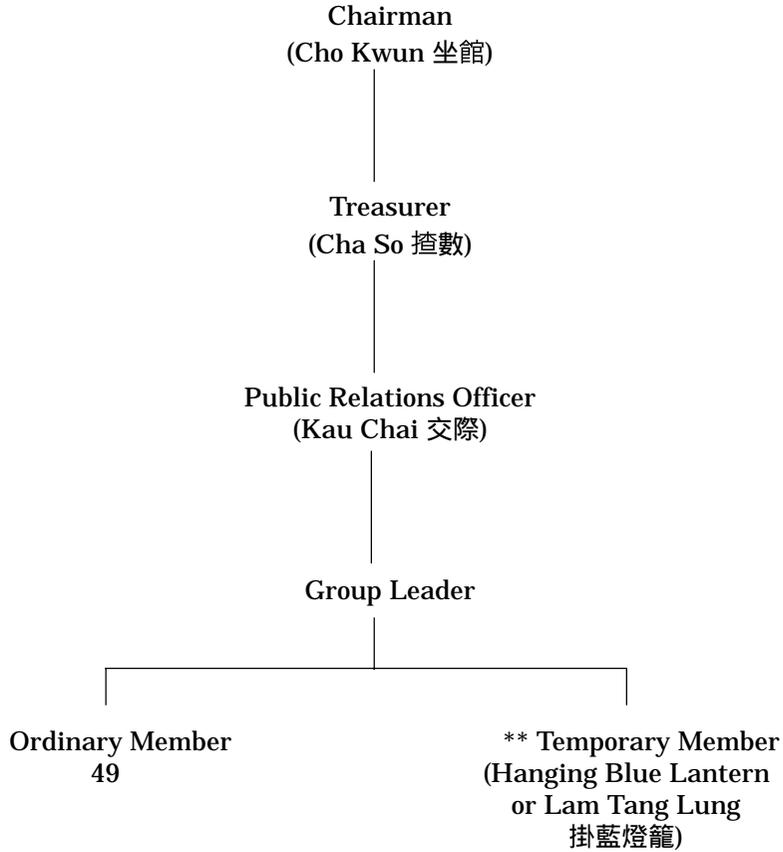
EXPLANATION OF THE ROLES AND NUMERICAL FIGURES

- (a) 489 - The Leader of the Society is generally known as the First Route Marshal or Dragon Head. He is also referred to as the Shan Chu, the literal meaning is 'Mountain Master' 山主.
- (b) 438 - The Deputy Leader is generally known as the Second Route Marshal or Fu Shan Chu 副山主.
This title of 438 can also be awarded to the office bearers officiating as 'Incense Master' or Heung Chu 香主 or Vanguard 先鋒 in a triad ceremony.
- (c) 415 - An official generally known as Pak Tsz Sin 白紙扇 (meaning White Paper Fan) whose duty is to advise generally on the organization, administration and finance of the Branch.
In other words he is the Counselor or the Chief of Staff.
- (d) 426 - An official generally known as the Hung Kwan 洪棍 (meaning Red Pole) whose duty is to take charge of the fighting section of the Branch and play the leading role in fights against rival groups.
This official is also responsible for the Society or Branch membership.
- (e) 432 - An official generally known as the Choi Hai 草鞋 (meaning Straw Sandal) is the liaison officer as well as the chief messenger of the Branch and through whom messages from the Branch concerning meetings, manpower, rallying for settlement talks or gang fights are passed on to other members of the Branch.
- (f) 49 - An ordinary member of a Triad Society who is normally the protégé of a particular junior office bearer.
- (g) Blue Lantern Member or Hanging Blue Lantern Member 掛藍燈籠

A member who has undertaken an oath of allegiance to a Triad Society or to a Triad Society member without having been initiated through a Hung Mun ritual. His allegiance may have been shown by having paid a fee, or by the adoption of Triad title or Triad slang, or by verbal recognition of joining the Society or by becoming a follower of a Triad member or an Office Bearer (known to be a protector).
Depending on the Triad Society, some Blue Lantern members may undergo initiation rites later.

Appendix C

CURRENT (SIMPLIFIED) STRUCTURE OF A TRIAD SOCIETY



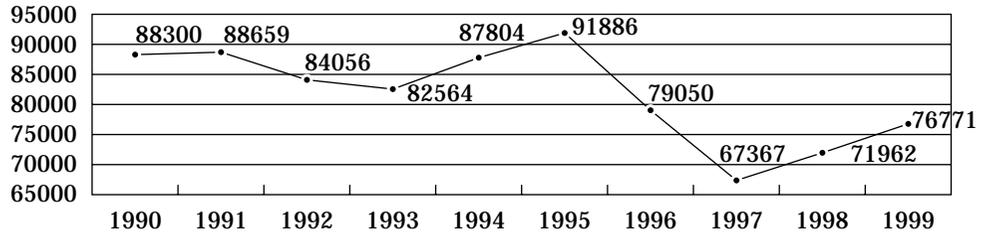
* Any Office bearer of 426, 415 or 432 rank

** A member that has not yet been initiated

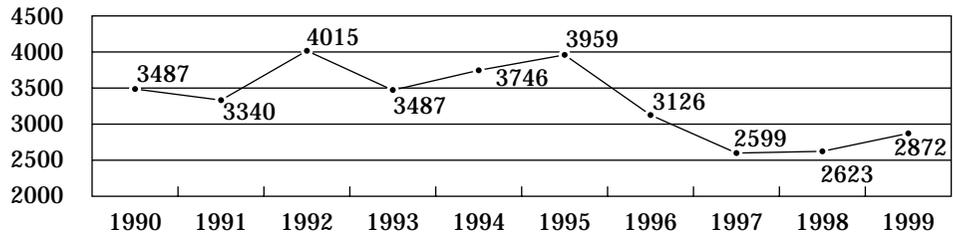
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Appendix D

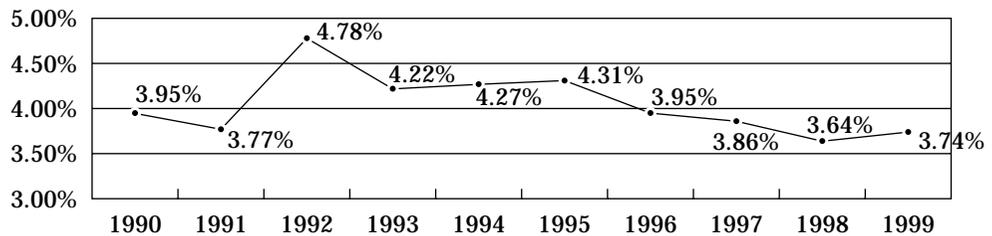
THE TOTAL NUMBER OF REPORTED CRIMES, 1990-1999



THE TOTAL NUMBER OF TRIAD-RELATED CRIMES, 1990-1999



THE PERCENTAGE OF TRIAD-RELATED CRIMES TO TOTAL REPORTED CRIMES, 1990-1999



EFFECTIVE METHODS TO COMBAT TRANSNATIONAL ORGANIZED CRIME IN CRIMINAL JUSTICE PROCESSES

*Bruce G. Ohr **

I. INTRODUCTION

One of the most serious unintended consequences of the globalization that we have been experiencing for the last few years has been the rapid rise of transnational organized crime groups. There are several reasons for this, including the following.

First, the increasing ease of international communications brings the world to each individual more directly and potentially more dangerously than ever before. The internet allows the individual to access information, do business with and communicate instantly with persons in every nation, but at the same time it allows criminals to perpetrate confidence schemes and stock market manipulations, run illegal gambling operations and peddle child pornography across the globe.

Second, the growth of international commerce and the staggering number of international banking transactions performed every day by major banks provide vital benefits to the world's economies, but they also present ample opportunity for fraud and theft and allow international money launderers to easily hide their ill-gotten gains.

Third, the fall of Communism in the Soviet Union and Eastern Europe has brought freedom and democracy to millions, but has also resulted in massive

economic upheavals in those countries and an often-violent free-for-all among businessmen for the rich natural resources of those regions. These changes have not only spawned new criminal enterprises within the area of former Soviet domination, but have led directly to money laundering and other crimes in the rest of the world as well.

Finally, the international traffic in illegal commodities, chiefly narcotics and would-be immigrants to wealthy nations, shows no signs of abating. Organized criminals have already shown themselves to be masters of these illegal markets. Given these developments, it is easy to see why these are boom times for transnational organized crime.

The growing threat of transnational organized crime is forcing radical changes in traditional methods of law enforcement. Law enforcement has historically been a matter primarily of domestic concern. In the United States, for example, we have traditionally focused our anti-organized crime efforts solely on the American Mafia, or La Cosa Nostra. We, and our colleagues in other countries, have therefore been caught unprepared by the sudden rise in transnational organized crime activities. We are not used to criminals who might reside in country A and travel to country B in order to commit a crime that takes place in countries C, D and E. Our organized crime investigators and prosecutors are not used to obtaining evidence from other countries and conducting joint investigations with law enforcement officials of other countries. Indeed, in many

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instances our laws and procedures slow us down instead of aiding us in these endeavors. And we have not spent enough time studying the new organized crime groups, learning their faces, their organizations, their ways of doing business.

We are now working energetically to close the gaps in our knowledge and to expand cooperation with other countries on law enforcement matters. This work is being done on several fronts. First, our prosecutors and investigators are working hard to improve their understanding of transnational organized crime groups. With the help of the Justice Department's Office of International Affairs, they are investigating new cases in which they are learning to work more closely with their foreign counterparts. Second, the U.S. Government is stationing more law enforcement personnel in other countries. The FBI has legal attaches in over 20 countries and is planning to open more offices as well. The Justice Department's Office of International Affairs has judicial attaches in London, Rome and Mexico City, and is trying to arrange for a person to be assigned to Moscow as well. Other U.S. law enforcement agencies such as the Drug Enforcement Administration, the Customs Service, and the Immigration and Naturalization Service are also expanding their overseas presence. Finally, we applaud the efforts of forums such as UNAFEI which provide us with the valuable opportunity to meet directly with our colleagues for other countries. These forums are extremely important for strengthening mutual understanding of each others' legal systems and for giving us the chance to improve cooperation on specific matters.

I will first briefly discuss the current situation with respect to transnational organized crime in the United States. I will then cover in somewhat more detail some

of the most important methods that we use for fighting transnational organized crime - electronic surveillance, undercover operations, accomplice testimony and the RICO statute. Finally, I will discuss in general terms some of the challenges that we face in improving law enforcement cooperation between countries on transnational organized crime cases.

II. TRANSNATIONAL ORGANIZED CRIME IN THE UNITED STATES

The Organized Crime and Racketeering Section is responsible for overseeing the Justice Department's programme for the fight against organized crime in the United States. As I mentioned, the Section's work and the work of its 24 Organized Crime Strike Forces across the country has historically focused on the activities of La Cosa Nostra, the American Mafia. In recent years, the Attorney General has also directed the Section and its Strike Forces to attack the growing presence of Russian and Asian organized crime groups in the United States. As a result, the Section now supervises investigations into all three major areas of organized crime activity in our country - LCN, Asian and Russian. I should mention that, for operational reasons, the South American narcotics trafficking groups are generally investigated and prosecuted by other parts of the Department of Justice, and the Organized Crime and Racketeering Section does not supervise these prosecutions unless they also involve one of our groups. In addition, while we also see some signs of organized criminal activity from African and South Asian groups, they have not yet reached a serious enough level to demand the attention of our Strike Forces. I will therefore limit my comments to the two major kinds of international organized crime groups within the Section's area of activity - first the Asian, then Russian and East European.

A. Asian Criminal Enterprises

As you are all aware, criminal enterprises have existed in Asian countries for centuries. However, we have so far found little evidence that the traditional Asian criminal groups have been able to set up extensive networks in the United States. Asian immigrant communities in the United States have suffered from the predations of gangs and organized crime groups, but in most instances these are home-grown groups, without formal ties to organized criminal groups in Asian countries. Furthermore, in contrast to La Cosa Nostra, the Asian Criminal Enterprises found in the United States tend to be loosely structured and often lack a formal organization.

Nevertheless, Asian Criminal Enterprises pose a significant crime problem in the United States. These groups commit traditional organized crimes within various Asian communities, such as extortion, murder, kidnaping, illegal gambling, prostitution, and loan-sharking. Additionally, Asian Criminal Enterprises have engaged in international criminal activity, including alien smuggling, drug trafficking, financial fraud, theft of automobiles and computer chips, counterfeiting and money laundering.

1. Chinese Criminal Enterprises

Chinese criminal enterprises operating in the United States often bear names familiar to students of the traditional Hong Kong or Taiwan triads, such as 14 K, Sun Yee On, Wo Hop To, or Hung Mun. However, while these groups may indeed have some links to the traditional Hong Kong or Taiwan triads, the U.S.-based groups usually operate independently of the parent organizations. For example, the Tung On Gang was a major criminal organization operating in New York and other cities on the east coast of the United

States. Its former leader was a Red Pole of the Sun Yee On Triad, but the Tung On Gang's only connection to the Sun Yee On was for the purpose of importing Southeast Asian heroin into the United States. Otherwise, the Tung On Gang engaged in local criminal activities in the United States such as extortion, murder, illegal gambling and money laundering without taking direction from Hong Kong.

The range of Chinese criminal groups in the U.S. runs from simple street gangs, such as the Flying Dragons and Ghost Shadows of New York's Chinatown, to quasi-legitimate businessmen, sometimes associated with criminally-influenced Tongs, engaged in complex frauds. Currently, the principal criminal Tongs in the United States are the Hip Shing Tong, located in New York and on the West coast, principally in San Francisco, and the On Leong Tong, located predominately in New York, Chicago, Houston, Detroit, and Atlanta. These Tongs mainly operate illegal gambling, prostitution, alien smuggling and stolen property activities along with narcotics trafficking.

Chinese criminal groups in the United States traditionally preyed almost exclusively on residents of Chinese communities in American cities. More recently, however, these groups have expanded the scope of their activities to attacks on other U.S. companies and institutions and to international crimes such as alien smuggling, drug trafficking, credit card fraud, theft of automobiles and computer equipment, counterfeiting, money laundering, and piracy of intellectual property.

Chinese criminal enterprises have proven themselves to be flexible and sophisticated, capable of engaging in complex crimes requiring a considerable amount of planning and/or coordination

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with individuals overseas. Different groups may pool their resources when necessary to complete an ambitious criminal scheme. Furthermore, the loose structures of their organizations makes it difficult for law enforcement to identify and target key individuals.

One of the most dramatic cases of Chinese organized crime in the last couple of years was the so-called "Bites Dust" operation, centered in San Francisco, in which a Chinese criminal group engaged in robberies of computer chips from warehouses and sold them on the black market. Carefully planning their operations, the robbers had arranged in advance with buyers exactly what kind of computer chips to steal. As with many other Chinese criminal enterprises in the U.S., the gang committing the robberies was loosely organized and not affiliated with a specific triad or tong.

2. Vietnamese Criminal Enterprises

Vietnamese criminal enterprises are the major Asian organized crime problem in some parts of the United States such as Texas, Louisiana and the Washington, D.C. area. Currently, more than 750,000 Vietnamese have settled in various parts of the United States, with California housing a large majority.

Compared to other Asian groups, Vietnamese criminal groups are the most flexible groups in terms of cooperating with criminals of other ethnic and racial backgrounds. U.S. law enforcement agencies face not only traditional organized crime problems within various Vietnamese communities such as extortion, murder, kidnaping, illegal gambling, prostitution, home invasion robbery, illegal weapons trafficking, and loan-sharking, but also national and international organized crime problems including alien smuggling, drug trafficking, credit card, check and food

stamp fraud, white collar crime, theft of automobiles and computer chips/equipment, counterfeiting of monetary instruments, money laundering and piracy of intellectual property.

Although the crime problem generated from Vietnamese criminal enterprises in the United States has been in existence for a little more than a decade, their violence and their proliferated criminal activities have generated grave concerns to law enforcement agencies and the public. Vietnamese criminal enterprises are the fastest growing Asian crime group in the United States. Not only have they established a foothold in various newer Asian communities, they are challenging the established crime groups in older Asian communities. For the moment, they are not as sophisticated as other more established Asian crime groups, such as Chinese, Japanese and Korean, and do not have the same level of financial backing, but this is changing.

Recently our Houston Strike Force prosecuted a Vietnamese group engaged in health care fraud. The defendants, who ran four health clinics, would stage auto accidents and then submit false medical bills for reimbursement by the Government. Enlist an attorney to assist them in the scheme, the defendants mastered complicated paperwork to obtain \$ 4 million dollars within a three year period.

3. Korean Criminal Enterprises

As with the Chinese criminal groups, Korean criminal enterprises in the United States have ties to Korean criminal groups in Korea and Japan, but they are independent entities. While Korean criminal enterprises are generally less sophisticated and less organized than Chinese criminal enterprises and Japanese Boryokudan, they are best known for and

are extremely proficient in criminal activities related to the trafficking of crystal methamphetamine and Southeast Asian heroin, extortion, illegal gambling, alien smuggling, prostitution, public corruption, and money laundering.

Many of the criminal activities of the Korean groups require an extensive national and/or international network of criminal contacts. Adapting to the expanding international economy, Korean traditional criminal organizations are linking up with organized crime groups abroad, including Japanese and Russian groups, to form business joint ventures and to learn new methods of committing crimes.

Since Korean immigrants in the United States are often reluctant to report crimes to law enforcement agencies, the activity of Korean criminal enterprises often remains undetected by law enforcement organizations in the United States. As a result, these groups have flourished in the past decade. They have gained a strong foothold in various prosperous Korean communities, have controlled a large share of methamphetamine trade in Hawaii and the U.S. West Coast, and have had a network of prostitution/alien smuggling operations that span the nation. Korean criminal enterprises have the potential to become "entrenched organized crime groups" within the United States, similar to their counterpart criminal groups in Korea.

4. Japanese Criminal Enterprises

Japanese criminal enterprises, the Boryokudan, also known as Yakuza, can be categorized as traditional criminal enterprises. Japanese criminals based in other countries with Asian communities, such as the United States, Australia, and Brazil, are either associates of the Japanese Boryokudan, Boryokudan members, or Japanese delinquents

(chimpira) who are would-be Boryokudan.

The primary activities of the Boryokudan in the U.S. are money laundering, drug trafficking, handgun trafficking, monopoly of the Japanese tourist trade, and manipulation of the real estate market. The most aggressive Boryokudan groups in the U.S. include Yamaguchi-gumi, Sumiyoshi-rengo-kai, Inagawa-kai, and Toa Yuai Jigyo Kumiai.

The Boryokudan's main activity is money laundering, a very difficult operation for law enforcement to detect. Japanese victims are usually reluctant to report crimes to law enforcement for fear of retaliation. Boryokudan members and their associates have also invested in high-volume cash businesses, such as restaurants, bars, gift shops, and hotels, and in other legitimate businesses, such as construction companies, oil companies, banks, casinos, golf courses, and U.S. securities.

Nevertheless, recent investigations have indicated a decline of the Boryokudan's activities in the United States. It has been speculated that this could be related to Japan experiencing a long period of economic downturn, providing an abundance of opportunities in Japan for the Boryokudan to take over ailing businesses and profit from them.¹ Still, the Boryokudan pose a significant threat to the United States through their financial resources, their ability to launder large amounts of money, their ability to infiltrate legitimate businesses in the United States, and their international connections with high-level political, financial and criminal figures.

¹ See Mary Jordan and Kevin Sullivan, *A New Mob Mentality in Japan*, WASH. POST, April 11, 1999, at A1.

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Although the Boryokudan groups have formed alliances with various international organized crime groups, such as Chinese, Korean, Taiwanese, Russian, and Italian, they remain the most closed ethnic crime group. Only Japanese or Japanese-related individuals are included in their organizations. They have established themselves to some extent in Hawaii and Southern California. United States law enforcement organizations are focusing more attention to the Boryokudan because they fear that the Boryokudan will become a truly entrenched criminal organization similar to the La Cosa Nostra crime family. However, evidence thus far does not indicate that they possess a substantial threat in the U.S.

B. Russian and Other Eurasian Organized Crime

The U.S. Justice Department uses the terms “Russian Organized Crime” and “Eurasian Organized Crime” interchangeably to refer not only to organized crime groups operating in Russia, but also those groups operating in or headquartered in countries in Eastern Europe and Asia that were formerly part of the Soviet bloc, such as Poland, Hungary, Georgia, Armenia, Kazakhstan, Ukraine and others. Eurasian Organized Crime has become prominent in the West only in the past ten years, since the collapse of the Soviet bloc.

As I mentioned earlier, the dissolution of the Soviet Union in 1991 led to widespread economic upheaval across the former Soviet bloc countries. The economy of Russia and other former Soviet countries shrunk drastically as unprofitable state enterprises lost their state funding and shut down. The considerable natural resources of these countries became the prizes in a fierce struggle between competing businessmen who often allied themselves with organized crime elements,

resulting in dozens of murders and other crimes as the contestants vied for control. Criminals who managed to gain access to these resources sought to cash in on their success, selling oil and other resources overseas in violation of Russian laws and concealing the profits in a series of offshore bank accounts. Finally, the criminals sought to use the proceeds of their crimes to purchase real estate and other assets in the United States and other western countries.

At the same time the loosening of travel restrictions from the former Soviet Union allowed many individuals to emigrate to the United States and other western countries. Among these immigrants were a few criminals who took advantage of the new environment to set up new criminal organizations which preyed on their fellow immigrants. Thus, in the United States, we have seen the growth of organized criminal groups in places such as the Brighton Beach neighborhood of New York, where their members practice extortion on local businesses and commit excise tax and health care frauds, drug trafficking and visa and immigration fraud. The Brighton Beach groups show particular flexibility in working with other established criminal groups such as La Cosa Nostra. In one particularly egregious example, Russian mobsters in New Jersey combined with La Cosa Nostra members in a scheme to cheat state authorities of millions of dollars in excise taxes on the sale of gasoline.

So far we have identified roughly twenty large Russian Organized Crime groups operating worldwide. Over the last decade, these groups have expanded their operations into more than 55 countries, including the former Soviet Union, Europe and North America. The most prominent of these groups are:

- (i) the Ivankov group, also known as the “Organizatsiya,” based in

- Vladivostok and Moscow, with influence in New York, Miami, Boston, and Los Angeles;
- (ii) the Semion Mogilevich Organization, based in Budapest and Moscow and located in Philadelphia, Miami, Los Angeles, New York and Boston;
 - (iii) the Izmailovskaya Organization, which operates in Moscow, Tel Aviv, Paris, Toronto, Miami and New York City; and
 - (iv) the Solntsevskaya Organization, which is based in Moscow and Budapest, and has moved into Florida, Southern California, and Chicago. These groups are involved in a variety of crimes including business frauds, especially excise tax frauds on gasoline, money laundering, health care fraud, drug trafficking, extortion and visa and immigration fraud.

The transnational aspects of Eurasian Organized Crime, as practiced by the larger criminal groups, pose a particularly acute threat to the societies of the West. Our law enforcement bodies face great difficulties in attempting to investigate large scale financial fraud and money laundering schemes emanating from the former Soviet Union. Often the only part of the crime taking place within western jurisdictions is the movement of millions, or even billions, of dollars through western bank accounts. Obtaining a clear picture of the possibly criminal activities linked to this money requires the close cooperation of authorities from Russia, other members of the Commonwealth of Independent States and many other countries. Such cooperation is extremely difficult to obtain in a timely manner, particularly when many different countries are involved. As a result, it is often impossible to investigate these cases as thoroughly as they deserve,

and the criminals gain the ability to hide and make use of their ill-gotten assets in the west.

I don't have to tell you that it is a very dangerous situation when organized criminals have access to large amounts of money in your country. In the United States, La Cosa Nostra historically used its control of the pension funds of certain large labor unions to fund its criminal activities and further the power of the Mafia, including in the political arena. If we fail to check the ability of these criminals to make use of the billions of dollars they have moved out of Russia, you will find the influence of Eurasian Organized Crime spreading to other sectors of the economy and the political life of western countries.

III. METHODS OF COMBATING TRANSNATIONAL ORGANIZED CRIME - DOMESTIC RESPONSES

United States international law enforcement has increased its ability to combat transnational criminals. Prosecutors have worked out the techniques for acquiring evidence from abroad, while extradition and mutual legal assistance treaties have proliferated and become more inclusive.² Many domestic legal obstacles to effective international law enforcement have largely been reduced or eliminated by the actions of Congress and the federal courts. Additionally, foreign governments and law enforcement agencies have worked with U.S. officials towards reducing the frictions created by their own criminal justice systems.³ While much work remains to be done, we feel that our law enforcement bodies are gradually acquiring the necessary tools to do the job.

² Ethan A. Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* 467-468 (1993)

³ *Id.* at 468.

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Our fight against transnational organized crime will, however, rely first and foremost on the investigative techniques and prosecutive tools developed in our long struggles against the American Mafia. I would therefore like to begin by discussing with you some of the most important law enforcement tools in our arsenal. I will begin with three techniques used by our investigative agencies with the assistance and under the oversight of prosecutors: electronic surveillance, undercover operations and the use of confidential informants.

A. Electronic Surveillance

Electronic Surveillance represents the single most important law enforcement weapon against organized crime. There is nothing as effective as proving a crime through the defendant's own words. Electronic Surveillance evidence provides reliable, objective evidence of crimes through the statements of the participants themselves. Additionally, electronic surveillance enables law enforcement to learn of conspirators' plans to commit crimes before they are carried out. This allows them to survey the criminal activities, such as delivery of contraband and conspiratorial meetings, or to disrupt and abort the criminal activities where appropriate, making electronic surveillance particularly helpful in preventing the occurrence of violent crimes.

Additionally, electronic surveillance is particularly helpful in transnational crimes because it enables law enforcement to intercept conspirators in the United States discussing crimes with their criminal associates in countries outside the United States. Electronic surveillance gives United States law enforcement evidence of conspiratorial planning against co-conspirators operating outside of the United States that would otherwise be very difficult to obtain.

While electronic surveillance is extremely valuable, it is also a very sensitive technique because of legitimate concerns for a person's privacy interests. These concerns impose significant restrictions on electronic surveillance. For example, electronic surveillance can only be used to obtain evidence of some specific serious offenses listed in the governing statute.⁴ If an agent or governing attorney wishes to secure electronic surveillance, he or she must submit an affidavit to a United States district court judge containing specific facts establishing probable cause to believe that the subjects of the electronic surveillance are committing certain specified offenses and that it is likely that relevant evidence of such crimes will be obtained by the electronic surveillance.⁵ Thus, the government must receive the approval of a neutral independent judge to be authorized to conduct electronic surveillance. Additionally, before electronic surveillance is permissible, the government must establish probable cause to believe that other investigative techniques have been tried and failed to obtain the sought evidence, or establish why other investigative techniques appear to be unlikely to succeed if tried, or establish why other techniques would be too dangerous to try.

In executing the electronic surveillance, the government must minimize the interception of innocent conversations, taking reasonable steps to assure that only conversations relevant to the crime under investigation are intercepted.⁶ In practice, the monitors are required to turn off recording machines when conversations are not discussing matters relevant to the crimes under investigation.

⁴ See 18 U.S.C.A. § 2516 (West Supp. 2000).

⁵ See 18 U.S.C.A. § 2518 (West Supp. 2000).

⁶ See 18 U.S.C.A. §§ 2511, 2518 (West Supp. 2000).

Once the electronic surveillance begins, the government must submit regular reports to inform the court of the information obtained through the surveillance. In these so-called “10-day reports” the prosecutor lists the number of intercepted calls, the number of calls containing criminal conversations, summarizes of those conversations, and describes any unusual events that transpired in connection with the surveillance. This constant report writing is part of what makes electronic surveillance so labor-intensive for the prosecutor.

Electronic surveillance is also restricted in terms of its duration. Court-authorized electronic surveillance is limited to thirty days.⁷ This may be extended for additional thirty-day intervals, provided that all the requirements are met every thirty days and approved by the judge.⁸ Although substantially useful in law enforcement, it is evident that there are considerable restrictions on electronic surveillance designed to protect individuals’ privacy interests.

B. Undercover Operations

As far as organized crime control goes, undercover operations are second only to electronic surveillance, often working hand-in-hand with each other. An undercover investigation may be of very short duration, lasting only a few hours, or may be quite lengthy, lasting a few years. It may be directed at only a single criminal incident, or a long term criminal enterprise. In some instances, the undercover operation may involve merely the purchase of contraband, such as illegal drugs, stolen property, or illegal firearms, or it may involve the operation of an undercover business, such as a tavern or other

operation, where criminals meet and discuss their activities with undercover officers or informers. Through such undercover operations, law enforcement agents are able to infiltrate the highest levels of organized crime groups by posing as criminals when real criminals discuss their plans and seek assistance in committing crimes.

Agents often are able to gain the confidence of criminals, inducing them to reveal their past criminal activities as well as plotting with the agents to engage in additional, ongoing criminal activities. In conjunction with electronic surveillance, the undercover approach provides comprehensive coverage of the targets’ daily activities. However, undercover operations are extremely sensitive and pose the danger of luring otherwise innocent people into criminal activity. Because this technique carries the potential for problems, it requires exceptional preparation.

For example, the physical safety of the undercover agent must always be considered. To prevent the premature disclosure of his or her identity, the agent must be provided with a fully substantiated past history, referred to as “backstopping,” and careful briefings of the targets’ modus operandi. Every conceivable scenario that may induce suspicion of, or hostility towards the agent must be considered in advance. Additionally, the undercover agent must undergo careful testing, often including psychological profiling, to ensure that he or she possesses the intangible qualities to ensure that he will “fit” comfortably into the new identity.

In the United States, before an undercover investigation may occur, the consent of agency supervisors and prosecutors is required. The level at which the activity is reviewed increases as more

⁷ See 18 U.S.C.A. § 2518 (West Supp. 2000).

⁸ See 18 U.S.C.A. § 2519 (West Supp. 2000).

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sensitive circumstances are involved in the investigation. To balance the concerns and avoid harm to the public, the Department of Justice has set up Undercover Review Committees, comprising senior prosecutors and investigators. These Undercover Review Committees are responsible for reviewing, approving, and controlling all sensitive undercover operations. To be approved, an undercover proposal must be in writing, contain a full factual description of the suspected criminal activity and the participants therein, set out, in detail, the proposed undercover scenario, the expertise of the undercover team, the duration of the project, the anticipated legal issues, and it must evaluate the risk to the agents and the public.

If the undercover activity is of relatively short duration, such as a one time purchase of narcotics or other contraband, a first line investigative agency supervisor and first line prosecutor must approve the activity after having been advised of all the facts of the matter. If the undercover activity is of a longer duration, with an undercover agent and informant engaging in what would otherwise be ordinary violations of the law on a repeated basis, then the approval of a higher level supervisor, such as a local lead investigative agent, and a supervisory prosecutor must be informed of all the facts and give his or her approval to the activity. These long-term undercover operations are essential to assist in infiltrating organized crime groups that continue their illegal activities over many years. Finally, if there are sensitive circumstances involved, such as a risk that innocent third parties might be affected by the activity, or there is extensive and ongoing criminal activity of a serious nature, then the activity must be reviewed and approved at the headquarters of the investigative agencies and by Washington-based Department of Justice prosecutors.

Whenever an undercover operation reveals that a crime of violence is about to take place, law enforcement authorities are required to take necessary steps to prevent the violence from occurring. This may include warning the potential victim, arresting the subjects who pose a threat, or ending the undercover operation altogether.

C. Informants

Another critical law enforcement technique involves the use of confidential informants. When United States law enforcement uses the term confidential informant, we refer to an individual who is not willing to testify but who provides information or assistance to the authorities in return for a promise that we will try to keep his identity confidential. We cannot absolutely guarantee such confidentiality because in relatively rare circumstances courts may conclude that due process, or concerns of fundamental fairness, require that a confidential informant's identity be disclosed to a defendant charged with a crime where the informant can provide evidence that could exculpate the defendant. Absent such a rare case, we are able in most cases to keep an informant's identity confidential.

Confidential informants are typically motivated to provide information to the authorities in exchange for money or lenient treatment regarding charges pending against them or likely to be brought against them. In many cases confidential informants are themselves engaged in criminal activities which enables them to provide valuable direct evidence of criminal activities by their criminal associates. Confidential informants frequently provide the information that enables law enforcement officials to obtain judicial warrants authorizing electronic surveillance. Many successful prosecutions of the LCN

leadership have involved information supplied by confidential informants who provided information for many years about the leadership of the LCN; indeed some of the informants have been “made members” of the LCN. Incriminating evidence by informants who deal directly with the LCN leadership is simply invaluable to break through the layers of insulation that the leadership uses to conceal their activities.

However, there are high risks associated with the use of informants. Sometimes, informants do not fully disclose their own criminal activities, or they falsely implicate their enemies in crimes, or they engage in unauthorized criminal activities. In that latter respect, under United States law, law enforcement may authorize informants to participate in some forms of non-violent criminal behavior that would otherwise be illegal, if they were not acting as informants with authority to engage in the activities. For example, depending on the circumstances, in order to protect an informant’s cover and to enable him to be in a position to obtain incriminating evidence against others, informants may be authorized to participate in illegal gambling, trafficking in stolen property, and other non-violent crimes. Therefore, it is important for law enforcement to closely monitor the activities of informants to minimize the danger that the informant would use his association with law enforcement to shield his own unauthorized criminal activities.

On balance, however, experience teaches us that as a general rule, the benefits from the use of informants greatly outweigh the risks. But, we must be ever vigilant of the risks.

These three techniques, electronic surveillance, undercover operations, and use of informants are the most important techniques that have assisted the

investigative agencies to combat organized crime and transnational crimes. Next, I will discuss the weapons available to the federal prosecutors in the United States to combat organized crime and transnational crimes.

D. Racketeer Influenced and Corrupt Organizations Statute (RICO)

In every organized crime case, the goal is to convict the highest levels of a crime organization. To accomplish this, prosecutors must be equipped with the proper tools. One particularly valuable tool is a law which singles out the activity of ongoing criminal organizations. In the United States, the most important law of this sort is the Racketeer Influenced and Corrupt Organizations Statute (RICO). In general, RICO provides heavy penalties, including life imprisonment in certain circumstances, when a defendant conducts, or conspires to conduct, the affairs of an enterprise through a pattern of specified acts, known as predicate crimes. An enterprise can include anything from a corporation, to a labor union, to a group of individuals working together to commit crime, such as the Asian and Russian organized crime groups discussed above.

Interestingly, the RICO statute did not actually create a new crime, as the crimes of murder, arson, and extortion, to name a few of the 46 predicate offenses in RICO, were all made criminal long before RICO’s enactment in 1970. However, RICO was still a dramatic legislative initiative because it permitted many of these generically different crimes to be charged in a single indictment. After RICO, these different crimes could even be charged in a single count against a defendant, so long as the crimes were part of the defendant’s pattern of acts that related to the enterprise. In essence, RICO made it a crime to be in the business of being a criminal.

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RICO is particularly effective in organized crime cases, as it allows a prosecutor to demonstrate the full range of criminal activity of an individual or a group of criminals. For example, RICO has a reach-back feature that enables a prosecutor to show a pattern of racketeering activity. As long as one of the predicate crimes alleged against a defendant occurred within the five years of when the indictment is brought, the next previous crime in the pattern of racketeering need only be within ten years of the most recent crime. Similarly, the third most recent crime need only have occurred within ten years of the second act. This reach-back feature enables this process to continue, possibly extending twenty years or longer into the past. Ordinarily, the evidence of past criminal activity that may be presented under RICO is outside the period for which a person could be prosecuted, as indictments in the United States generally cannot allege crimes that occurred more than five years prior to the date of the indictment. This makes RICO particularly useful in organized crime cases.

Additionally, RICO's reach is very broad, as the predicate crimes that qualify as RICO predicates span all forms of criminal actions. Without RICO, most United States judges would prohibit the prosecution of such diverse crimes in a single case and would be more likely to break it up into a series of smaller trials, especially if numerous defendants were being charged. Organized crime groups prefer dividing up a prosecution because no one jury gets to see the entire picture. Organized crime is composed of many crimes, all linked by a single chain-of-command to the same enterprise. Thus, any effective prosecution of a crime family requires proof of many crimes in a single trial. RICO allows this, enabling the jury to see an entire pattern of crimes.

RICO allows the government to prosecute criminal activity on a systematic basis, enabling them to punish the members of an organized crime group for the criminal activities each has engaged in on behalf of that group. In an ordinary RICO prosecution, often six or more racketeers are charged with perhaps a dozen or more predicate crimes extending over a decade. In each of the alleged predicate crimes, usually only some of the defendants are named. There have been cases where RICO indictments have charged several defendants with committing over fifty offenses as part of a pattern of racketeering activity!

Furthermore, RICO also allows the presentation of evidence of criminal activity that has been the subject of earlier prosecutions. Ordinarily, this would not be allowed in the United States because of constitutional rules against successive prosecutions for the same conduct. Nevertheless, this is also permitted under RICO. RICO has proven to be an extremely important tool assisting in the prevention of organized crime in the United States.

As powerful as RICO is, there were only a few RICO prosecutions brought against organized crime in its first fifteen years. That was primarily because it took Federal prosecutors that long to feel comfortable enough with the complicated instrument to make it the centerpiece of organized crime prosecutions. Another reason was that the investigative techniques necessary to build a suitable RICO case, such as electronic surveillance and undercover operations, were not routinely used against organized crime bosses in the 1970's.

Currently, it is evident that control of organized crime in the United States would be inconceivable without RICO. Beyond organized crime, RICO cases have also been brought against hundreds of police

officers, judges, and public officials for official misconduct, and against terrorist groups, radical hate groups, street gangs, stock manipulators, and drug cartels. However, like any powerful tool, RICO has the capability of being abused. To protect against potential abuses, the Organized Crime and Racketeering Section has a special unit of attorneys who carefully review all proposed RICO indictments for legal and factual sufficiency. This unit ensures that RICO is used only when it is necessary, disapproving of a RICO charge when less powerful statutes would be just as effective.

E. Organized Crime Strike Force Units

As I previously stated, the LCN is the number one organized crime problem in the United States. The LCN is an extensive nationwide criminal organization. Therefore, it was essential to attack the LCN and other organized crime groups through a closely coordinated nationwide effort. However, law enforcement is very fragmented and decentralized in the United States. The United States Department of Justice at the federal level is divided into 94 different United States Attorneys offices throughout the country that operate with considerable independence of the main Justice Department located in Washington, DC. In addition, there are literally hundreds, perhaps over 1,000 state, county and city prosecutors' offices and police departments that have criminal jurisdictions that are totally independent of the federal Department of Justice. This fragmented prosecutorial authority makes nationwide coordination difficult. These difficulties are made even greater when you factor in the large territorial size of the United States and its relatively large population of over 260 million people.

To improve coordination of federal efforts to attack organized crime, in the late 1960s the Department of Justice created 24 specialized prosecutive units called Organized Crime Strike Forces located in the cities where the 24 LCN families were most active. These Strike Force Units were staffed by career prosecutors who were experienced in electronic surveillance, undercover operations, and long term proactive investigations. Moreover, these prosecutors are only allowed to work on organized crime matters. To assure that they work only on organized crime matters and to assure that the Strike Force cases are properly coordinated from a national perspective, supervising prosecutors in Washington, DC must approve every investigation, every indictment, every wiretap and every other principal activity that each Strike Force Unit undertakes. Through such oversight, the supervising attorneys in Washington, DC are able to maintain the focus of efforts against organized crime groups and to see to it that relevant information developed by one Strike Force office gets to another office in another part of the country that may need it.

Moreover, because the supervisors in Washington, DC, are aware of all LCN investigations and prosecutions in the United States, they are able to reduce duplication of efforts and coordinate investigations and prosecutions conducted by more than one office.

The creation of these Strike Force Units proved to be invaluable. Over the past 25 years, the vast majority of all the major convictions of LCN bosses and members were obtained by these Strike Force Units. Although the LCN remains strong in the metropolitan New York City area where roughly 80% of the LCN members operate, the LCN has been substantially weakened in other parts of the United States -

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particularly in San Francisco, Los Angeles, Kansas City, Milwaukee, St. Louis, and other cities.

Although the Strike Force Units were initially created to combat the LCN, their mission was expanded in 1990 to combat Asian and Russian organized crime groups. In 1990, the Attorney General of the United States adopted a national strategy to coordinate the federal attack against then newly emerging organized crime groups operating in the United States. The Strike Force approach became the centerpiece of that national strategy since it had been so successful against the LCN. The Strike Force Units were well equipped to handle the new challenges because of their experience, and also because the Strike Force Units were already located in the cities where the Russian and Asian organized crime groups were most active. Not surprisingly, the Russian and Asian organized crime groups are active in the same large cities as the LCN.

To implement this national strategy, the Attorney General created the Attorney General's Organized Crime Council, the members of which are the heads of the Federal Bureau of Investigation, the Drug Enforcement Administration (DEA), the Division of Enforcement of the Securities and Exchange Commission, the Secret Service, the Marshals Service, the Customs Service, the Postal Inspectors, and the Internal Revenue Service. The Council meets as necessary to set the official priorities of the Federal Government's organized crime programme, which currently are LCN, Asian, and Russian organized crime. In order to set these priorities, each agency and the country's 94 top Federal prosecutors (called United States Attorneys) are required each year to file written plans assessing the problems posed by organized crime groups in their districts and for attacking organized crime

groups in their districts. The Department of Justice's Organized Crime and Racketeering Section then reports its analyses of these plans to the Council. The most important feature of this system is control: It obligates the regional prosecutors and agents to keep constant pressure on La Cosa Nostra and Asian and Russian crime groups, and prevent them from succumbing to periodic temptations to assign prosecutors and agents to non-organized crime cases.

Implementing this national strategy has enabled the Federal Government to coordinate its nationwide efforts against organized crime groups and to keep the pressure on them to prevent them from expanding their corrupt influences on society.

F. Immunity System

Another valuable tool used by prosecutors in organized crime cases is the power to grant immunity under certain conditions in return for a witness's testimony. Every individual in our country has a right under Fifth Amendment of our constitution to refuse to testify against himself. The immunity system allows the government to force an individual to testify in return for a promise that the testimony may not be used against the witness in any subsequent criminal case.⁹

Until 1970, there were numerous federal immunity statutes providing transactional immunity, protecting people testifying under these laws against prosecution or penalty on account of any transaction, matter, or thing relating to their testimony or production of evidence. Therefore, under transactional immunity, the witness received immunization from a subsequent

⁹ See 18 U.S.C.A § 6002 (West Supp. 2000); *Kastigar v. United States*, 406 U.S. 441 (1972).

prosecution as to any matters about which he or she testified.

Today, however, transactional immunity no longer exists in the federal system. It was replaced by what is referred to as “use immunity.”¹⁰ In 1970, the United States Congress enacted the so-called “use immunity” statutes that explicitly proscribe the use in any criminal case of testimony compelled under the order granting immunity. In essence, use immunity only provides that the witness’ testimony itself will not be used against him or her; he or she may still be prosecuted using other evidence. Although use immunity is not considered as broad a protection to the individual as transactional immunity, it is nevertheless consistent with the proscriptions of the Fifth Amendment because it “prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.”¹¹

The United States attorney, with the approval of the Attorney General, the Deputy Attorney General, or a designated assistant attorney general is empowered to seek a court order granting use immunity when, in the judgment of the government, the testimony or other information is necessary to the public interest and the individual has asserted or is likely to assert his or her privilege against self-incrimination. In 1999, the Department of Justice authorized 2,059 requests for witness immunity, and 1,444 of those requests were granted to the Criminal Division.

In addition to the Immunity system, there is also the “Crown Witness” system which, although it is not codified in the United States Code, is a widespread and approved practice in obtaining witnesses. Under the “Crown Witness” system, there are two types of agreements that the United States can enter into with witnesses, non-prosecution agreements and cooperation agreements.

Non-prosecution agreements, are mainly used for situations where a witness’s involvement in a criminal act is minimal.¹² These agreements grant immunity from prosecution in connection with that case in return for full, truthful cooperation. Although non-prosecution agreements are available, they are rarely used.

Cooperation agreements, on the other hand, are the most commonly used instrument to compel testimony. These agreements require the defendant to incur some type of liability for his or her criminal conduct. In a cooperation agreement, the defendant agrees to plead guilty to certain agreed-upon charges, to fully and truthfully cooperate with prosecution, and to testify in any court proceeding concerning all matters asked of him or her. In exchange for the defendant’s cooperation, the government agrees to file a motion pursuant to Federal Sentencing Guideline § 5K1.1.¹³ This motion gives a judge discretion with respect to the defendant’s sentence, something he or she ordinarily would not possess. Upon receipt of such a motion, the sentencing judge will usually decide to reduce the sentence. This creates a powerful incentive for cooperation, and is a particularly valuable tool in the prosecution of organized crime

¹⁰ See: 18 U.S.C.A §§ 6001, 6002, 6003 (West Supp. 2000); *Kastigar v. United States*, 406 U.S. 441 (1972).

¹¹ See: *Kastigar*, 406 U.S. at 453.

¹² US Dep’t of Justice, United States Attorney’s Manual, ch.9, § 27.600(B)(1)(c) (1997).

¹³ US Sentencing Guidelines Manual, § 5K1.1 (1998).

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groups.

G. Witness Protection Programs

Another valuable asset that aids the prosecution of organized crime groups is the federal Witness Security Programme. Because of the often violent nature of organized crime, witness intimidation can be a significant obstacle in the way of a successful prosecution. To address that problem, the Department of Justice created the Federal Witness Security Programme in 1970. Requests for protection of witnesses must be made as soon as it is known that the Witness Security Programme candidate will be a significant and essential witness, and will need relocation due to proximity to a "danger area." Naturally, because of the security concerns regarding the witness and his or her family, a witness's pending and actual participation in the Programme is not disclosed unless under the authorization of the Office of Enforcement Operations (OEO). This allows the United States Marshals Service (USMS) time to conduct preliminary interviews, psychological testing, and appropriate review, thereby minimizing the disruption to both the witness and the concerned government agencies.

A witness is admitted into the Programme when he or she is able to supply significant evidence in important cases, and there is a perceived threat to his or her security. Once in the programme, the witness and his or her family are given new identities, relocated to another part of the United States where the danger to their security is decreased, and are given financial assistance until the witness is able to secure employment.

The Witness Security Programme is very costly. Since the beginning of the Programme, over 6,800 witnesses have been admitted, along with an additional

roughly 9,000 family members. The average cost is \$75,000 per witness, per year, and \$125,000 per family, per year. Despite these numbers, the results derived from the Programme have made it worth the cost. Since its inception in 1970, over 10,000 defendants have been convicted through the testimony of witnesses in the Programme.

The vast majority of protected witnesses, about 97 percent, have criminal records. However, the recidivist rate for witnesses in the programme is 21 percent, which is half the rate of those released from prison in the United States. Overall, the Witness Security Programme has proven to be extremely beneficial and effective in the prosecution against organized crime groups.

H. Forfeiture

It cannot be overstated that making money is the primary goal of organized crime and transnational criminal activities. Therefore, it is imperative to take the profit out of crime. Strong forfeiture laws do just that. Forfeiture is a criminal penalty for many offenses in the United States. Generally speaking, upon conviction for an offense that carries forfeiture as a penalty, a defendant may be ordered to forfeit all profits or proceeds derived from the criminal activity, any property, real or personnel, involved in the offense, or property traceable to the offense such as property acquired with proceeds of criminal activity. For example, if a defendant uses a residence or car to distribute drugs, that property is subject to forfeiture. Thus, a convicted defendant may be ordered to forfeit all proceeds of his criminal activity including money and other forms of property.

In addition to criminal forfeiture, civil forfeiture laws also allow the government to obtain property used in criminal

activities. The principal difference between criminal and civil forfeiture is that criminal forfeiture is limited to a convicted defendant's personal interest in property subject to forfeiture, whereas civil forfeiture focuses on the property itself.

For example, suppose a defendant repeatedly used a house to sell drugs, but he did not have an ownership interest in the house. If he is convicted of drug dealing, that house is not subject to criminal forfeiture because the defendant did not own the house. However, a civil forfeiture law suit could be brought against the house itself as a defendant, even if the owner of the house was not engaged in criminal activity. The house, nonetheless, is subject to civil forfeiture because it was repeatedly used to facilitate criminal activities, and the owner did not take adequate steps to prevent his house from being used for criminal activities.

There are various defenses to such civil forfeiture, such as the "innocent owner defense", but I do not want to digress into the complexity of United States forfeiture law. To some extent I have generalized and oversimplified United States forfeiture law which is complex so as not to detract our attention from the main point I am trying to make. That is, that criminal and civil forfeiture laws are powerful weapons in the prosecutors' arsenal to take the profit out of crime.

I. Money Laundering

Strong money laundering laws go hand-in-hand with forfeiture laws as powerful weapons against criminal activities. Under United States money laundering laws, it is a crime to knowingly conduct a financial transaction with the proceeds of certain specified unlawful activity set forth in the statute with either the intent to promote the specified unlawful activity or with the intent to conceal the specified unlawful

activity. The term transaction is broadly defined to include "a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition" and "with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected."

As you can see, the money laundering statute covers nearly every imaginable type of transaction. Moreover, the penalties for money laundering include forfeiture which greatly enhances law enforcement's efforts to take to profit out of crime.

For example, in one recent case in Boston, defendants were convicted of laundering \$136 million in drug proceeds for Colombian drug traffickers. The defendants received the cash drug proceeds, and used it to buy money orders, cashiers' checks, or gold to conceal the illegal source of the cash; this constituted money laundering. The defendants argued that they should only be required to forfeit the 5% laundering fee (or roughly \$7 million) that they charged the drug traffickers since the \$136 million belonged to the drug traffickers. The court rejected this argument and held that the defendants were liable for forfeiture of the entire \$136 million that they laundered.

Other examples of money laundering illustrate the breadth of the statute. For example, proceeds of fraud that are deposited in bank accounts or other financial institutions which is commingled with legitimate money in accounts under the names of nominees constitutes money laundering subjecting, under some circumstances, the entire amounts in the

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accounts to forfeiture, including the money obtained legally as well as the crime proceeds.

In many cases, not just organized crime cases, money laundering violations coupled with forfeiture have proven to be powerful weapons to take the profit out of crime.

J. Sentences

Finally, I would like to briefly discuss United States sentencing laws. Fair punishment upon conviction is obviously the ultimate goal of all prosecutions. Perhaps most important is the protection afforded by incapacitating the convicted criminal through incarceration. To be sure, imprisonment substantially reduces, but does not totally eliminate, opportunities for criminals to continue their illegal activities.

In 1987, the United States Federal Government adopted a comprehensive change in its sentencing laws to make punishment more definite and more uniform throughout the federal system. First, federal parole was abolished. Therefore, a sentence of 10 years in jail means a defendant will not be paroled at a shorter time and the defendant will actually serve 10 years in jail, with some modest reduction for good time behavior while in jail. Other changes involved substantial restrictions on the discretion of judges in imposing sentences. Pursuant to the changes, sentences are now determined by application of a complex numerical weighing system. Under the formula, specific numbers are assigned to relevant factors such as the type of offense, the nature of the underlying circumstances, the defendant's role in the offense and the defendant's criminal history. The numbers are added up and the defendant is generally sentenced to a guideline range according to the resulting number. Again, I am oversimplifying complex legal provisions.

Most prosecutors and police in the United States would argue that the longer prison sentences under the Federal Sentencing Guidelines and similar state guidelines are in part responsible for the large decrease in the rate of serious crime in the United States over the last ten years. Others may take the contrary view and point to some cases in which the Guidelines, and the mandatory minimum sentences associated with certain drug crimes, lead to harsh results in individual cases. I take no view on this debate, except to argue that for the most serious criminals, especially high-ranking members of organized crime groups, the Guidelines and mandatory minimum sentences have ensured that the most serious criminal conduct will be matched with a serious punishment. The certainty of long sentences for criminal convictions also tends to convince defendants that they would be better served by cooperating with the Government and testifying against their bosses, rather than hope that a judge will be swayed by their lawyers' arguments into giving them a light sentence. In this way the Guidelines help our cases by making it more likely that defendants will choose to "flip" and testify for our side.

IV. METHODS FOR COMBATING TRANSNATIONAL ORGANIZED CRIME - INTERNATIONAL RESPONSES

I would now like to turn my discussion from the principal aspects of the United States domestic responses to transnational crimes and organized crime to what we are doing together with other countries in the international arena to combat such criminal activities.

A. Extradition

It is imperative that international criminals be denied a safe haven.

International extradition treaties remain the most effective legal mechanism to obtain the return of international fugitives. In 1990, the United States sought the extradition of 1,672 accused or convicted criminals. By 1996, that number had jumped to more than 2,894, including numerous fugitives wanted for murder, major drug trafficking offenses, money laundering, multi-million dollar financial scams, and other serious crimes committed against the United States.

The United States is currently party to over 110 such extradition treaties. The United States Departments of State and Justice, with appropriate input from other law enforcement agencies, are involved in an active programme to negotiate modern treaties in order to replace old, outdated instruments, to create extradition treaties where none previously existed, and to ensure that new crimes are covered by extradition treaties. We encourage the international community to work together to deny safe havens to international criminals through procedures consistent with domestic and international law.

B. Mutual Legal Assistance Treaties (MLATS)

In light of the international nature of transnational and organized crime activities, it is also essential to be able to obtain, in a timely way, the testimony of witnesses, bank records, other financial records and other evidence from foreign countries, and in some cases from several different countries, and for the United States to give similar assistance to other countries. Therefore, Mutual Legal Assistance Treaties have become important tools to address international criminal activities.

Barely 20 years ago, the United States entered into its first MLAT. Today, there are the United States has MLATs with 36

countries. These MLATs are invaluable in setting out clear procedures by which prosecutors can gain evidence from other countries. However, MLATs do not execute themselves. In some ways the MLAT is only the first step. Prosecutors in both countries have to work hard to prepare requests that will be understood by the receiving country, and have to work equally hard in preparing responses to incoming requests that will be useful to the requesting country.

In the United States Department of Justice, the Office of International Affairs is responsible for coordinating both incoming and outgoing requests for legal assistance with other countries. The Office's attorneys become experts in the law of their assigned countries and are able to provide assistance and advice both to US prosecutors seeking evidence from abroad as well as foreign countries seeking evidence from the United States. They confront all manner of problems and misunderstandings that arise between different legal systems, where even similar terms like "judge" and "indictment" have very different legal meanings and effects. In the years to come, the Office of International Affairs and its counterparts in other countries will be called upon to play a larger and larger role in our organized crime investigations.

Even where there is no MLAT in force, the United States is hopeful that law enforcement agencies will be able to exchange information and provide mutual assistance in ways that are fully consistent with the laws of the countries involved. Such cooperation is essential to effectively combat the international criminal activities of sophisticated criminals who seek to exploit the difficulties inherent in international investigations.

**C. Expanding the Presence of
United States Law Enforcement
Agents Abroad**

Tough United States laws that protect United States citizens and interests abroad will be of little value if the United States does not establish an investigative and law enforcement infrastructure to pursue violations of these laws. United States law enforcement officials stationed abroad work shoulder to shoulder with their foreign counterparts to investigate crimes against United States nationals committed overseas. Where offenders are identified, these officials also work to locate, apprehend, and return the perpetrators of such crimes through extradition, expulsion or other lawful means. They also facilitate the arrest and extradition of international fugitives located in the United States and wanted abroad.

The United States would like to expand its law enforcement presence in other countries to work with the host countries to respond to this growing need. For example, the FBI currently has FBI offices in 44 other countries and is looking to expand further. Similar expansions are being planned by the Customs Service and Drug Enforcement Administration. These expansions will bolster United States law enforcement abilities to arrest and punish fugitives who have committed crimes against the United States, to dismantle international organized crime rings, and to strengthen law enforcement and judicial systems around the globe. I have been fortunate enough to work with FBI Legal Attaches in many foreign countries, and I have found their advice to be absolutely essential to our work. I strongly encourage prosecutors and police officials of every country to make and maintain close contact with the nearest FBI Legal Attache if you have any kind of investigation that touches both your country and the United States, or if you want any kind of investigative

assistance from the United States.

One particularly bold step taken earlier this year was the creation of a joint FBI-Hungarian National Police Unit based in Budapest that investigates organized crime cases. This advance was made possible because the Hungarian government recognized that transnational organized criminals based in Budapest were committing crimes that affected many different countries, including the United States. The Hungarians and the Americans agreed that a joint police unit would be better able to pursue transnational investigations that would result in prosecutions in Hungarian or American courts. This unit has already made a big difference in the operating environment for criminals in Budapest, and we are open to considering similar initiatives with other countries.

To complement the increasing number of United States law enforcement personnel overseas, mutual legal assistance is greatly enhanced by the Department of Justice's cadre of overseas attorneys. Their role includes facilitating requests for extradition and mutual legal assistance, providing substantive legal guidance on international law enforcement and treaty matters, and increasing cooperation between United States and foreign prosecutors. Currently, the Department of Justice has prosecutors in Brussels, Mexico City, Paris, London, Geneva, and Rome. This summer we also had a prosecutor stationed in our embassy in Moscow, a position that we hope to make permanent. These attorneys do work similar to that of their Office of International Affairs colleagues in Washington, D.C., but are even more effective because they are on the spot. They have also proved vital for building the long-term working relationships that we hope to establish with our overseas colleagues.

If it were not for budget constraints, I would gladly see these positions expanded to a dozen other countries.

over. It is only when we learn to work effectively across borders that we will be able to mount an effective attack on transnational organized crime.

V. CONCLUSION

Transnational organized crime is a rapidly growing problem. The criminals have showed that they can adapt instantly to new technologies, to exploiting opportunities created by the increasing globalization of the world's economies. They know how to use borders to their best advantage to protect themselves, but do not let problems of national sovereignty, ethnicity, or language get in their way when they see an illegal way to make money. We members of law enforcement, by contrast, must obey not only our own rules, with all their technicalities, but must scrupulously obey each others' rules whenever we venture into another country. In the eternal battle between policeman and crook, the criminals threaten today as never before to gain the upper hand on a global scale.

The measures which I have outlined above are at most partial solutions. They will have at best only a limited effect until we undergo a more fundamental shift in our attitudes toward the difficult and frustrating process of international investigations. We all have heavy demands on our time, more cases than we know what to do with, and many leads to follow which will always seem more promising or more urgent than a foreign bank account number, or a telephone call by a criminal that goes overseas. These foreign leads, we feel, are unlikely to amount to anything, and even if they did lead to a case it would be a long and difficult one. My argument to you today is that we have to overcome this reluctance, we have to be willing to take the plunge and reach out for a foreign colleague who may be looking at the other end of the same case that you are puzzling

TRANSNATIONAL ORGANIZED CRIME AND THE COUNTERMEASURES IN KOREA

*Yong Kwan Park **

I. CHARACTERISTICS AND HISTORY OF ORGANIZED CRIMES IN KOREA

Korea has a unique history concerning organized crime. As modernization of Korea began in 1800s, Korea's population increased dramatically and concentrated to urban cities. On the other hand, there were not enough job opportunities for the increasing number of young people. Young men who had the energy to work, but who could not find jobs, banded together and idled about city streets. They worked at places like bars, gambling houses and construction sites, and some of them earned easy money by getting involved in small but lucrative businesses. Some called them 'Keondal', it means scamps or libertine. The terms Keondal scamp and libertine did not have only bad meanings. Actually, they were not considered as criminals or criminal groups. They had conflicts over some lucrative businesses, but did not cause major harm or damage to ordinary citizens. They honored loyalty and faithfulness, and they would sometimes help the weak and the poor.

Even now, the lives of scamps are an attractive source of movies, which picture them as heroic or romantic. Young men who are not satisfied with their jobs are admiring the lives of scamps. Movies and TV dramas featuring the lives of scamps are sometimes very popular with viewers. Many people were surprised when in a recent survey, some teenagers said that

they wish to be scamps or libertines when they grow up. Similarly, in Japan, organizations like the Yakuza were considered by some as groups of people who know what loyalty really is.

Korean scamps did not use weapons to fight. They used their bodies, their hands, feet and heads. Naturally, their fights rarely resulted in deaths or severe injuries. This owes much to the Korean tradition in which civilians were prohibited from arming themselves. In today's Korea, arms such as guns and swords are still strictly restricted and controlled. Carrying a gun or a long knife or sword constitutes an offense in itself.

But, as Korea became more industrialized and urbanized, Korean scamps began to change as well. In the 1960's when Korea was undergoing modernization processes, organized crime groups emerged as an influential power in entertainment districts. They soon became associated with some politicians. They guarded the politicians from danger, and interrupted the political rallies of competing politicians by using violence. These groups were the so-called political gangs or henchmen.

The military regime which was established in 1960 accused these crime groups as being mainly responsible for the social disorder. The military government arrested 13,000 members of such crime groups.

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Korean criminal groups, up until this point, were merely groups of scamps who

did not use arms. Moreover, the Korean military government conducted raids on these crime groups, pointing them out as a social evil. As the result of such raids, the crime groups almost vanished in this period.

Things began to change in the 1970's, as crime groups armed with Japanese knives and iron bars dominated the busy streets of the Myongdong area in downtown Seoul. They were no longer the romantic libertines of old times, but were vicious crime groups, formed with the aim of obtaining illegal profits by using violence.

It is from this point that Korean crime groups were organized in the form of families. Families had fights with each other, which often involved cruel killings and murders. As time went on, these families became bigger, and developed into large businesses.

In the 1980's, when Korea made economic progress and became more open to foreign countries, organized crime groups developed into nationwide organizations, and some of them even extended their activities to foreign countries, by associating with crime groups in Japan and the United States. These crime groups in Japan and the US were mostly groups formed by ethnic Koreans living in those countries.

On October 13, 1990, the Korean government declared "the war against crime", and initiated comprehensive raids on various crimes, including organized crimes. The arrested members of crime groups were punished for forming or joining criminal organizations. At this time, the Korean government started a new supervision programme for professional criminals. Under this programme, criminals were subjected to care and custody for on additional seven to ten years

at rehabilitation facilities, after serving the imposed sentence of imprisonment. As the result of the raids, most of the leaders of the major families were arrested and some of them fled to foreign countries.

In the early 1990's, in Korea, habitual pickpockets were subjected to harsh punishment, and were made to serve additional terms of care and custody after finishing their sentence in prison. To evade such harsh punishment, they fled to nearby Japan, and continued to commit crimes there.

In 1993, I dealt with mutual legal assistance affairs while I worked at the Korean Embassy in Tokyo. At that time, Korean pickpockets traveling to Japan to commit crimes became a hot issue. At the assistance of the International Division of the Japanese Justice Ministry, I obtained investigative materials for the Korean pickpockets arrested in Tokyo and other Japanese cities, and forwarded them to Korean prosecutorial authorities (100 such persons were arrested in Japan.) Korean prosecutors started investigations based on the provided materials, and arrested and punished those pickpockets in Korea according to Korean criminal law (the Korean Criminal Code provides that if a person has already been punished in a foreign country for a crime, that person can be also punished for that crime in Korea by Korean law. In such cases, the punishment in Korea may be mitigated or remitted. The specific article for this provision is Article 7 of the Korean Criminal Code). Korean pickpockets traveling to Japan began to realize that even if they are not arrested in Japan, they could be arrested in Korea when they go back home, and would be punished severely under Korean law. Accordingly, Korean pickpockets vanished from Japanese streets.

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II. RECENT TRENDS IN KOREAN ORGANIZED CRIME

A. Overview

Security and order is fairly well maintained on the streets of Korea. You can walk the Korean streets at night with a sense of safety. Korea's traditional policy strictly prohibited civilians from carrying guns, swords, gunpowder, gas jet guns and bows and arrows. To possess guns or other weapons for the purpose of hunting or for other sports, it is necessary to obtain police authorization. For this reason, we have rarely seen such incidents in Korea where criminals fire at people on the streets, or criminal groups fight with each other with guns and knives.

The Korean prosecutorial authority not only initiates investigations on its own, but also supervises investigations initiated by the police. The prosecutors have exclusive authority to investigate and prosecute all kinds of offenses. To efficiently deal with organized crime, the Supreme Prosecutor's Office established the Violent Crime Department within itself and within major prosecutor's offices, thereby establishing a nationwide chain for the investigation of organized crime.

The continual and strenuous efforts of the Korean prosecutors to combat organized crime has made substantial achievements. The Violent Crime Department at the Supreme Prosecutor's Office has collected comprehensive information about most criminal organizations in Korea, and has grasped the overall picture of such criminal organizations.

The Violent Crime Department evaluates whether the prosecutorial authority has been doing a good job in suppressing organized crimes, with a relatively small number of officials (there

are about 114 prosecutors in Korea who are entirely responsible for investigating violent crimes).

However, the situation took a bad turn in the late 1990's. The former bosses and leading members of crime groups who had been arrested during "the war against crime", completed serving their sentences and were released from prison. Recently, criminal families of the past have been reestablished and many new ones have emerged in major cities. Moreover, the members of the new criminal families are mainly composed of teenagers.

As of January 2000, the prosecutor's offices have estimated that there are 11,500 members in 404 families or groups. We keep special surveillance on 647 members in 117 families or groups. According to the analysis of the prosecutor's offices, during the period between 1998 and 1999, the average number of members in one criminal organization was 35. The number of members of each criminal organization ranged from the minimum of 10 members and the maximum of 88.

B. Transnational Organized Crime in Korea

In the 1990's, the cold war came to an end and Korea became more open and internationalized. With the economic growth and globalization trend, organized crimes in Korea are becoming larger in scale and wider in the field of operation. In the past, groups were primarily involved in violent crimes such as blackmailing bars and stores in entertainment districts, using violence and threat. Recently, they are engaging in any business, if it is profitable, regardless of whether it is legal or illegal.

Businesses that are usually operated by criminal organizations are: drug trafficking, prostitution, gambling, smuggling of persons, entertainment

businesses, underground financial businesses like private loan businesses and credit card discounts, construction contracts, real estate dealings, fraud such as counterfeiting credit cards, waste disposal, smuggling, insurance fraud, and the export of used cars. These are businesses that make big money very easily.

Criminal organizations accumulate funds through these businesses and invest these funds into lawful businesses. Eventually, it becomes more and more difficult to distinguish between the businesses of criminal organizations and businesses operated by other legitimate entities. Members of criminal organizations are transforming into businessmen with smart appearance and ability.

As the passage of persons and trade with China and Russia has become freer, criminal organizations are engaged in the export of labor and the smuggling of persons. In addition, the export of used cars to these countries is increasing. Car theft is dramatically increasing in Korea and it is believed that a great number of stolen cars are being exported to foreign countries by criminal organizations. In July of this year, a criminal organization was prosecuted for stealing new and expensive vehicles and dump trucks, and exporting these stolen vehicles to China, Russia and South East Asia. In August, 11 organized crime members were arrested for stealing about 700 motorcycles which were exported to South East Asia.

Meanwhile, Russian Mafia, Chinese Triads and Japanese Yakuza are trying to extend their businesses in Korea, taking advantage of the reform and liberalization policy in Russia and China. There are some reported cases where those foreign organizations are involved in drug

trafficking in connection with Korean criminal organizations.

Japanese Yakuza, Thai Kungsa and Colombian drug cartels are trading large portions of drugs such as methamphetamine, cocaine, heroin, etc (with Korean criminal organizations). One of the facts that we should take notice of is that a triangle of methamphetamine manufacture and sales has been established in this part of the world.

Korean manufacturers are making large quantities of methamphetamine in Taiwan, China and South East Asia, with the funds provided by Japanese criminal organizations. They then bring the products into Japan and Korea for sale. Also, there are suspicions that methamphetamine produced in North Korea is being brought into Japan and Korea through China or sea routes.

C. Cases in Korea

1. Crime Related to Drugs

Before the 1990's, most drugs produced in Korea were smuggled into other countries such as Japan or sometimes the US, due to the severe punishments and social stigma attached to drug use in Korea. Recently, however, there has been an increasing consumption of drugs in Korea. For instance, the number of drug users increased by 26.8% from 8,350 in 1998 to 10,589 in 1999.

Provoked by the government's strong control over drug production and the rise of drug production costs, Korean criminal organizations have moved drug factories to other countries, for instance, Taiwan and China. Korean criminal organizations have kept increasing their influence on drug businesses in Asia. However Korea is now a drug transit country to Japan and other countries. Some drug crime cases related to transnational criminal

organizations which were successfully prosecuted by Korean prosecutors are:

- (i) In November 1994, 300 kilograms of the raw material of methamphetamine - hydrochloric ephedrine - were smuggled out of China into Korea by a Korean gang member. The raw material was brought into Pusan, Korea through a sea route.
- (ii) In July 1995, the United States drug control agency informed the Korean prosecutor's office that 6,000 kilograms of hashish produced in Uganda was shipped and being delivered to the seaport of Pusan, Korea, via Singapore and Taiwan. All of the shipped hashish was confiscated.
- (iii) In October 1995, the head member of a Japanese organization contracted the manufacture of 6 kilograms of methamphetamine with a Korean manufacturer who was staying in China. Both of them were arrested in Korea.
- (iv) In May 1997, members of the Thai drug organization "Kunsa" smuggled 500 grams of heroin into Korea and attempted to sell it.
- (v) In October 1998, a housekeeper working at a foreign embassy in Korea was arrested for smuggling 60 kilograms of heroin from the Philippines into Korea and forwarding it to the United States.
- (vi) In April 1999, a Korean criminal organization (Shinsangsapa) and a Japanese organization (Sumiyosi kumi) bought 100 kilograms of methamphetamine from North Korea and smuggled it into Japan.
- (vii) In September 1999, a member of a Colombian drug cartel and a businessman of a Korean trading company smuggled 22 tons of potassium permanganate, raw material of cocaine, into Colombia.

2. Trafficking in Human Beings

Russian and Korean-Chinese criminal organizations are involved in trafficking women and migrant workers. The Russian Mafia provides job opportunities as entertainers to young Russian women and assists them in obtaining Korean tourist visas. In this process, the Russian Mafia receives commissions from the applicants. The women who apply are sent to Korea to work in entertainment businesses as dancers or bar maids (so-called "hostesses"). They usually end up as prostitutes.

If we look at their former occupations, 1,133 had been students, 430 had been clerks and 1,703 had been unemployed. Twenty-nine percent were in their twenties or thirties. Despite the fact that there are not enough employment opportunities for young foreign women in Korea, many young Russian females came to Korea last year. From this fact, we can speculate that many of them have illegal jobs in Korea and consequently involve themselves in prostitution. In December 1999, the Russian "Sakhalin" Mafia supplied 60 Russian prostitutes to some underground prostitution businesses in Korea.

Regarding labor migrations, Korean-Chinese criminal organizations are involved in illegal job placements in Korea. According to research on migrant workers in Korea, there were 139,480 illegal residents in 1997. Among them, 17,368 were either Chinese or Korean-Chinese workers. In order to procure jobs in Korea, they spend, on average, their annual income as commissions to labor-exporting agencies in China. The Korean law enforcement authorities presume that some of those labor-exporting agencies are managed by Korean-Chinese criminal organizations.

3. Money laundering

Money laundering by transnational criminal organizations is not widespread in Korea. There are about eight to nine money laundering cases every year. According to research on the annual estimate of the money laundered, the minimum is US \$450 million, and the maximum is US \$1.4 billion. Most money laundering cases in Korea were committed by self-employed business owners and/or business managers. Only a few money laundering cases were associated with transnational organizations, there include:

- (i) In September 1995, a Korean criminal organization established a shell company dealing with jewelry and gold. Through this company, the organization smuggled 2.6 tons of gold into Korea and laundered US \$7.9 million by using bank accounts in borrowed names. The organization sent the money to Hong Kong.
- (ii) In December 1998, a Colombian and an Italian conspired to launder US \$30 million of drug money and transferred the money to the bank account of a Korean shell company which was connected with a Korean criminal organization.

4. Other Cases Related to Transnational Criminal Organizations

- (i) In September 1995, a member of the Chinese-American organization "Waching", based in Los Angeles, was hired by a Korean criminal organization to murder a member of another criminal organization in Seoul.
- (ii) In February 1996, members of the Hong Kong Triads manufactured and distributed illegal pornographic and music CDs in Korea.

- (iii) In December 1996, some Korean organized criminals and a member of a Japanese organization attempted to withdraw cash in Seoul by using fake credit cards produced by American gang members.
- (iv) In September 1999, the Russian criminal organization "Shatendoveskaya" was hired to solve a loan business between Russian and Korean international trade businessmen in Korea.

III. COUNTERMEASURES BY THE GOVERNMENT

The measures of Korean government to combat organized crime can be classified into two types: short-term strategies and long-term strategies. The short-term strategy is similar to "the war against crime" conducted by the Korean government in the past. It aims at isolating criminal organizations from society through investigation and prosecution. This is analogous to a surgeon's operation, which cuts out the affected part. Regarding the long-term strategy, measures to deal with delinquent juveniles (who are the human resources of criminal organizations), Korean laws criminalizing organized crime, and the Korean government's effort to strengthen cooperation with foreign countries in combating organized crime are explained below.

A. Delinquent Juveniles: Potential Members of Criminal Organizations

The number of delinquent juveniles (below age 20) in Korea is approximately 100,000 each year. This number does not include trivial violations of traffic regulations. Among them, about 50,000 are charged with infliction of bodily injury, assault or extortion, and about 40,000 are

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charged with theft, fraud and handling of stolen property. Moreover, as many as 4,000 juveniles are charged with murder, robbery, rape and arson each year.

Table 1
Juvenile Delinquency in Korea
(1998)

Violence (assault, infliction of bodily injury, extortion, etc.)	50,987
Violent crimes (murder, robbery, rape, arson)	4,355
Theft	37,981
Property crimes (handling of stolen property, fraud, embezzlement, breach of trust)	4,814
Violation of special criminal laws (Violation of the Road Traffic Act, the Noxious Chemical Substance Control Act, etc.) * Among them, violations of the Road Traffic Act are 33,644	48,946
Others	1,475
Total	148,558

Most juveniles in Korea are enrolled in school. The number of students from elementary school to college is about 6.7 million. Some of them, who quit school for committing delinquency, form their own groups, and commit crimes like assault, extortion, theft, etc. They are growing into potential members of criminal organizations. These teenage criminals are more cruel and dangerous than their predecessors.

Korea is putting considerable effort into the three-step strategy for dealing with juvenile delinquency:

- i) Deterrence,
- ii) Law enforcement against crimes, and

- iii) Education and rehabilitation of delinquent juveniles.

As for the effort to deter juvenile delinquency, there is the Initiative for the Campaign of Crime Free and Safe Schools, which was started under the leadership of the prosecutor's offices in 1991. This campaign is now headed by citizens, with the support of the prosecutor's offices.

The Juvenile Delinquency Department in the Seoul District Prosecutor's Office is responsible for the enforcement activities against juvenile delinquency. The Department, composed of 7 prosecutors, conducts investigation of crimes related to juveniles, or supervises such investigations conducted by the police. In each local prosecutor's office there is a prosecutor entirely responsible for juvenile delinquency.

The education and rehabilitation of delinquent juveniles is making remarkable achievement as the education programs in juvenile prisons and reformatory schools have been changed significantly. All reformatory schools for delinquent juveniles have been renamed as middle schools or high schools. If a person finishes all courses at such reformatory schools, it is regarded as the same as graduating from a regular school. The courses that these facilities provide include computer-related skills and English, which meets the needs of the young generation. Because of such new courses, reformatory schools for delinquent juveniles provide an even better environment for education than most ordinary schools.

Recently, about 120 inmates who were about to be released after completing a period of service at the reformatory school refused the release and requested permission to stay at the school to continue the in education. Special permission was

given to these students to continue their study in areas like computer skills.

Korea has a unique system in dealing with cases of juvenile delinquency. On the condition that the charged juvenile receive the guidance of a counselor (who is a volunteer) for six to twelve months, the prosecutor suspends the prosecution of the charged juvenile. This system has been enforced for twenty years, and is evaluated as very effective in facilitating the return of delinquent juveniles to society.

These various measures undertaken by the Korean government aims to prevent delinquent juveniles from growing into professional criminals, or members of criminal organizations.

B. Korean Legal Provisions on Organized Crime

The formation of or participation in a criminal organization is criminalized under Article 114 of the Korean Criminal Code. Article 114 provides that if a person forms an organization which aims to commit crime, or participates in such organization, that person shall be punished for that crime which the organization aims to commit.

Under this provision, a person who forms or joins a criminal organization is punishable regardless of whether or not the intended crime was actually performed. For instance, the person who forms or participates in a criminal organization aimed at committing robbery will be punished for the crime of robbery, and the formation of or participation in a criminal organization aimed at prostitution will be punished for the crime of prostitution.

Furthermore, the Act on the Aggravated Punishment of Violence, a special criminal act, provides punishment for those persons forming or joining organizations aimed at committing violent crimes such assault,

infliction of injury, threatening, extortion, robbery etc. This Act provides:

- i) death penalty, life imprisonment or imprisonment of not less than ten years for the boss of such organization;
- ii) life imprisonment or imprisonment of not less than seven years for the assistant leaders;
- iii) imprisonment of not less than two years for ordinary members; and
- iv) imprisonment of not less than three years for those persons who collected or provided funds for such an organization.

According to the case law, the elements of a criminal organization are:

- i) that the organization be composed of specified members of plural number;
- ii) that the organization have the purpose of committing a certain crime or crimes;
- iii) that the members of the organization act in concert for a period of time; and
- iv) that the organization have a hierarchical structure.

The court's interpretation of the provision on the formation of a criminal organization is very strict. Although the Korean laws criminalize the formation of a criminal organization, it is still very difficult to investigate and prosecute criminal organizations. Because it is a tough to substantiate the existence of a hierarchical structure in an organization, it is sometimes very difficult to apply the provisions on the formation of a criminal organization.

In Korea, an average of 2,000 members of criminal organizations are arrested each year. However, only an average of 700 are punished for the formation of a criminal organization, and the rest are punished for the individual offenses they actually

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committed, like assault, extortion and drug trafficking.

Table 2
Arrest of Persons for Organized Crimes

Year	1995	1996	1997	1998	1999	Total
Number of arrestees	1,763	1,928	2,691	2,303	2,750	11,435
Number of persons punished for formation of or participation in a criminal organization	575	578	779	750	653	3,335

**Between January and July of 2000, the number of arrestees was 1,736, and among them, the number of persons punished for formation of and participation in a criminal organizations was 283.

C. International Cooperation

As we step into the new millennium, there is a rapid increase in the exchange of persons and properties among nations. The Iron Curtain that separated the East and the West is no more. Traditional religion is losing its significance. Traditional morals and ethical views are changing. All these provide on an ideal breeding ground for transnational organized crime.

The coordination of measures to combat organized crime is a slow and laborious process, because of the differences between domestic legal systems and the excessive emphasis laid on sovereignty. Criminals can use the differences in domestic criminal laws to their own advantage. Organized crime is speedy and flexible. But the criminal justice authorities are slow and

rigid because they have to adhere to lawful processes. If we are to effectively cope with transnational organized crime, we need, above all, to foster and strengthen international cooperation.

1. Mutual Legal Assistance and Extradition of Criminals

To develop the framework for international cooperation, we need to negotiate and conclude new bilateral and multilateral agreements on mutual legal assistance and extradition, thereby creating a seamless web of agreements among countries. Recognizing this need, the Korean government has signed twelve bilateral extradition treaties and nine bilateral MLATs, and is continuing its negotiation with other countries, such as China, Russia, and Hong Kong to expand this treaty web.

Table 3
Countries with which Korea has Signed an Extradition Treaty

Country	Date of Signature	Date of Effectuation
Australia	September 5, 1990	January 16, 1991
Philippines	May 24, 1993	November 30, 1996
Spain	January 17, 1994	February 15, 1995
Canada	April 15, 1994	January 20, 1995
Chile	November 21, 1994	October 1, 1997
Argentina	August 30, 1995	Not in effect yet
Brazil	September 1, 1995	Not in effect yet
Paraguay	July 9, 1996	December 29, 1996
Mexico	November 29, 1996	December 27, 1997
United States of America	June 10, 1998	December 20, 1999
Thailand	April 16, 1999	Not in effect yet
Mongolia	May 31, 1999	January 27, 2000

The treaty of mutual legal assistance on criminal matters that was signed with China is especially significant to Korea. Ever since the two countries normalized diplomatic relations in 1992, there has been a surge of exchange in persons and commodities in many areas. Moreover, several hundreds of thousands of people

from each country have made visits to the other country. In 1998, half a million Koreans visited China and ninety thousand Chinese visited Korea. As such exchange increases, crimes that are committed by each country's citizens in the other country are more likely to occur.

Table 4
Countries with which Korea has Signed Mutual Legal Assistance Treaties in Criminal Matters

Country	Date of Signature	Date of Effectuation
Australia	August 26, 1992	December 19, 1993
United States of America	November 23, 1993	May 23, 1997
Canada	April 15, 1994	February 1, 1995
France	March 2, 1995	March 8, 1997
China	November 12, 1998	March 24, 2000
Hong Kong	November 17, 1999	February 25, 2000
Russia	May 28, 1999	Not in effect yet
Mongolia	May 31, 1999	January 27, 2000
New Zealand	September 15, 1999	March 30, 2000

However, the traditional system of mutual legal assistance and extradition, which requires considerable documents and formalities, is sometimes inadequate to effectively cope with the new aspects of

crime in the 21st century, such as cyber crimes. We should study how to streamline the procedures of mutual legal assistance and extradition.

2. International Cooperation among Law Enforcement Agencies

The Korean government is committed to enhancing international efforts for combating drug crimes. Since 1997, the Ministry of Justice has annually hosted the International Training Course on Crime Prevention and Criminal Justice, inviting senior members from various criminal justice agencies in Asian countries, including judges, prosecutors, police officers and correctional officers. For three weeks, the participants have in-depth discussions about new trends in drug syndicates and organized crime groups, and about effective joint countermeasures against the internationalization of regional crime. In doing so, the participants get to know each other better, and naturally form human networks for international cooperation.

In April of this year, the Korean Ministry of Justice hosted the Second Organized Crime Regional Initiative in the Asia/Pacific Region in Seoul, jointly with the Korean Supreme Public Prosecutor's Office and the Asia Foundation. The conference was attended by thirty representatives from five countries in the Asia Pacific region. They are the United States, Japan, China, Russia and Mongolia. At the conference, the participants discussed the realities of organized crime and drug crimes in each country and the countermeasures employed by each country. At the close of the conference, the participants proposed measures for international cooperation to combat organized crime in the region.

In detail, the participating countries have talked about an informal network composed of key working level members of the international law enforcement community dealing with organized crimes. For this purpose, each country will make available to each country, a contact list,

including the relevant contact names, telephone and facsimile numbers, and e-mail addresses, of its officials dealing with organized crimes. Each participating country will provide as much information as is legally permissible, regarding laws or procedures relevant to extradition or organized crime, upon receiving an informal request from an other participating country via telephone, facsimile or e-mail. The participating countries are now working together to establish an informal network to combat organized crime, as discussed.

The Korean prosecutor's offices no longer confine the scope of their function to purely domestic affairs. In 1994 the Supreme Public Prosecutor's Office of Korea began to exchange visits with the Supreme People's Procuratorate of China. On September 6, 1999, the two agencies signed an agreement to establish the framework for strengthening cooperation between the prosecutor's offices of the two countries. Under the agreement, the two countries now have active exchange and cooperation at the level of local the prosecutor's offices.

Korea and Japan established, as early as in the 1980's, a regular committee for mutual cooperation in combating drug crimes. The committee, which meets annually, consists of officials from the respective Foreign Ministries, Justice Ministries, National Police Agencies, Customs Offices, and Ministries of Health and Wealth. The regular meetings of this committee provide a network of information exchange for broad cooperation in the process of investigation and trial proceedings, as well as opportunities for discussion on measures to reduce drug demands. It is viewed that through meetings like this, Korea and Japan have successfully intercepted the illicit trafficking of methamphetamine between the two countries.

The Narcotics Division of the Supreme Public Prosecutor's Office in Korea, which is charged with drug crimes, has held ADLOMICO's (Anti-Drug Liaison Officials' Meeting for International Cooperation) quarterly meeting of drug enforcement liaison officials, since April 1989 (the Supreme Public Prosecutor's Office is planning to expand the present Narcotics Division into the Narcotics Investigation Department within this year). The ADLOMICO meeting is aimed at enhancing cooperation among countries in a broader region than just those countries directly neighboring Korea. Particularly, the June ADLOMICO is an extensive meeting participated in by experts from the member countries' own law enforcement agencies, as well as the UNDCP (United Nations International Drug Control Programme) and the ICPO (International Criminal Police Organization) Bangkok office.

In June of this year, the eleventh ADLOMICO was successfully held in Busan, participated by 122 persons from 17 countries and 2 international organizations. The participants exchanged information on the current issues of drug crimes in each country, and discussed effective measure to intercept illicit drug supply and to cut down on drug demand. They also discussed measures for the exchange of information, and for cooperation in investigation.

In this session, the participants reached at a consensus that cooperation should be not only be made formally through diplomatic channels and international organizations, but also be made informally and directly among working-level officials. The participants noted that to facilitate such informal and direct cooperation, it is important to promote direct contact of working-level officials through regular

meetings at the regional level.

The Korean Customs, another component in enforcement against drug crimes, have taken initiatives to combat drug crimes. The Korean Customs Agency have concluded agreements for mutual assistance in criminal matters with 16 countries, thereby providing a legal framework for cooperation with foreign customs services. Based on the agreements, the Korean Customs Agency actively exchanges information and assistance in customs affairs with foreign countries.

In order to build on the cooperative relationship with foreign customs agencies, the Korean Customs has hosted and participated in an annual Customs Cooperation Conference with the 16 parties to the customs mutual assistance agreements. There were 8 sessions in 1997, 3 sessions in 1998, 7 sessions in 1999 and this year, there were 6 sessions. In each session, measures to enhance mutual cooperation for effective drug control is discussed as an important agenda item of the Conference.

The Korea Customs, in order to provide a basis for closer cooperation with their neighbor country, Japan, concluded, in June this year the MOU (Memorandum of Understanding) with the Japanese customs authority on the joint project against the smuggling of illicit drugs. As a measure to effectively intercept the smuggling of illicit drugs from one country to the other, the two parties have agreed to designate officials in charge, to exchange information on the smuggling of illicit drugs, mainly through these officials, and to provide each other with trend analysis reports on illicit smuggling.

We cannot emphasize enough the importance of international cooperation to

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combat organized crime. As we are agreed on this point, it is time that we moved on to discover specific practical measures for international cooperation, and implement them into action. In this respect, I believe that the Korean Government's efforts for international cooperation could set a good example for the international community.

We believe that when it comes to drug problems, no country could or should be an isolated island. Without close cooperation, sacrifice and solidarity, international cooperation in the true sense of the word will not be achieved, and without genuine cooperation, we can not eradicate drug crimes. In this regard, each government should do its best to provide an adequate basis for international cooperation. The Korean Government will take an active part in this motion of the international community to promote cooperation.

3. International Support by the Korean Police

The Korean National Police Agency joined the International Criminal Police Organization (Interpol) in 1964 and established the National Central Bureau in 1996. As of December 1999, the total number of cases investigated with the support of international cooperation reached 2,141. Among them, the Korean Interpol made requests for 807 cases and received requests from foreign Interpols for 1,334 cases.

The region with which the Korean Interpol has most frequently cooperated in investigations is North America, and other regions on the frequently requested list are Asia, Europe, Central and South America and Oceania, in the order of frequency.

Table 5
International Cooperation of
Korean National Central Bureau

Continents/ Countries	Interpol Headquarter	North America	Europe	Central & South America	Oceania	Africa	Japan	China	Total
Requests made	30	290	50	95	78	13	73	64	807
Requests received	124	286	253	131	111	47	91	61	1,334

* "Requests made" is the number of wanted criminals that Korean Interpol has made requests in regard of to the Interpols of other countries.

** "Requests received" is the number of wanted criminals that Interpols of other countries have made requests in regard of to the Korean Interpol.

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Some cases of how two police force works through international cooperation are as follows:

- (i) In July 1998, a thirty-nine year old Japanese male robbed a bank clerk who was carrying 5.5 million Yen in cash (equivalent to US \$500,000), at a parking lot adjacent to the bank. The Japanese male threatened the clerk with a gun. Shortly after, the offender fled to Korea using a fake passport. A team of several Korean detectives arrested him at his residence in Korea, and the offender was deported.
- (ii) In January 1999, a Korean male working in Hong Kong embezzled US \$4.4 million in company funds, and illegally transferred the money to another country. When Hong Kong's law enforcement authorities blocked the withdrawal, the offender fled Hong Kong via Paris to Switzerland. A Hong Kong police agent persuaded him to voluntarily surrender. He was arrested at the Kimpo Airport in Seoul, Korea.
- (iii) In April 1999, a Korean banker who embezzled US \$220,000, from the bank for which he had worked, fled to Australia. When he entered Fiji by using a fake passport on his way to New Zealand, he was arrested and deported to Korea.

D. Witness and Victim Protection Programs

Korea enacted the Witness and Victim Protection Law on August 31, 1999, which entered into force on June 1, 2000. The purpose of this law is to protect the witnesses and victims of certain crimes, so that they can safely support and assist the criminal proceedings.

In Korea, there was a shocking case where a victim of a crime was stabbed to death by a member of a criminal organization, when he was walking out of the court building after giving testimony at the trial. There are many cases where victims and witnesses find it difficult to give assistance to the criminal trial because of the intimidation of the offender. This is not restricted only to organized crimes, but includes ordinary criminal cases.

The Witness and Victim Protection Law applies to witnesses and victims related with certain crimes, and their families. Certain crimes include:

- i) the formation of and participation in criminal organization, and crimes committed by criminal organization;
- ii) violent crimes such as murder, robbery, rape and kidnapping, and
- iii) drug-related crimes.

If there is a possibility of retaliation on witness, the name of the witness will be kept secret, and the trial can also be held in secret. If the prosecutor judges that there is a possibility of retaliation on a witness, the prosecutor will direct the employees of the prosecutor's office or the police to protect the witness.

When the witness or the victim sustains financial loss, the government may give relief money for the loss, and if it is necessary for the witness or the victim to change homes or jobs for safety reasons, the government may bear the cost. The Law also provides that if a person reports to authorities a crime in which she/he is involved, that person may be exempt from punishment or be subject to mitigated punishment for that crime. The Law thereby protects the whistleblower or inside reporter.

IV. CONCLUSION

When we talk about organized crime, the first word that comes to our minds is “mafia”. The term ‘mafia’ is used as a synonym for both international and domestic criminal organizations. We talk about the Italian Mafia, Russian Mafia and Polish Mafia. In Asia, the Japanese Yakuza and Chinese Triads are known to be synonymous for criminal organizations. But, no one really knows about the Mafia, Yakuza or Triads or about their scale and businesses.

The formation of Mafia, Yakuza and Triads is not the subject of investigation in itself. Only when the crimes of the members of these organizations are detected do the investigative authorities begin investigation. The investigative authorities try to reveal how the members and leaders of a criminal organization are associated with each other, but in many cases, these efforts are not profitable. This is because criminal organizations mobilize funds illegally, and they invest them into lawful businesses. They do hiding activities behind legal fronts.

These criminal organizations ensure sufficient welfare, care and remuneration for their members, whereas cruel punishment or retaliation awaits betrayal or disobedience. Through these means, criminal organizations successfully prevent the in members from walking out of the organizations. They dress like smart-looking businessmen and act like such. They hire lawyers to defend them, and win over politicians or public officials with bribes. In Korea, there were times when the boss of a criminal organization would approach the prosecutor or police official newly coming to the office, to bribe them by hosting welcome party. In doing so, the bosses would pretend as if they were influential persons in the community.

I would like to talk about four problems in the investigation of organized crime in Korea. First, it is almost impossible to start an investigation of the criminal organization itself. This is also true in Japan. You can't begin to investigate an organization, just because it is reported to be organized. Such an investigation of an organization can be subject to the criticism that this investigate an violates freedom of association under the Constitution. If the suspected organization has a religious element, it is even more difficult to investigate. It is because freedom of religion and the right to free association to pursue religion is more strongly protected under the Constitution. This explains why there were only a few criminal organizations that were investigated and prosecuted in Korea, although the Criminal Code clearly criminalizes the offense of the formation and participation of a criminal organization.

Second, it is becoming more and more difficult to investigate and confiscate the funds of a criminal organization. Even if we have a suspicion that the criminal organization launders money by establishing legitimate companies and falsely cleaning the money transactions for the operation of those companies, it is not easy to trace the flow of money. Banks try to protect the secrets of their customers. The trend in the legislation of most countries is to protect the the secrecy of account owners.

Korea has implemented the so-called real name transaction protection system since 1993. In 1997, the Real Name Transaction and Protection of Secrecy Act was enacted. As you can see from the name of this law, the law focuses on the protection of the secrecy of bank transactions. Therefore, for investigative authorities to begin tracing the flow of funds, mere suspicion is not enough. They must have

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proof for certain violations, and present a warrant issued by the court. As the process for the issue of a warrant by the court is slow and laborious, the investigative authorities sometimes give up investigation. It is equally as difficult to obtain materials other than financial materials. Data protection laws have considerably restricted the ability of investigative authorities to collect and analyze information.

To effectively address money laundering, Korea is preparing legislation for the introduction of an FIU (Financial Intelligence Unit) system. Under this system, the financial institutions should promptly report to the FIU those suspicious transactions indicating money laundering, and when the FIU determines that the transaction is related to a crime, it could provide information on the transaction to the investigative authorities. This system will allow us to get fast information on transactions that are suspected of being associated with organized crimes, the bribery of public officials, tax evasion and the smuggling of funds. In this regard, this system will be of great assistance in the investigation of transnational organized crime. Currently, a task force including a prosecutor has been established for the establishment of FIU in Korea. We are working to finalize the draft law for the establishment of FIU within this year.

Along with the FIU law, we are also working on anti-money laundering law. This law would criminalize money laundering, and provide measures to confiscate the illegal proceeds obtained through the commission of crime. The scope of crimes subject to confiscation will include 57 types of crimes including organized crime, tax evasion, bribery and the smuggling of funds. The confiscation of illegal proceeds obtained from drug-related offenses is made possible by a

different law, the Special Act against Illicit Trafficking of Narcotic Drugs and Psychotropic Substances.

If both of the FIU law and the anti-money laundering law are finally enacted, the investigation of suspicious financial transactions will be conducted based on information provided under the FIU law, and the illegal proceeds identified through the investigation will be confiscated under the anti-money laundering law.

The third problem in organized crime investigation is that it is becoming increasingly difficult to monitor the activities of criminal organizations by means of wiretapping. In Korea, the wiretapping issue recently gave rise to heated discussions. It even stirred political disputes, and the public suffered anxiety for fear of being monitored through wiretapping. As a result, wiretapping by investigative authorities has been restricted severely, and this is making investigation a tougher job.

The fourth problem is that the arrest, prosecution and punishment of members of criminal organizations is becoming more difficult, because they are able to hire good lawyers with adequate funds. They also make good use of the loopholes in the law.

The Korean Criminal Procedure Code provides a very complicated procedure for the pre-trial confinement of criminals, more complicated than any other criminal procedure law in the world. The police can arrest a suspect only under the supervision of a prosecutor, except in urgent situations. The arrested suspect can apply for a review of the legality of the arrest. In order to place the arrested suspect under confinement, the prosecutor should request the issue of a warrant of confinement within 48 hours of the arrest (the Korean system distinguishes between the arrest

and the confinement, unlike the US system. The Korean system is similar to the Japanese system). The judge issues the warrant of confinement, after holding a hearing where the arrested suspect is present (Article 201bis of the Criminal Procedure Code). This procedure is called the review for a warrant of confinement. It has been implemented since December of 1997. Through this procedure, about 15% of the arrested suspects get released.

After the suspects are placed under confinement, they can apply for a review of the legality of confinement. At this stage, a number of suspects get released (Article 214bis of the Criminal Procedure Code). After indictment, a person is allowed apply for bail. At this stage, a number of people are released on bail. The release is also possible before the indictment, if bail money is deposited. The convicted person can be released on probation at the end of the first trial.

From the arrest to the conclusion of the first trial, there are 6 stages including:

- i) Arrest;
- ii) Review of the legality of arrest;
- iii) Pre-confinement hearing on the suspect;
- iv) Confinement;
- v) Review of the legality of confinement, or pre-confinement bail; and
- vi) Post-confinement bail.

The suspect may choose to give up certain stages. As we can see in these four problems, it is becoming more difficult to investigate crime, as criminals become more organized and intelligent. For more efficient investigation of organized crime or transnational organized crime, there are some things that we should attend to.

Mutual understanding and cooperation-prompt cooperation-among countries is essential for efficient investigation of

transnational organized crime. To facilitate cooperation among countries, it is necessary to enact anti-money laundering laws, and to make the procedures of extradition and mutual legal assistance more expeditious and less complicated. The current system of extradition and mutual legal assistance is too laborious and tedious.

Domestically, we need to enforce crime deterrence measures, especially measures against delinquent juveniles who are very likely to end up in criminal organizations as adults. We can call them 'reserve troops' of organized crime.

We need to make sufficient use of scientific techniques in investigation, which do not exclude wiretapping and the tracing of funds. In using these techniques in investigation, we should also keep in mind to protect the rights, property and secrecy of our citizens.

Criminals and criminal organizations should be subject to strict punishment according to law. Illegal proceeds obtained through drug trafficking, prostitution, gambling, fraud, extortion and theft should be confiscated thoroughly. We should work to promote that sound citizenship cannot be bought with illegal money. Finally, we should go on to apply administrative and economic sanctions against businesses operated by criminal organizations. There is no hope in such a society where corrupt politicians or public officials cooperate with or remain silent about the businesses of criminal organizations.

CONTROLLED DELIVERY

*Johan Peter Wilhelm Hilger **

I. INTRODUCTION

Controlled delivery is a tool employed by the criminal prosecution authorities which is indispensable to effectively detect international organized crime. In Germany, we understand by this controlled importation, controlled exportation and controlled transit.

Controlled delivery is not governed by law in Germany. In practice, it is subject to the tactical discretion of the criminal prosecution authorities. Individual provisions can be found in guidelines issued to the criminal prosecution office, which is the authority in charge of the investigation proceedings. The police must follow the instructions of the office (sections 161 and 163 of the Code of Criminal Procedure [StPO]). This has worked smoothly in practice in Germany for years; this also applies to cooperation with the police authorities in the neighbouring European states. The success of the investigations is frequently spectacular.

II. PRINCIPLES AND FRAMEWORK

The principle of mandatory prosecution applies in Germany, which is derived from the rule of law principle (sections 152, 161 and 163 of the Code of Criminal Procedure). Accordingly, the criminal prosecution authorities are obliged to initiate the measures necessary for prosecution without delay, in particular to solve the crime, when they gain knowledge or form a suspicion of the commission of a criminal

offence. This means that they have no discretion as to whether to initiate criminal proceedings; they are obliged to take the necessary investigative measures.

Furthermore, the duty to act 'within a reasonable time', as prescribed in Article 6 para 1 of the European Human Rights Convention, applies in Germany. This means that the necessary criminal prosecution measures are to be taken without delay.

It is however not possible to deduce from these principles an instruction to intervene immediately in the sense of, for instance, search or seizure, or indeed apprehension without delay. Rather, the public prosecution office has tactical discretion as to which measure to take at what point in time to solve a crime; the highest principle is only that rapid detection may not suffer as a result of this tactical discretion.

The principle of mandatory prosecution does not entail a duty to take a specific investigation and intervention measure unless a specific danger otherwise exists that the criminal prosecution would suffer were this measure not to be taken, and that in particular items of evidence would be lost.

There is also no statutory requirement in Germany that the offender is to be brought before a court in Germany. It is sufficient to ensure that the offender is sentenced at all. On the whole, this means: The principle of mandatory prosecution, the principle of acting within a reasonable time and controlled delivery do not contradict but complement one another in

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a harmonious manner. This becomes clear if one realises that too early, too rapid or too intensive intervention, too early seizure or too early apprehension may be detrimental to the investigative proceedings in individual cases because it restricts the possibilities available for detection. This would mean in practice that it would contradict a correctly understood principle of mandatory prosecution if - depending on the facts of the individual case - controlled delivery were not to be used, but one were to intervene too early. The principle followed is: too early intervention is just as detrimental as the criminal prosecution authorities intervening too late, because it would reduce the potential success of the investigations.

There are naturally cases in which the principle of mandatory prosecution and the principle of acting within a reasonable time force one to reject or abort controlled delivery. Such a case is, for instance, where the implementation of controlled delivery would be too dangerous for the officers involved. Another case in which controlled delivery is not implemented or must be aborted is that of endangerment to the goods being transported, as is the case with trafficking in human beings.

III. INDIVIDUAL QUESTIONS

On the basis of these considerations, Nos. 29 a to 29 d of the guidelines on criminal proceedings stipulate the following, in the main:

A. 29 a

Controlled delivery is the illegal transportation of narcotics, arms, stolen goods and property, etc., from a foreign country through domestic territory to a third country, monitored by the criminal prosecution authorities; controlled exportation is illegal transportation from

domestic territory to a foreign country; controlled importation is monitored illegal transportation from a foreign country to domestic territory.

B. 29 b

Such controlled transportation can only be considered if the ringleaders cannot otherwise be identified or distribution channels uncovered. Monitoring is to be carried out such that it is ensured that the offenders and items involved in the offence can be accessed at all times.

Moreover, the following declarations by the foreign states must be provided for delivery and exportation:

- (i) assurance to monitor transportation continuously;
- (ii) assurance to strive to investigate couriers, ringleaders and buyers, to seize the narcotics, arms, stolen goods and property and the like, and to attempt to convict the offenders and execute their sentences; and
- (iii) assurance that the German criminal prosecution authorities will be continually informed of the respective state of the proceedings.

C. 29 c

With controlled delivery, if as yet there are no investigative proceedings pending with a German public prosecution office in respect of the offence, the public prosecutor is on principle responsible for the proceedings who is responsible for the border crossing via which the items related to the offence are brought onto domestic territory. This also applies to controlled importation. With controlled exportation, the proceedings are on principle operated by the public prosecutor from whose district the transportation is initiated.

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D. 29 d

The decision as to the permissibility of controlled transportation is taken by the responsible public prosecutor. He/she informs the public prosecutor from whose district the transportation is likely to leave domestic territory. The public prosecutor responsible for the place of importation is also to be informed if another than this one is operating the proceedings.

The authorities and officers of the police and customs service on principle approach the responsible public prosecutor if they need decisions and information.

These relatively strict guidelines, which are binding on the public prosecution office and the police, ensure that controlled delivery is only employed if it is expedient. They also ensure that, in accordance with the principle of mandatory prosecution and the principle of acting within a reasonable time, the offenders will be sentenced at home or abroad without delay.

IV. OUTLOOK

I stressed at the beginning that controlled delivery in Germany is a continually functioning practice with good detection rates. My information has, I hope, also demonstrated that no statutory provision is needed.

It is an unmistakable fact that controlled delivery is gaining ever greater significance as internationally operating organized crime increasingly expands trade channels over the world. Effective detection is only possible if controlled delivery is possible and practised the world over in a network formation.

One should also not overlook the fact that controlled delivery becomes all the more complicated the more complex the links and trade channels of organized crime

become. It is also made more difficult if organized crime becomes less accessible. Here, controlled delivery overlaps with other investigation methods, such as the use of undercover investigators. These are frequently involved in controlled delivery. If organized crime becomes even less accessible, it will become more and more difficult to infiltrate organisations with undercover investigators. However, if this becomes more difficult, it will also become more difficult to identify illegal transportation of criminal goods at the outset and to take early measures necessary for controlled delivery. I only wish to touch on this problem here. We can perhaps discuss this later.

MEASURES OF INVESTIGATIONS IN CASES OF ORGANIZED CRIME IN THE CRIMINAL PROCESS OF GERMANY

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I. INTRODUCTION

The aim of my paper is to give you some information on measures of investigation in the criminal process of Germany, which can be used for the persecution of cases of organized crime. I shall explain, in critical terms as well, the most important measures for which provision has been made in the Criminal Procedure Code (StPO). In conclusion I shall indicate which of the demands addressed to Parliament have not been taken up, and I shall also indicate the areas where -perhaps- is a need for further action.

II. CURRENT POSITION

A. Analysis

Organized crime has also become a challenge to state and society in Germany. Because of its legal system, of its prospering economy and its stable currency, its infrastructure and its geographical position, the Federal Republic of Germany faces special danger from organized crime. This type of crime is concentrated in certain offence spheres guaranteeing high criminal profits where, at the same time, the risk of detection is reduced because there are either no immediate victims or the victims are not willing to lay a criminal charge and to make a statement to the prosecuting authorities.

In the first place, the development of organized crime over the past years was marked by an alarming increase in drug trafficking offences. Internationally

organized drug syndicates brought drugs into the Federal Republic of Germany by means of couriers, builded up marketing organisations and took steps to launder and recycle the money earned from drug trafficking. Money earned from illegal drug trafficking was quite often transferred to other lines of criminal activity yielding particularly high profits, for instance in the field of money and cheque forgery or as regards the 'red-light' crime which is largely impermeable (pimp rings, operation of illegal gambling casinos).

Drug crime is only one part of organized crime - even if this part is particularly important and must be combated with special urgency. Also, in other spheres of crime we can see the development of a substantive qualitative change: the increasingly organized mode of commission. To a growing extent, criminal organisations are coming to the fore in special spheres of crime such as counterfeiting money, gang theft and theft by burglary, with handling rings waiting in the background, and particularly as regards removal of high grade assets to foreign countries, illegal arms trafficking, 'red-light' crime connected with prostitution and 'night business', and extorting protection money. As far as possible, the activities of such organisations are arranged so that the main figures do not stand out conspicuously. It is usually only the crimes of peripheral figures that can be cleared up with traditional means of investigation, i.e. - of figures lacking insight into the structure and composition of the organisation as a whole. These peripheral

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offenders are interchangeable and replaceable at will, with the result that their arrest does not really disturb the criminal activities of the organisation. Persons who inevitably know of the crimes committed are restrained from making statements by hush money, by orders not to talk, by threats and by intimidation. Where a lone offender is caught, the organisation quite often renders material support to the members of that person's family and assures responsibility for defence costs so as to obtain compliance and to prevent disclosure of information concerning the organisation. Altogether, the crimes committed show that criminal offenders - who are usually interconnected on the international level - exploit personal and business connections with enormous criminal energy and financial strength in order to make large illegal profits. Conspiratorial preparation and execution of criminal offences make the fight against crime more difficult. Its success depends on the extent to which the people acting behind the scenes and the organisers concerned are convicted of committing criminal offences and are deprived of the financial resources for committing further crimes.

B. Consequences

Therefore traditional methods of investigation are often inadequate because of the special structures found in Organized Crime and in the light of the progressive professionalism of the offenders operating in this sphere. Necessary are instruments of investigation which are adequate to the structure and the methods of organized crime and which enable the prosecuting authorities to penetrate the core of criminal organisations. Furthermore, provision must be made for regulations and measures for a better guarantee of the safety of informers, particularly witnesses. Only when the safety of imperilled informers is effectively ensured will it be

possible to expect statements from them, with the aid of which those operating behind the scenes and pulling the strings in criminal organisations can be brought to trial and convicted.

III. THE MEANS OF THE GERMAN CRIMINAL PROCEDURE CODE

A. General Principles

The German Parliament has taken appropriate action in the last years and it has brought in the provisions of the necessary measures. While the bill was being discussed before Parliament individual proposals in the bills were the subject of fierce controversy. There was less doubt about the fundamental need for legislative measures. However, individual proposals were criticised for being constitutionally objectionable, not necessary or - on the contrary - inadequate. At least the proposals of the provisions of the necessary measures of investigation became law. Demands for more far-reaching measures are now being discussed rarely.

B. General Conditions

In selecting and structuring the statutory provisions desirable for combating Organized Crime Parliament does not have unrestricted freedom of manoeuvre. First of all, the constitution sets limits. Provisions allowing substantive or procedural encroachment, under the criminal law, on basic rights protected by the constitution¹ are only admissible if, and to the extent that, a restriction of basic rights protection is permissible under the constitution in

¹ See eg. Article (Art.) 1 (protection of human dignity), 2 (safeguarding the general right of personality), 10 (protection of the privacy of telecommunications), 13 (inviolability of the home) 14 (guaranteeing property) Grundgesetz/GG (Basic Law).

Germany, the Basic Law, thus making encroaching provisions possible; moreover, such provisions are only admissible to the extent that they are absolutely necessary in the preponderant state interest. Finally, the general principle of proportionality must also be complied with.

In addition, any provisions being planned must fit into existing criminal and procedural law without there being inconsistency. In particular, the pre-existing standard and system of regulation of the original legislation already in force must be adhered to.

These conditions made the legislative work much harder. Provisions demanded from the police point of view for criminal prosecution measures were not feasible, or not as comprehensively as called for. Complicated and detailed wording had to be found for some of the provisions, the content and consequences of which are now only comprehensible to, and capable of interpretation by, specialists.

C. Definition of Organized Crime

The Criminal Procedure Code does not actually define what Organized Crime is. Also, it does not make the admissibility of its measures depend on this definition. The reason for this is that no-one has managed to develop a formula of words (definition) that is sufficiently accurate, precisely circumscribed, and yet short enough to be fit for a statutory definition. This will become apparent from the following. A working party comprising representatives from the police and the judicial- system worked out in 1990 the following description of organized crime after intensive discussions: ²

“The planned commission of criminal offences, inspired by the pursuit of profit

or power, constitutes organized crime where such offences are of substantial importance either individually or as a whole and if more than two participants collaborate within a division of labour over a longer or indefinite period of time:

- (a) by using commercial or business-type structures;
- (b) by using force or other means suited to intimidate; or
- (c) by exerting influence on politics, the media, public administration, the justice system or the economy.

This definition does not include criminal offences of terrorism.

The working party then went on to state that:

“The manifestations of Organized Crime are multifarious. Besides structured, hierarchically developed forms of organisation (often also underpinned by ethnic solidarity, language, customs, social and family background), there are links - based on a system of criminally exploitable personal and business connections - between criminal offenders with varying degrees of commitment among themselves, whereby it is the particular criminal interests concerned that determine the actual moulding of such links.”

Organized crime is predominantly observed in the following spheres of crime:

- (i) drug trafficking and smuggling
- (ii) arms trafficking and smuggling
- (iii) crimes linked with night life (above all procuring, prostitution, slave trafficking, illegal gambling and cheating)
- (iv) extorting protection money
- (v) illegal smuggling of aliens into the country
- (vi) smuggling
- (vii) forgery and misuse of means of

² For details see BT - Dr 13/4942.

- non-cash payment
- (viii) manufacturing and disseminating counterfeit money
- (ix) illicit removal particularly of high-quality motorcars, and of lorry, container and ship's freight .

In addition to these spheres of crime there are also signs of organized crime in the area of illegal waste management and of illegal technology transfer. This all goes to show : the phenomenon of organized crime cannot be defined in such a way that the definition itself would be suitable for inclusion in a statute.

The criminal procedure law therefore links its provisions to particular groups of offences and offence spheres where experience has shown them to be preferred fields of activity for organized crime.³ Furthermore, it falls back on certain types and forms of commission that have long since been formulated in criminal and in criminal procedure law and which are taken to be typical manifestations of organized crime⁴.

D. The most important measures of investigation in the Criminal Procedure Code

- (i) electronic data matching
- (ii) telephone tapping
- (iii) longer-term observation
- (iv) use of technical aids for surveillance purposes
- (v) undercover investigators
- (vi) notification for police surveillance

In the discussions of the parliament the difficulties referred to in the section on

³ Apart from drug crime, particular account must be taken here of counterfeiting money, theft and handling stolen property, illicit gambling, extortion, slave trafficking and illegal arms trafficking.

⁴ Particularly commission on a gang and on a business basis.

“General conditions” were especially encountered in this sphere of regulation. Understandable demands for practice-oriented provisions and corresponding solutions for increasing the effectiveness of criminal-prosecution must be balanced against the demand and need for the lowest possible degree of basic right limitation, particularly as regards the protection of personality and of data, and against the demand for far-reaching measures to safeguard criminal proceedings and the demand that defence effectiveness should by no means be impaired.

How often, in which cases, with which results these measures are used by prosecutor and police - we don't know exactly in Germany; for we have no or no detailed statistics for the most of the measures⁵.

1. Search by Screening

98a and 98b StPO are the special statutory basis for so-called screening searches . It is an automated (machine) comparison (matching) of personal data collected for purposes other than prosecuting purposes and in data files kept by agencies other than the prosecuting authorities. Matching occurs by using criminalistic (offender type) checking criteria specific to the case concerned (screening).

A screening search is only admissible in regard to serious criminal offences set out in a generalising catalogue (section.98a.I 1) (Such offences are, for instance, criminal offences of substantial importance in the sphere of illicit trafficking in drugs or in arms, or against life or limb, or committed by the member of a gang). For a screening order it will suffice if there is an initial suspicion (section 152 II) that such an offence has been committed. The

⁵ See BT-Dr 13/4437.

automated matching of data⁶ is permissible as regards persons who fulfil checking criteria that - depending on the stage investigations have reached in the case - are likely to apply to the offender. The aim is to filter out, from this mass of non participants in the offence, those persons who largely have the "suspect profile" in the case - which may be founded on criminalistic experience or on the outcome of preceding investigations. The method is to eliminate persons who, although fulfilling criteria applying to the offender, cannot be considered as possible offenders (negative screening search) in the light of their other data, or to filter out those persons in respect of whom criteria typically applying to the offender are to be found cumulatively (positive screening search).⁷

All private or public agency storing the data needed for matching, which typifies screening searches, are under a duty to filter these data out of its inventory and transmit them for screening to the prosecuting authorities.

The admissibility of the measure is limited by a subsidiarity clause. According to this clause a prognosis has to be made in terms of success and difficulty in clearing up the case. If this prognosis shows that full clarification of the criminal case by using other investigatory measures could nowhere near be achieved with the same measure of success as would seem possible with a screening search, the latter may be undertaken.

Section 98b contains procedural provisions relating to screening searches. In principle, matching and data

⁶ Name, address, other personal criteria specific to the individual case, eg. ownership of a particular vehicle, modes of conduct, eg. that payments are made in cash.

transmission are the subject of a judicial order. Knowledge based on a screening search can be used for the purposes of criminal prosecution to a limited extent only, ie. as evidence in the prosecution of another criminal offence only when such offence is likewise a catalogue offence under section 98a. In practice today this measure is used rarely.

2. Telephone Surveillance

It has been permissible since as long ago as 1968 to monitor telephone calls in the detection of serious criminal offences (section 100 a). This measure is only permissible in the case of a restricted list of serious criminal offences (e.g. in cases of trafficking in human beings, counterfeiting money, murder, gang theft, robbery, holding to ransom, handling stolen property on a commercial basis, money laundering, criminal offences in accordance with the Firearms Act [Waffengesetz] or the Narcotics Act [Betäubungsmittelgesetz]). Furthermore, it is only allowed in subsidiary terms when it would be

⁷ Example : if it is suspected that a criminal offender was driving a red Toyota motor car, built in 1985, model X, while escaping after committing the offence and that the car may have been from the town Y because the official registration number of the vehicle began - according to the observations of witnesses - with the letters of the town Y, it will be possible, with the aid of the motor vehicle licensing authority's data files, to find out which persons in Y are the owners of such a vehicle. If, moreover, it is known (eg. by observations of witnesses) that the offender pays his bills using a certain credit-card, the data of these vehicle owners (name, address, etc) can be compared by machine with the customer data of the credit card company, thus "screening out" that only very few of the owners concerned are the same time holders of this credit card. Traditional criminal procedure methods can then be used for further investigation of the latter persons to see whether they come into question as possible offenders.

impossible or much more difficult to ascertain the facts or to locate the accused by other means, in other words using only other measures. Monitoring concerns the accused and/or so-called messengers, i.e. individuals who accept telephone messages for the accused, pass on his/her messages by telephone or individuals whose telephone connection the accused uses.

As a rule, the measure must be ordered by a judge. Information which could also be significant for another set of criminal proceedings may only be used in this other set of proceedings for evidentiary purposes if it is also concerned with the detection of a listed offence. Finally, the documents are to be destroyed when they are no longer required for criminal prosecution.

Telephone surveillance has been the subject of constant criticism for years, in particular in the sphere of legal policy and by data protection specialists. Whilst not denying the need for such measures, they do allege that it is being used too frequently. Indeed, the number of surveillance orders has grown to more than 8,000 per year over the past few years.⁸ This does not mean, however, that more than 8,000 were sets of criminal proceedings or that more than 8,000 were accused persons. There is also no information as to how many sets of proceedings related to the criminal offences of organized crime.

3. Longer-term Observation

Section 163 f permits longer-term observation of accused persons and contact persons. Longer-term observation is observation planned to last more than 24 consecutive hours or to take place on more than two days. The measure, which is in fact a standard investigatory procedure in cases of serious crime, is permissible in respect of all criminal offences of

considerable significance, but only if other measures which would encroach less on the person concerned are much less promising or would lead to a considerable hindrance. As a rule, the measure is ordered by the public prosecutor and is then limited in duration to a maximum of one month. An extension may only be ordered by a judge.

4. Use of Technical Means of Surveillance

These provisions (section 100c) were the subject of great controversy among politicians, legal scientists and the public both before and during the parliamentary discussions. The main reason for this was the fact that such measures may constitute a deep invasion of the personal sphere, particularly the intimate sphere, of those affected. The latter may not only be the accused themselves but also others who may be affected by such a measure (contact persons or those affected by chance).

These provisions⁹ regulate the following:

- (i) production of photographs and visual recordings during surveillance ,
- (ii) use of other technical devices for surveillance purposes, and
- (iii) technical monitoring and recording, outside and /or inside a dwelling, of words not spoken in public.

Section 100c regulates which technical means may be used, against whom they may be used and under what conditions.

- (i) *Photographs and Visual*

⁹ The use of mere visual aids like binoculars, the recording of words spoken in public and the mere monitoring of words not spoken in public, do not fall under these limiting provisions since they are permissible without restriction pursuant to §§ 161,163. Also preserving traces of an offence does not fall within the sphere of § 100 c.

⁸ See BT- Dr 14/1522.

Recordings (section 100c I no. 1a StPO)

Such pictures may be taken of the accused outside a dwelling without his knowledge. This applies to criminal offences of all kinds, and also always to the police without prior-permission from the public prosecution office being needed. The precondition for taking such pictures is that any other way of trying to find out the facts or where the offender is would be less likely to succeed or more difficult to achieve. Practically speaking, this means general admissibility, limited only by the general principle of proportionality. As regards persons other than the accused, admissibility is limited only by a strict subsidiarity clause (much less likely to succeed or much more difficult to achieve)(section 100c II 2).

(ii) *Other Technical Means Specially Intended for Surveillance Purposes (section 100c I no.1b StPO)*

They may be used for trying to find out the facts or where the offender is when a criminal offense of substantial importance is the subject of the investigation. Such means are homing devices, mobile alarm units, motion detectors, the use of the "Global Positioning System¹⁰" etc.- in other words, devices that do not record conversations.

The use of such means is likewise linked to a subsidiarity clause with a low threshold, namely that finding out the facts or where the offender is residing would be less likely to succeed or more difficult to achieve if some other means were used.

Linking the use of these special surveillance devices to a "criminal offence

of material importance" gives those involved in practice the indispensable flexibility needed for an effective criminal prosecution even if certain difficulties do not seem to be excluded because of this concept being really indefinite. It would not be proper to link use to a catalogue of particular crimes because the use of such means must be possible - with a view to practical prosecution needs - in a large variety of offences. Apart from this aspect, the concept has become established in legislation on police matters; otherwise, there is no alternative of a form of general clause - with no alternative. It is made amply clear that the use of such technical means, in a manner consistent with the principle of proportionality, should only be allowed in relation to offences above the threshold of petty crime. In each case an individual assessment will be necessary taking into account the general principle of proportionality.

As for third persons, the measure is only admissible if it is to be assumed that the former are connected with the offender or that such a connection is being set up (contact persons), that the measure will lead to finding out the facts or where the offender is residing, and that using some other means would be futile or be much more difficult (section 100c II 3)

(iii) *Monitoring and Recording of Words Spoken outside a Dwelling, but not Spoken in Public, by Technical Means (section 100c I no. 2)*

This provision on the monitoring and recording of the spoken word is much more restrictive, and it is modelled in large measure on the provisions on telephone tapping (section 100a, 100b). The monitoring and recording, outside a dwelling, of words spoken by the accused, but not in public, is admissible with

¹⁰ OLG Düsseldorf JR 1999, 255.

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technical means (eg. using directional microphones), but only when certain facts establish a suspicion that one of the serious offences (eg. murder, kidnapping, hostage-taking, extortion, robbery, gang theft, arms or drug trafficking), listed in the catalogue of criminal offences in section IOOa (telephone tapping), has been committed. A further requirement is that any other means of finding out the facts or where the offender is residing would be futile or be much more difficult. Hence, this provision closely follows section IOOa. In practice the identical subsidiarity clauses might lead to difficulties if for instance, telephone tapping is being planned but it cannot be established that clarification by some other means would be futile because monitoring itself might not be entirely unsuccessful. But usually in such cases it can be said that clarification would be much more difficult without the simultaneous use of both measures, for if only one of the two measures were used clarification would probably take much longer.

Monitoring the words spoken outside a dwelling by a third person who is not the accused and who is not speaking in public, is only admissible, under even stricter conditions, in respect of contact persons from whose surveillance important indications are (or may be) expected for the purpose of clarification. Monitoring may be ordered in respect of nonaccused persons only if it is to be assumed on the basis of certain facts that they are connected with the offender or that such a connection is being set up, that the measure will lead to finding out the facts or where the offender is residing, and that using some other means would be futile or be much more difficult (section IOOc II 3). These three requirements are cumulative. The higher threshold of action and the subsidiarity clause correspond to the provision made in section IOOa (telephone tapping). The wording is intended to make it clear that

the mere possibility of contact, or of the establishment of contact, and of successful clarification will not be enough; rather, certain facts must indicate a higher likelihood of there actually being a connection between the offender and the contact person, or of such a connection existing in future, and that successful clarification is not only seen to be a possibility but is to be expected in all probability.

Section IOOc III makes it clear that these measures may also be applied when third persons are inevitably going to be affected by them. Here it is ensured that there is no need for such measures to be dispensed with when a person who is not actually the target of the measure but only the partner of a target person or a non-participant affected by chance is included in pictures or films or when conversations are being monitored.

Section IOOd deals with important parts of the proceedings. Monitoring and sound recording equipment can only be used if a judge so orders, or where danger is imminent the order may be given by a public prosecutor or by his auxiliary officials. In the event of an order by way of emergency power, an application for judicial confirmation must be made without delay. If confirmation is not forthcoming within three days the order ceases to have effect. The order must be made in writing, must contain the name and address of the person against whom the order is directed and it must also state the nature, extent and duration of the measure. The order shall be limited to three months at the most, and an extension may be obtained for not more than three months at a time so far as the conditions for an order, as set out in section IOOc I no.2 , are fulfilled. If these conditions are no longer fulfilled, the measures must be stopped immediately. The judge must be

informed of this termination. Documents acquired by virtue of the measure are to be destroyed without delay under the supervision of the public prosecution office if they are no longer needed for the purpose of public prosecution ; a record must be made of the destruction in question.

Subsection 2 provides - just as in the case of a search by screening - that knowledge got by monitoring measures may be used in other criminal cases to a limited degree only¹¹.

The measure was used until now only very seldom.¹²

- (iv) *Surveillance and Recording with Technical means of the Spoken Word not Spoken Publicly within Dwellings (section 100 c I no. 3)*

Of particular significance, indeed controversy, at least in discussions on legal policy, and for those affected by such a measure, is the surveillance and recording with technical means of the spoken word not spoken publicly within dwellings (e.g. using directional microphones or so-called "bugs"). This measure differs from telephone surveillance in qualitative terms because it is not a telephone call which is monitored, which leaves the dwelling by telephony, but a conversation carried out within a dwelling and intended to remain there, in other words one which is intended only for those in the dwelling. Here, those speaking may well trust in the English saying: "my home is my castle". For this reason, particularly strict restrictions apply here. It is only permissible to monitor a conversation taking place in a dwelling, but not to take pictures or make

a video of what is happening in the dwelling.

So-called acoustic monitoring of dwellings is permissible only if specific facts give rise to a suspicion of particularly serious criminal offences. Such criminal offences include, for instance, grievous trafficking in human beings, criminal offences against personal freedom, crimes committed on a gang basis, handling stolen property on a commercial basis, money laundering, accepting and offering bribes, crimes in accordance with the Firearms Act and the Foreign Trade and Payments Act (Außenwirtschaftsgesetz), criminal offences in accordance with the Narcotics Act and the criminal offence of forming a criminal or terrorist association.

This measure may only be carried out if ascertaining the facts by other means would be disproportionately difficult or impossible. It is to be limited in duration to a maximum period of four weeks, and on principle is only permissible in the dwelling of the accused. It is only permissible to monitor the dwellings of other persons if it can be presumed on the basis of specific facts that the accused is in these dwellings, that the measure in the dwelling of the accused by itself is insufficient to research the facts or to locate the offender, and that this would be made disproportionately difficult or impossible by other means.

The order must be issued by three judges of a national security panel at the Regional Court and confirmed by the presiding judge of this panel in the event of an urgent decision.

All individuals concerned by acoustic monitoring must on principle be informed of the measure (as soon as this is possible without endangering the purpose of the investigation, for instance).

¹¹ In § 101 there is regulation of the cases where and when affected persons have to be informed of the measures.

¹² See BT -Dr 14/1522.

The protection of the confidential conversations of an accused person with a person entitled to refuse to give evidence is provided for in particular. There is an express prohibition to take evidence in relation to confidential conversations between an accused person and a clergyman, Member of Parliament, his/her defence counsel and, for instance, with lawyers, tax advisors, doctors or journalists who are entitled to refuse to give evidence. Knowledge gained from monitored conversations with relatives who are entitled to refuse to give evidence may only be used as evidence if, taking account of the significance of the basic relationship of trust, this is not disproportionate to the interest in ascertaining the facts. If, in other respects, it is to be expected that all knowledge obtainable from the measure is subjected to a prohibition to use the information, monitoring is not permissible from the outset, i.e. it is prohibited to take evidence in such cases.

In addition, the statute governs the permissibility of using the information gained by virtue of monitoring in other sets of proceedings, such as the usability of information gained by coincidence in other sets of criminal proceedings.

Finally, the accused or the owner of the dwelling may apply for a court to examine the lawfulness of the order and the nature of its execution once the measure has been carried out.

In the political debate, amongst other things the accusation has been made that this statutory regulation constitutes a major step towards the 'big brother state'. Against this, it should be stated that Parliament has done its utmost in legally permitting this monitoring tool, which is necessary to suppress organized crime, but admittedly highly problematic, while

contriving also to protect the freedom of the citizen from the state, without placing either interest in jeopardy. The measure has also only been ordered very rarely, in only nine sets of criminal proceedings in 1998.¹³

Finally, it is important to note that the Federal Government is obliged by law to inform Parliament, i.e. the Deutscher Bundestag, every year of incidences where acoustic monitoring of dwellings was carried out.

5. Use of Undercover Investigators

Sections 110a to 110e StPO regulate the use of undercover investigators. In a fundamental sense there is no constitutional objection. This measure is not often¹⁴ used. Its implementation is accompanied by considerable difficulties. But it is indispensable in the sphere of Organized Crime. The provisions are largely oriented towards current operational practice¹⁵.

Undercover investigators (legal definition in section 110a II 1 StPO) are investigating police officers who have a new and lasting identity conferred on them (a "legend", in particular with a new name, a new address and a new occupation/profession). In other words, they investigate using a false name without disclosing their status as police officers or the fact that they are investigating. Relevant documents can be drawn up, altered and used for the purpose of building up and maintaining the legend (section 110a III). Undercover investigators are allowed to take part in legal transactions using their legend (section 110a II 2), eg.

¹³ See BT- Dr 14/2452.

¹⁴ See BT - Dr 12/1255 ; BT - Dr 14/1522.

¹⁵ The statutory provisions are supplemented by guidelines of the Ministers of Justice and Ministers of the Interior.

they may also enter into contracts and found undertakings. Using their legend they may also enter dwellings when allowed to do so by the person with a right of entry (section 110c); but any pretence of a right of entry going beyond this is inadmissible. In certain circumstances the identity of an undercover investigator can also be kept secret in the relevant criminal proceedings (section 110b III, section 110d II). Acting as an undercover investigator is not a ground justifying their commission of criminal offences oneself.

Pursuant to section 110a I StPO the use of undercover investigators is already admissible where there is an initial suspicion (section 152 II StPO), but only in respect of certain criminal offences in a general catalogue. These are offences of substantial weight in the sphere of drug or arms trafficking, of forging money or trade marks, of state security, or those offences that have been committed on a business or habitual basis, by the member of a gang or in some other organized way, as well as those offences where there is a definite risk of repetition. Here the subsidiarity clause applies, ie. that trying to find out the facts using some other means would be futile or be much more difficult. In the case of serious crimes committed without risk of repetition, being crimes that are not part of the general catalogue, the use of undercover investigators is admissible where the offence is of great significance and other investigatory measures would be futile. All in all, the catalogue of offences in respect of which this measure is admissible is not fully identical to the catalogue of other measures.

The use of undercover investigators is also admissible in a search for a person accused of a catalogue offence. Further, it is admissible for an undercover investigator to carry out several mandates at once, eg. in several criminal cases, or

repressive mandates in addition to preventive ones in each case the relevant requirements for applying the measure must be fulfilled, and in the case last mentioned the restrictive provisions of the StPO must be complied with also when they are stricter than police law. The carrying out of a mandate is not to suffer on account of such multifunctional activity.

During operative action the undercover investigator has all powers generally at the disposal of police officers under the StPO or other statutes¹⁶. In practice the use of undercover investigators is increasingly running into difficulties. Groups of criminals into which undercover investigators are supposed to be infiltrated are increasingly cutting themselves off from "strangers" (as new members). Moreover new members of the group have to undergo unlawful "tests of innocence". Undercover investigators then fail the test because as a matter of principle they are not allowed to commit any criminal offences.

Section 110a III provides that documents may be drawn up, altered and used for an undercover investigator's operational activities if this is indispensable for building up or maintaining his legend (eg. passports, driving licence, school certificates, etc.). This authorisation to draw up the necessary documents does not, however, mean that changes can be made in public books and registers.

Section 110b I, II deals with questions of competence in respect of operations. On principle, an operation is only admissible with the consent of the public prosecution office. Only where there is imminent danger and the public prosecutor's decision

¹⁶ Knowledge acquired by an undercover invest. may be used in other criminal proceedings to a limited degree only- § 110e.

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cannot be obtained in time may the operation be ordered by the police. The public prosecutor's consent then has to be obtained without delay. The operation is to be stopped if the public prosecution office does not give its consent within three days.

Pursuant to section 110b II a judge's consent will be required if the undercover investigator is not only on the "scene" to clear up the circumstances of an offence or to get information on an offender whose identity is still unknown but is also deliberately operating against a specific accused person- whether by finding out the facts or where he is residing; the same applies if, during an operation, the undercover investigator enters a dwelling to which there is no general access. Only where there is imminent danger will the public prosecutor's consent suffice. If the latter's consent cannot be obtained in time, the police may approve the operation although they have to obtain the public prosecutor's consent without delay. Furthermore, the public prosecutor has to obtain the judge's consent, and if he does not give his consent within three days, the measure has to be stopped.

Consent by the public prosecutor and the judge must be given in writing and for a limited period. No provision has been made for a maximum period. The period will be governed by the circumstances of the individual case. An extension is possible so long as there is fulfilment of the preconditions for the operation.

Section 110b III deals with individual questions concerning the secrecy of an undercover investigator's identity, particularly in criminal proceedings. The principle that applies is that the undercover investigator's identity can be kept secret after the operation has been stopped. What is meant here is true identity, ie. his real name and other

personal particulars, including the fact that he was (is) an undercover investigator. He can continue to act in legal transactions using his legend. The decision on secrecy is at the discretion of the police. The public prosecutor and the judge who are responsible for the decision on consent to the operation may, however, demand that the undercover investigator's true identity be disclosed to them. Moreover, in a criminal case, ie. in an operation or in other criminal proceedings where the undercover investigator is due to appear - eg. as a witness, his true identity must on principle be disclosed at the main court hearing. Keeping a true identity secret is only possible in accordance with section 96 StPO, ie. when it is to be feared that disclosure would threaten life, limb or liberty of the undercover investigator or some other person, or that it would jeopardise continued use of the undercover investigator. The decision on secrecy is taken by the highest service authority having due regard to all the circumstances of the individual case. Sweeping general secrecy is not allowed since every instance of secret identity and its relevant treatment in the files might reduce the legal protection of the person affected. When the decision is being made the legal interests at variance must be carefully weighed and the facts of the case assessed as a whole. Where facts requiring secrecy so permit, the criminal court shall be informed at the time the prohibition is declared - for the court must be able to examine the lawfulness of the prohibition at least as regards manifest errors. Reasons for the prohibition must be explained to the court so that it can work actively to eliminate any barriers and provide the best evidence possible.

If the true identity of the undercover investigator is not protected, pursuant to section 96 StPO, by a decision of the highest service authority, the undercover

investigator must, on principle, testify as a witness in criminal proceedings using his real name. If necessary, he can be afforded protection by the provisions on the general protection of witnesses. If his true identity is kept secret during the criminal proceedings, the undercover investigator will generally testify as a witness using his legend. If this is not enough to eliminate danger, the undercover investigator can be prohibited from taking part altogether by analogy to section 96 StPO.

6. Police Surveillance

Finally, section 163e regulates police surveillance for the inconspicuous ascertainment and collection of facts for the purpose of drawing up a (selective) picture of movements on the part of the person, being kept under surveillance. As a rule, the object is to identify connections and cross links within a group of criminals.

This measure is applied as follows : the personal particulars of persons under surveillance are noted during police checks that have already been ordered and are in force for other reasons and where the checking of personal particulars is permitted (eg. border or airport controls). The data thus collected are then evaluated, giving a picture of place-to-place movements by the person under surveillance, particularly as regards the journeys undertaken by that person.

Surveillance of an accused person is admissible in respect of all criminal offences of material importance where finding out the facts using some other means would be much less likely to succeed or be much more difficult. By virtue of the same subsidiarity clause other persons may also be covered if it is to be assumed that they are linked with the offender or are setting up such a link and that police surveillance would also be qualified by success. Vehicle registration plates may

also be covered for surveillance purposes. The data of accompanying persons may also be reported (section 163e III). The judge is responsible for making the order, and in emergency cases the public prosecutor; in the latter case, the order will cease to have effect if not confirmed by a judge within three days.

IV. FURTHER DEMANDS ADDRESSED TO PARLIAMENT; FURTHER NEED FOR ACTION

A. Conduct Appropriate to the Milieu

In the last years there were also calls for a statutory provision allowing undercover investigators to commit criminal offences where this is indispensable in connection with their operations. Here consideration was given to the possibility of, for instance, allowing them to take part in illicit games of chance or to commit other criminal offences not encroaching on the protected legal interests of other persons.

This demand was not followed up. An important argument here was that a state based on the Rule of Law should not descend to the level of crime not even for the sake of fighting Organized Crime. In any case, a provision of this kind would not have solved the problems concerned for genuine 'tests of innocence' with the object of testing whether a new gang member is an undercover investigator (eg. by demanding that he commit a rape or inflict bodily harm on persons who are not involved) would not be hindered by this.

B. Informers

There was also discussion whether - as in the similar case of undercover investigators - a statutory provision might also be necessary to allow the use of informers to help clear up serious criminal cases. Informers are persons who are not

on the staff of a prosecuting authority but who are nonetheless willing to assist the prosecuting authorities, on a confidential basis and for sometime in clearing up criminal cases; their identity should generally be kept secret.

The Procedure Code has no statutory provisions on this. This is - so I believe - not necessary, and indeed it would be wrong. Informers are simply normal witnesses no more and no less. They have no special powers. What they know has to be used by the prosecuting authorities just like the knowledge of other witnesses. Special protection is possible for informers in terms of the provisions relating to the protection of witnesses.

C. Precursory Investigations

Sometimes there is a discussion of the question whether clearing up cases of Organized Crime might be intensified by so-called precursory investigations. According to section 152 II StPO criminal investigations begin only when there is an initial suspicion, ie. when there are sufficient factual indications. The latter will be given if, on the strength of concrete factual circumstances, there is a certain probability, being at least a slight probability, that a criminal offence might have been committed. This probability must go beyond the general theoretical possibility of crimes having being committed.

And this is the very point where the call for admissible precursory investigations crystallises. This demand is aimed at "acquiring" suspicion, ie. at first establishing an initial suspicion. Here one has terrain in mind where, on past experience, the commission of crimes or the detection of an initial suspicion is to be expected, eg. in big insurance companies where indications of insurance fraud might be found through examining a large

number of files, or in large industrial enterprises where cases of criminal breach of trust might come to light when a large number of files are studied; for want of relevant experience or of the necessary expertise, the undertakings in question would not have discovered these cases at all.

I have fundamental legal policy misgivings about a statutory provision permitting such precursory investigations below the threshold of an initial suspicion, for the limiting function of an initial suspicion in terms of section 152 II StPO is of material importance in a state based on the Rule of Law. It protects an individual against being made the object of exploratory enquiry for no reason. Investigations below the threshold of an initial suspicion would derogate from the citizen's rights of personal liberty. Furthermore, regulation, under criminal procedure, of precursory investigations would entail numerous problems of detail requiring solution in the Criminal Procedure Code.

D. International Co-operation

International co-operation is just as important. It cannot be confined to mutual (bilateral) legal assistance between states. What is important is that there should be a multilateral exchange of experience and data, and especially that common strategies should be evolved to fight Organized Crime.

INTERPOL and EUROPOL could be helpful here. Very important is especially the international co-ordination of transfrontier suppression. Numerous problems emerge in this connection problems concerning data protection, difficulties over sovereign rights, problems resulting from differences of system as well as from differences in the legal standard found in the various countries. But I am

confident that these problems may be solved.

V. FINAL REMARKS

I would like to conclude by proposing several ideas for discussion:

- (i) In the suppression of organized crime, Parliament is faced with a tension - ultimately irresolvable - between two opposing interests, typified by the classical wording of the Federal Court of Justice: "It is not a principle of the Code of Criminal Procedure that the truth must be found at any price" on the one hand, and on the other, by the accurate claim that a state governed by the rule of law is obliged to protect its citizens against wrongdoing.
- (ii) It is a part of the essence of criminal and criminal procedure law that criminal prosecution is thereby set limits as a kind of "Criminal's Magna Charta". This is a restriction placed on the state powers of punishment. It is essential to an open, pluralistic society that there should be a debate on where these restrictions should be drawn. It is just as frequent for their inviolability to be rashly claimed as the contrary.
- (iii) Organized crime is not merely a phantom, it is a socially-damaging manifestation of crime which must be taken seriously. The extent of the threat that it poses is evaluated differently in the legal and criminal policy discussions, as is the priority given to the preventive measures. There is, and can be, no doubting that society must defend itself against organized crime by all appropriate means.
- (iv) To this extent, the repressive approach pursued by criminal and criminal procedure law must be supplemented by a preventive approach, to which the same priority must be attached, and the shortcomings in execution must be remedied.
- (v) Organized crime cannot be covered by elements of criminal offences, but only described from criminological and criminalistic points of view. Indications of specific shortcomings may result from such a description, in both criminal and criminal procedure law.
- (vi) The Federal Republic of Germany has already made available the necessary legal provisions, by virtue of the statutes already enacted, for those measures, which are needed to suppress organized crime in Germany. The concessionary nature - and in part also the complexity - of the regulations is also a consequence of the basically irresolvable tension between ensuring individual freedom and fighting crime effectively.
- (vii) In criminal procedure law, the increased permissibility of undercover investigation measures is directed against the conspiratory nature of organized crime. Witness protection, which gives the preventive component greater priority, is geared towards the aspect of threat and intimidation, which is inherent in organized crime.
- (viii) In an overall evaluation, the repressive concept developed by Parliament so far appears to be self-consistent. Its measures target the right problem areas. Whether or not it is sufficient in quantitative terms is the subject

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- of debate in terms of legal and social policy.
- (ix) Parliament has to date satisfactorily balanced the opposing interests of safeguarding freedom whilst at the same time fighting crime. The statutes have neither made of the criminal prosecution authorities a toothless tiger, nor has the rule of law protected itself to an excessive degree. This however does not rule out individual criticism, corrections or additions after a careful analysis has been carried out.
- (x) It is, however, difficult to discuss this issue predominantly from the point of view of mere effectiveness and with the dominance of the repressive approach to criminal and criminal procedure law.
- (xi) The danger ascribed to the ability of organized crime to destabilise the free social order is two-fold. It consists not merely of Mafia structures infiltrating society. It may also lie in the fact that an exaggerated set of defence tools calls into question our personal freedom.
- (xii) It is now a matter of intensifying the work of the criminal prosecution authorities on the basis of the clear preconditions for statutory permissibility, and of using all permissible tools to effectively suppress organized crime.
- (xiii) Time will tell whether further statutory regulations are necessary to facilitate additional measures. In order to evaluate this question, reports from the criminal prosecution authorities, describing successes and difficulties encountered in practice, are indispensable.
- Experience reports from foreign criminal prosecution authorities and knowledge based on legal comparisons should be included in the assessment wherever possible.
- (xiv) One should bear in mind in performing this assessment that the previous statutory provisions and the tools permissible in accordance with them do impose limits on what is possible and feasible in a state based on the rule of law. Effective criminal prosecution is also restrained by the rule of law. It is not enough to ensure criminal prosecution, no matter what the price, even when prosecuting organized crime. Human rights, freedom, general rights of privacy, including data protection and other basic civil rights, must be respected. These core rights may not be violated lightly. However, where Parliament may restrict these rights, such restrictions are also to be limited in scope to the degree indispensable for effective suppression of organized crime.
- (xv) It is now a priority to examine how and in which areas - taking account of the above idea - international cooperation to suppress organized crime can be expanded and intensified. Effective international cooperation is, ultimately, more important than respecting national sovereignty rights. Within the framework of international cooperation, one should strive to optimise the international coordination of cross-border suppression of organized crime. One should also strive - whilst respecting the above principles - towards a uniformity of procedures,

standards and techniques to suppress organized crime. However, where the national legal standard is higher, it should not be significantly reduced through compromises in favour of international standardisation, cooperation and coordination.

ORGANIZED CRIME / WITNESS PROTECTION IN GERMANY

*Johan Peter Wilhelm Hilger **

I. INTRODUCTION

As we are aware, organized crime demands the use of particularly effective investigation methods for its detection and suppression, as well as particularly effective measures to protect witnesses. Organized crime has the lack of scruple and the special power to use its considerable financial resources and connections to interfere with detection, in particular to intimidate witnesses and even, where necessary, to silence them. Detection must, of necessity, remain insufficient, and indeed fail, if witness protection does not work¹.

In Germany, there are no specific legal provisions to protect witnesses against organized crime. There is however a large number of regulations aimed to protect witnesses - largely independently of the nature of the offence committed; such regulations are, for instance, also applicable to terrorist crimes or offences against sexual self-determination, and they can be applied in respect of the criminal offences of organized crime. In overall terms, there is a need here to distinguish between B. Regulations in criminal proceedings and C: Regulations in very general terms to avert danger.

II. PROVISIONS IN CRIMINAL PROCEDURE LAW

The provisions for the protection of witnesses in criminal proceedings permit

the investigation authorities and courts to proceed in several stages². They depend upon the gravity of the threat to or endangerment of the witness and the need for a particular intensity of protection.

A. Section 68 of the Code of Criminal Procedure (StPO)

In accordance with section 68 subsection 1 second sentence, witnesses who have made their observations in an official capacity (such as police officers on duty) are always entitled (but not obliged) to state their place of work instead of their place of residence³.

Independently of this provision, any witnesses may be permitted by the person leading the questioning to state their business or workplace instead of their place of residence, or another address where a summons may be served, if it is to be feared that, otherwise, he/she or another individual is threatened in relation to any protected legal interest. Under the same preconditions, the witness may be permitted to refrain from giving information as to where he/she can be reached (section 68 subsection 2 of the Code of Criminal Procedure).

In accordance with section 68 subsection 3 of the Code of Criminal Procedure, the identity of a witness (i.e. at most all

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¹ Government of FRG BT-Dr 13/8156.

² Renzikowski JZ 1999, 605 ; Griesbaum NSTz 1998, 433.

³ The same applies as well to all other office-holders, but not in cases where notice is taken of a matter in a business context ; here ,if need be, recourse may be had to section 68 II 1 StPO

personal information)⁴ may be kept confidential if there is reason to fear (the wording of the statute does not require a particularly high probability) that disclosure will place at risk the life, limb or freedom of the witness or of another individual. The documents relating to identity are kept at the public prosecution office, in other words they are not initially submitted to the court - and for this period there is also no inspection of the documents. They are not to be added to the file until the threat has ceased to apply. If witnesses are listed in the written charge or in a subsequent summons whose identity is not fully disclosed, this circumstance is to be stated.

An exemption from stating one's identity does not release one from the duty to state in the main trial⁵, when asked, in what capacity the observations were made. This is aimed at undercover investigators in particular⁶.

B. Section 68b of the Code of Criminal Procedure

This provision brings about an improvement in witness protection in that legal counsel may be appointed to the witness *ex officio* and at the expense of the state if the witness is unable to exercise his/her rights in person during questioning. In the case of witnesses to major crimes or to criminal offences committed on a

commercial or gang basis, i.e. offences of organized crime, such counsel for the witness is appointed as a rule. Counsel is to ensure in particular that the witness is able to assert his/her rights of defence and protection, and must try to ensure that the procedural measures available under the law as it stands to protect witnesses are applied to the necessary degree.

C. Section 223 of the Code of Criminal Procedure

In accordance with this provision, if there is an insuperable obstacle to a witness appearing in the main trial for a longer period or indefinitely, the court may order the witness to be questioned by an appointed judge. However, the defence counsel and the accused are entitled to attend such questioning. Having said that, it is permissible for the accused to be temporarily removed from questioning in accordance with section 247 of the Code of Criminal Procedure. Counsel for the defence may not be removed from questioning under any circumstances, not even for reasons of an endangerment to the witness.

It is also permissible for the witness to be questioned by the appointed judge using video technology in accordance with section 247 a. This video recording may be used later during the main trial.⁷

D. Section 247 of the Code of Criminal Procedure

In accordance with this provision, the court can order the accused to be removed from the courtroom during questioning if the fear exists that a co-accused or a witness will not tell the truth if questioned in the presence of the accused. The presiding judge of the court must inform the accused of the main content of what was testified in his/her absence once he/

⁴ Where a witness at risk has been given a "new identity" it may be sufficient - and therefore necessary in terms of the proportionality principle - for only the new identity to be kept secret.

⁵ This duty does not apply to interrogations during investigation proceedings.

⁶ As regards those questions to which the accused's right to put questions also applies, the fact that the prosecuting authorities used under cover investigators may be revealed during the main court hearing. If this is to be definitely avoided such witnesses will have to be dispensed with.

⁷ Kleinknecht/Meyer-Goßner § 223, 20.

she has returned.

It should be pointed out in this context that the court may also hold the proceedings in camera in accordance with section 172 of the Courts Constitution Act (Gerichtsverfassungsgesetz) if there is fear of a danger to state security or to public order or to the life, limb or freedom of a witness or of another person.

The court is under a duty to safeguard witnesses. The witness must be protected against a danger to life or limb to which he/she may be subjected as a result of participating in the court proceedings⁸.

E. Section 96 of the Code of Criminal Procedure.

In accordance with section 96, the court may not require an authority to submit files or information if the highest service authority states that the disclosure of the content of the files would be disadvantageous to the state. In similar application of this provision, it is also possible to refuse to provide to the court information on the name and address of witnesses who are being kept secret by authorities. Thus, a witness who cannot be otherwise protected, for instance because of an unusual danger, can be barred from the main trial by the police and the public prosecution office in application of section 96 of the Code of Criminal Procedure. This means that his/her identity and address are kept secret by the criminal prosecution authorities so that he/she cannot be summoned to the main trial - instead, the individuals (police, public prosecutor, judge) who have questioned this witness in the investigation proceedings are questioned as hearsay witnesses. Furthermore, in the event of such a bar, the reports of the questioning of the witness may be read out at the main

trial (section 251 of the Code of Criminal Procedure). Witness protection by means of this provision is most often applicable in the case of police officers, and undercover investigators in particular.

Furthermore, the court must examine at all times and on its own responsibility whether it should dispense with questioning a witness not barred in accordance with section 96 of the Code of Criminal Procedure because of a particular risk to this witness, for instance because of a danger to life or limb⁹.

F. Sections 110 b and 110 d

In particular the identity of undercover investigators who are working under an assumed name, i.e. a new cover, may be kept secret even after their deployment has come to an end. Only the public prosecution office and the judge responsible for deciding on deployment may demand the real identity to be revealed to them. Otherwise, it is permissible to keep the identity secret in criminal proceedings, in accordance with the abovementioned section 96 of the Code of Criminal Procedure, in particular when there is reason to fear that disclosing the real identity might place at risk the life, limb or freedom of the undercover investigator, or of another person, or reduce the possibility to deploy the undercover investigator in the future. Decisions and documents relating to the deployment of an undercover investigator are not inserted into the criminal files, but are kept by the public prosecution office. These documents are only to be included in the files if this is possible without endangering the purpose of the investigation or public security, and without placing at risk the life or limb of a person, or the possibility to deploy the undercover investigator again.

⁸ BVerfGE 57, 250, 284.

⁹ BGHSt 39, 141; BGH NStZ 1984, 31.

**G. Witness Protection Act
(Zeugenschutzgesetz)¹⁰ sections
58 a, 168 e, 247 a and 255 a**

In accordance with these provisions, witnesses may be questioned by a judge separately from the other persons concerned by the proceedings as early as in the investigation proceedings. In the main trial, witnesses do not always have to appear in the courtroom for questioning. In both cases, the testimony of the witness may be transmitted simultaneously via a permanent video connection and recorded on a picture and sound carrier if the statutory preconditions are met. It is also possible to record questioning by the police and public prosecutors.

The recording of questioning and its subsequent use as a substitute for questioning allows, in particular, witnesses to organized crime who are in serious danger to be released from appearing at the main trial and to submit their testimony to the main trial using the video questioning procedure. In detail:

- (i) In accordance with section 58 a of the Code of Criminal Procedure, any witness questioning may be recorded at any stage of the proceedings. It must be recorded if there is reason to fear that the witnesses cannot be questioned in the main trial and that the recording is required in order to ascertain the truth.
- (ii) Section 168 e of the Code of Criminal Procedure stipulates that the judge is to carry out questioning separately from the other persons involved in the proceedings, during the investigation proceedings, in the event of a serious danger to the

well-being of a witness which cannot otherwise be averted. Pictures and sound of the questioning are to be transmitted to the other persons involved in the proceedings simultaneously. The judge remains contactable by telephone or radio. It is thus ensured that defence counsel in particular is able to intervene in the questioning at any time with interjectory questions. Questioning may be recorded in order to avoid repeat questioning.

- (iii) Under the same preconditions, section 247 a of the Code of Criminal Procedure governs video questioning of a witness who is in a different location to the courtroom. The witness can therefore be in an adjacent room in the court building or in a safe place at home or abroad, for instance if it would be too dangerous for him/her to appear in court.
- (iv) Playing the video which substitutes questioning is governed by section 255 a of the Code of Criminal Procedure. The videotape may be played in all instances in which it would be permissible to read out a report of the questioning.

The following aspects are particularly significant:

- (i) With video questioning, for instance with optical transmission of the questioning of the witness during the main trial, where the witness is not in the courtroom but in a secret location, no optical barrier is permissible, such as distortion of the monitor picture or a bar over the face of the witness¹¹. If video questioning of the witness where face of the witness remains

¹⁰ BGBl. 1998 I, 820.

- recognisable does not sufficiently reduce or remedy the risk, the witness must be barred altogether in accordance with section 96 of the Code of Criminal Procedure.
- (ii) Several protective measures may be linked: It is for instance conceivable to apply for video questioning of the witness in the courtroom, to hold the proceedings in camera during questioning and to permit the witness to refuse to give personal details in accordance with section 68 subsection 3 of the Code of Criminal Procedure.
- (iii) In its decision as to which witness protection measure to implement, the court has to take into account several criteria and to balance their significance in accordance with the facts of the individual case, namely:
- (a) the duty to effectively detect the criminal offence in a manner in line with the principles of justice,
- (b) the respect for the interests of the accused to have the opportunity to defend him/herself effectively, which is also necessary under the rule of law, in particular to be able to ask witnesses comprehensive questions,
- (c) the duty to protect the witness, where necessary, such as because of a serious personal danger or because of state interests which take priority.

Therefore, a more comprehensive witness protection measure may only be ordered if a milder measure, which would prove less detrimental to detection or to

¹¹ BGHSt 32 , 221 ; Renzikowski JZ 1999 , 605 ; Kleinknecht/ Meyer-Goßner § 68 , 18 - all with more references.

- defence, would not be sufficient.¹²
- (iv) There is no questioning the fact that measures to protect witnesses who are in danger may have a considerable impact in individual cases on the potential for ascertaining the truth and on the interests of the defence. They must therefore be applied with great caution. The evaluation of the evidence by the court, in particular in the case of indirect evidence, must take this danger into account, and the principle "innocent until proved guilty" (Art. 6 II of the Convention for Protection of Human Rights and Fundamental Freedoms) may take on outstanding significance in individual cases.¹³

III. REGULATIONS UNDER POLICE LAW

The potential for protection provided by criminal procedural law is insufficient. Such protection is only effective during the criminal proceedings, but not outside the proceedings or for the subsequent period. However, a danger to witnesses may remain, or even increase, once the criminal proceedings have been concluded. During the criminal proceedings, and afterwards, the witness protection regulations of preventive law, i.e. of police law, also apply.

Such measures may be, for instance:

- (i) Psychological care of the witnesses and advice on conduct;
- (ii) The witness is provided with police protection for a longer period, in

¹² Renzikowsky JZ 1999 , 605.

¹³ Perhaps where the evidence is doubtful and where the defence's chances of examining the sources of evidence and the evidence itself, eg by conducting their own enquiries, have been restricted because of the need to protect witnesses.

other words monitoring and escort by police officers working openly or under cover;

- (iii) The witness is given a new identity, in other words a new name and new identity documents, a new home, a new job, perhaps in another state or abroad;
- (iv) He/she receives assistance and money for a temporary period to build a new life, in particular a new profession.

The regulations contained in police law supplement criminal procedure law during the criminal proceedings; the police must also respect the control of the proceedings to be exercised by the public prosecution office and the court. Such police law protection arrangements are important, for instance, in the case of organized crime in the shape of trafficking in human beings and prostitution.

In Germany at present, studies are in progress to determine whether a statute is necessary to govern this and similar measures in greater detail than was previously the case and to supplement them. The police laws¹⁴ have as yet frequently only contained general clauses on which measures can be based in individual cases when the time comes.

IV. PRACTICE

The police and judiciary have built up a "witness protection programme" which is applied to endangered witnesses. Accordingly, there are special witness protection agencies with experience in witness protection, as well as joint guidelines¹⁵ by the Ministers of Justice and the Interior which provide greater detail for and govern the application of the statutory provisions. In Germany, roughly 650 witnesses per year are provided for by

the witness protection programme. As far as is known, there have as yet not been any serious problems, neither was the ascertainment of the truth or the defence of the accused seriously affected, nor were the witness protection measures insufficient.

V. FINAL REMARKS

Effective witness protection is indispensable to detect and suppress organized crime, but must not lead to serious difficulties in ascertaining the truth, or pose a detriment to the possibility of defence of the accused to a degree which is objectionable or indeed unjustifiable in terms of the rule of law. On the other hand, it is not a matter of ascertaining the truth at any price, and especially not at the expense of endangering the life or limb of a witness. In this difficult area, criminal prosecution authorities, courts and the preventive police, if possible in cooperation with counsel for the defence, must find viable compromises which are justifiable for all interests.

Witness protection is a task not solely for the judiciary and the police, but for society as a whole, in particular for all state bodies, which need to accept and support the witness protection measures implemented by the judiciary and the police.

In practice, effective witness protection requires from all involved a high degree of sensitivity, mutual consideration and understanding for the interests of the state and of all concerned, as well as courage and, in particular, trust in the state measures on the part of witnesses, as well as imagination and discernment in selecting the right measures; money should not play a major role here!

¹⁴ See §§ 6 , 26 BKAG.

¹⁵ Griesbaum NSTZ 1988 , 433.

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The statutory provisions in Germany may be in need of improvement, but they are currently sufficient if properly applied to meet all the interests which need to be taken into account.

PRINCIPAL WITNESS REGULATIONS TO SUPPRESS ORGANIZED CRIME IN GERMANY

*Johan Peter Wilhelm Hilger **

I. INTRODUCTION

The history of the principal witness regulation in Germany is turbulent from a legal policy point of view, but not excessively long. I will start by explaining to you what principal witness regulations have previously existed, and which remain today. In doing so, because of the context of the regulations, I will also touch briefly on the principal witness regulation relating to terrorism. Following that, I will briefly explain the factual and political discussion in Germany.

II. THE INDIVIDUAL REGULATIONS

A. Section 129 of the Criminal Code (StGB)

Section 129 of the Criminal Code governs the punishability of the formation of criminal organisations and membership therein.

“Whoever forms an organisation, the objectives or activity of which are directed towards the commission of crimes, or whoever participates in such an organisation as a member; recruits for it or supports it, shall be punished with imprisonment for not more than five years or a fine.”

This criminal offence is an offence relating to membership of proscribed organisations. In accordance with this provision, a (criminal) organisation is an organisational union for a certain duration

of at least three individuals who, whilst subsuming the will of the individual to that of the whole, pursue common goals (commission of criminal offences) and are linked such that they feel themselves to constitute a unit together. This goal distinguishes such an organisation from mere complicity. Furthermore, an organisation is dependent on a minimum degree of permanent organisation; a mere gang does not fulfil this precondition as a rule.

Subsection 6 of this provision contains a “minor principal witness regulation”, or to put it better, a contribution by the offender towards prevention of an offence. The court may mitigate the punishment at its discretion or dispense with punishment in accordance with section 129 if the offender (1.) voluntarily and earnestly attempts to prevent the continued existence of the organisation or the commission of a criminal offence consistent with its goals, or (2.) voluntarily discloses his/her knowledge to a competent agency in good time that further criminal offences, where he/she is aware of their planning, may still be prevented.

This provision was and is relatively unattractive. It is restricted to the criminal offence defined by section 129, and retroactive assistance in detecting offences already committed may not be rewarded. The provision has therefore not assumed any major significance in practice.

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**B. Section 31 of the Narcotics Act
(BtMG)**

In accordance with this provision, the court may, at its discretion, mitigate or dispense with punishment in respect of specific narcotics-related criminal offences if the offender

- (i) by voluntary disclosure of his/her knowledge has substantially contributed to the offence being detected beyond his/her own contribution to the offence, or
- (ii) voluntarily discloses his/her knowledge of planned offences to a competent agency so timely that specific narcotics-related criminal offences, where he/she is aware of their planning, may still be prevented.

This provision, which entered into force in 1981, was the subject of much controversy at the time. Its aim is to provide special privileges to narcotics offenders in the non-organized crime area who, beyond the confession of their own offences, disclose their knowledge of clients and criminal organisations. The fear that this principal witness regulation, which is restricted to narcotics-related crime, might prove detrimental to the principle of mandatory prosecution and lead to undesirable trading between criminal prosecution authorities and accused persons was at that time put aside in favour of the expectation that one would be able to break up international organisations effectively trafficking in narcotics through granting privileges to offenders willing to testify and cooperate ("detection helpers") and to convict major dealers.

The provision finds particularly inflationary application in Germany today. The provision makes it possible to provide comprehensive information on a part of the

drug scene and to apprehend offenders dealer by dealer until the thread of the detection assistance breaks. The provision permits an unusually high success rate in detection, particularly in the area of organized narcotics crime. Of decisive significance for the overall success is that, at the outset, a central gang member is willing to testify, and that there is initially no outside knowledge of their comprehensive, detailed statement. If a special commission of the police is then able to collect evidence on a large number of the dealers described without being noticed and in separate sets of proceedings, and to apprehend these suspects in a raid, the persons apprehended as a rule compete against one another with their comprehensive confessions. If a special commission has the staff to also evaluate these statements quickly and in relation to persons, and to convict the suspects, there is a chain reaction of confessions, which unravel the links between the dealers like running balls of wool and open up a part of the drug scene like a net. The information provided by the detection helpers directly after their apprehension is as a rule much more reliable than after a long period of detention, when they have had time to brood and imagine alleged backgrounds and supporters of the organisations. Detection helpers may, for instance, be able to give a detailed description of procedures in the drug scene using seized address books and photograph albums. In cities in particular, detection helpers have in individual cases blown the covers on 20, 50 and more suspects. The provision also encourages dealers who have been frequently apprehended, and who expect a severe sentence, to disclose to the investigating authorities their narcotics stashes and deposits which have not yet been discovered. No one is now thinking about rescinding this provision in light of this experience.

C. Art. 5 of the Principal Witness Act (Kronzeugengesetz)

The actual principal witness regulation to detect and suppress organized crime was governed by Art. 5 of the Principal Witness Act. The provision was introduced in 1994¹ and ceased to apply on 31 December 1999.

It read as follows: “Article 4 sections 1 to 5 (of this Act) shall apply mutatis mutandis to disclosing by an offender or participant in a criminal offence in accordance with section 129 of the Criminal Code or of an offence related to such offence in respect of which time-limited imprisonment of at least one year is imposed if the objectives or activity of the organisation are directed towards the commission of offences in respect of which extended forfeiture (section 73 d of the Criminal Code) may be ordered. In accordance with Article 4 sections 1 and 2 second sentence, the public prosecution office and the court are responsible which would be responsible for the main trial.”

Article 4 sections 1 to 5, to which the provision refers, was the principal witness regulation for terrorist offences. It read as follows:

“If the offender or participant in a terrorist criminal offence (section 129 a of the Criminal Code) or in a criminal offence related to such offence him/herself or through the mediation of a third party discloses his/her knowledge of facts to a criminal prosecution authority which is likely

(1) to prevent the commission of such a criminal offence,

(2) to promote the detection of such a criminal offence, if he/she was involved therein, beyond his/her own contribution to the

offence, or

(3) to lead to the apprehension of an offender or participant in such a criminal offence,

the Federal Public Prosecutor General, with the agreement of the Criminal Panel of the Federal Court of Justice, may dispense with prosecution if the significance of what the offender or participant disclosed, in particular in connection with the prevention of future offences, justifies this in relation to that individual's offence.”

Once the charge had been filed, the court was able in such cases to dispense with a sentence in the judgment, or to mitigate the punishment at its discretion; in doing so, it was able to exhaust the minimum statutory punishment to be ordered, or to impose a criminal fine in place of imprisonment. Furthermore, the court - once the charge had been filed, but prior to the initiation of the main trial - was able to discontinue the proceedings with the permission of the Federal Public Prosecutor General.²

If one applies these provisions mutatis mutandis to specific criminal offences of organized crime - as stated in Article 5 - this means:

“If the offender or participant in a criminal offence in accordance with section 129 of the Criminal Code (membership of a criminal organisation) or the offender/participant in a major crime connected with this offence, if the objectives or activity of the organisation are directed towards the commission of offences in respect of which extended forfeiture may be ordered, he/herself or through the mediation of a third

¹ Verbrechenbekämpfungsgesetz vom 28.10.1994 - BGBl. I S.3186.

² Restrictions in § 3.

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party discloses his/her knowledge of facts to a criminal prosecution authority which is likely,

- (1) to prevent the commission of such an offence,*
- (2) to promote detection, or*
- (3) to lead to the apprehension of an offender of such an offence, the competent public prosecution office, with the agreement of the competent court, may discontinue the proceedings before a charge has been filed*

and if the charge has been filed, the court may discontinue the proceedings prior to the main trial, or mitigate the sentence by judgment or dispense with punishment.”

The aim³ of this provision, which was inserted by the 1994 Act on the Suppression of Crime, is to prevent the continued existence of a criminal organisation, or at least to prevent the commission of offences consistent with its goals. By linking to section 129 of the Criminal Code, the criminal offence of forming a criminal organisation, it has been made possible to restrict the provision to participants in criminal offences which are or are to be committed by organisations. Here, a further restriction applies by virtue of limiting to specific serious criminal offences.

The individual preconditions:

“An offence in accordance with section 129 of the Criminal Code, or a major crime linked to such an offence, must be disclosed by a member of the criminal organisation. The application of the provision is however restricted to organisations the objectives or activity of which are

directed towards the commission of such major crimes, in other words to offences in respect of which a minimum prison sentence of one year is imposable, where, additionally, extended forfeiture may be ordered in accordance with section 73 d of the Criminal Code. These are counterfeiting money in accordance with sections 146 and 152 a of the Criminal Code, grievous trafficking in human beings in accordance with section 181 of the Criminal Code, grievous gang theft in accordance with section 244 a of the Criminal Code, blackmail resembling robbery in accordance with section 255 of the Criminal Code, handling stolen property on a commercial and gang basis in accordance with section 260 a of the Criminal Code, as well as specific narcotics-related offences, commercial and gang smuggling of aliens, commercial and gang incitement to file wrongful asylum applications, offences in accordance with the Act Governing Control of Weapons of War (Kriegswaffenkontrollgesetz), in accordance with the Firearms Act (Waffengesetz) and in accordance with the Foreign Trade and Payments Act (Außenwirtschaftsgesetz). The intention here is to apply this principal witness regulation, in addition to the suppression of serious narcotics-related crimes which are regarded as typical of organized crime, to also suppress holding to ransom, smuggling of human beings, illegal arms trade and technology transfer.”

“Corruption crimes” are not covered. Whilst there were calls in the parliamentary debate on the Act to Combat

³ BT-Dr 12/6853, S.119 ff.

⁴ BGBl. I S. 2038..

⁵ Korte NStZ 1997, S.513.

Corruption of 13 August 1997⁴ for a principal witness regulation for corruption-related crimes⁵, it was rejected because of legal policy reservations.

In contrast to the situation with the principal witness regulation for terrorist offences, it is not the Federal Public Prosecutor General and the Federal Court of Justice who are responsible for taking the necessary decisions, but the public prosecution office and the court with respective competence. This therefore means, as a rule, a Great Criminal Panel of the Regional Court.

Whether the provision is used is at the discretion of the public prosecution office and the court. In deciding, the degree and significance of the disclosed knowledge must be balanced against the nature and significance of the legal interests which have been injured⁶. In this process, application of the regulation will be deemed to be particularly suitable if the contribution made towards detection makes it possible to prevent the commission of another criminal offence of organized crime. In other respects, the principle applies that assistance in detection must be all the greater the more serious the offence of the "principal witness" is. Granting a privilege is however not dependent, in personal terms, on a hierarchical relationship and, from a factual point of view, on a difference in the severity of wrongdoing. It is therefore not necessary for the accomplice who has been betrayed to be more important or at least as important as the principal witness and for the offence in respect of which freedom from punishment is granted to be less serious than the offence disclosed.

If the public prosecution office wished to avail itself of the provision, it would have two possibilities: either to discontinue the proceedings if the contribution towards detection were to justify such an action on weighing up all relevant circumstances, or filing a charge and applying for mitigation of punishment by the court in the main trial. In its judgment, the court could dispense with punishment or could mitigate the punishment at its discretion, and exhaust the statutory minimum of the imposable punishment, or impose a criminal fine instead of imprisonment.

Discontinuation by the public prosecution office was not final and binding, so that the office could resume its investigations at any time. The decision of the court by virtue of a judgment, on the other hand, was final and led to exhaustion of the available criminal action. The principal witness regulation was the subject of much controversy in Germany from both factual and political points of view.

From a factual point of view, it gave rise to problems, for instance, because in theory several principal witness regulations existed in proximity and might apply to the same case. Furthermore, disagreement existed as to the list of crimes covered, corruption, for instance, not being covered.⁷ Politically, the following in the main⁸ was levied at the principal witness regulation:

- (i) It violates the principle of equality (Art. 3 of the Basic Law [GG]), the principle of the rule of law (Art. 20 III of the Basic Law), is not compatible with the principle of mandatory prosecution.
- (ii) It is detrimental to the citizen's

⁷ Korte NSTZ 1997, S. 513.

⁶ Bernsmann NSTZ 1989, S.460 ; Hilger NJW 1989, S. 2377.

⁸ Kleinknecht / Meyer-Goßner, Kronz.G., Vorb. Rn 5. Pro :Schlüchter ZRP 1997, S.65.

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- confidence in the inviolability of the law and of the judiciary.
- (iii) In particular, it weakens the citizen's willingness to abide by the law if he/she sees that the state allows itself to buy witnesses by trading with serious criminals.
 - (iv) It is prone to abuse by virtue of the discretion provided.
 - (v) It reduces the significance of the main trial and makes things more difficult for the defence. The truth of the statement of the detection helpers is dubious.
 - (vi) It is questionable from a criminological point of view because, on the one hand, serious doubts must arise as to the plausibility of information provided by a principal witness who hopes to buy considerable advantages through his/her statement, and for another, the entire regulation may be counterproductive in that the danger of betrayal tends to bring the group together rather than to divide it, and that the failure of the regulation could be regarded as a success by large organized crime organisations.

It is being examined in Germany at present whether a new, different principal witness regulation should be created, which for instance could be inserted into the Criminal Code (among sections 46 et seqq. as a regulation on assessment of punishment). The examination is however still very much in its initial stages, and no conclusion is to be expected in the immediate future.

The expectations linked to the regulation appear not to have been fully met in Germany. No significant improvement in detecting and suppressing organized crime is visible. It cannot be ruled out that the regulation has been useful in individual cases.

III. OUTLOOK

The application of the principal witness regulation was time-limited from the outset - it was in other words a temporary statute. By statute of 19 January 1996⁹, its application was extended to 31 December 1999, and has hence expired.

⁹ BGBl. I, S 58.

EFFECTIVE METHODS TO COMBAT TRANSNATIONAL ORGANIZED CRIME IN CRIMINAL JUSTICE PROCESSES

*Franco Roberti **

I. A COMMON DEFINITION FOR "ORGANIZED CRIME"

A study on the phenomenon of organized crime aimed to a common understanding - without claiming to be exhaustive - must start from a definition of the concept of organized crime. Such a concept, indeed, logically precedes the explanation of the situation relevant to the various types of illicit activity, an explanation which I will make with respect to the Italian experience, given that any single activity necessarily implies the existence of an organisational structure.

An example can be made with regard to the international trafficking of drugs and to the laundering of the money thereof, i.e. criminal activities which need to be carried out in an associated way. By saying that, I do not intend to establish an equation between the monopoly of drugs trade and the spread of organized crime. Such an idea would be unfounded. Although drugs have provided - and still provide - criminal organisations with extraordinary possibility for enrichment, they are certainly not their one and only source of profit and, maybe, neither the most important one. On the contrary, the most developed criminal associations increasingly tend to direct and diversify their interests towards equally profitable illicit activities which they consider to be less risky because they are morally regarded as less disgusting or because they

are subjected to less heavy penalties and less investigation or because it is more difficult to find them since the finding would require the victims' co-operation which is not easy to obtain (extortion, control of public works' contracts, exploitation of prostitution, smuggling, frauds, trafficking of human beings, gambling, etc.).

According to the European Union Situation Report on organized crime delivered in Brussels on November 6th, 1998, *"Organized crime groups are known to be exploring and exploiting new areas of crime with a vigour not unlike that of legitimate business exploring and exploiting new commercial markets. Currently the trend in organized crime activity includes increased involvement in those criminal activities that generate high profits and at the same time lower risks to involved criminals in terms of lower detection rates by law enforcement - partly due to the complexity and costs of long term investigations - and/or imposed penalties. Crimes that present relatively low risks to organized crime are the smuggling and trafficking of human beings, and other economic crimes including frauds and ecological crimes. Economic crimes are therefore expected to remain on the increase both in volume and magnitude"*.

This manifest remark should suffice to destroy the argument - supported by the advocates of liberalization and legalization of drugs - according to which these would be useful to combat organized crime since this latter would be deprived of a source of enrichment. On the contrary, it is clear

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that, should the drug trafficking proceeds run out, the other illicit activities would carry on and be strengthened. Moreover, within a free market of drugs, criminal organisations currently managing it in a monopolistic system, would debar competition through such well-known discouraging methods as threats and violence, as they already do in formally licit economic sectors. For these reasons, we can no longer apply an international approach to fight organized crime considering the main types of criminal activities without attempting to define the concept of transnational organized crime.

This need is mostly felt in Italy where *Cosa Nostra* and the other Mafia-type associations - unlike the other criminal organisations - tend to be mixed in the society by means of apparently lawful business undertakings and apparently licit investments which necessarily require the control of the territory and of any licit and illicit activity carried out herein.

While the Mafia economy is taking increasingly developed and dangerous forms, the awareness that the development of criminal economy has a dreadful and irreversible impact on the legal economy has hardly spread: an impact which corrupts the financial and banking circuits, distort the markets' trend, and - resorting to instruments which are alien to the lawful entrepreneurial world - feeds the black economy and steals money to the tax revenue.

What is worse, the criminal economy brings about a kind of sharing of interests which seems to make the border between the criminal world and the society fade, establishing a steady collusive network of relations other than the traditional one linking criminals and the victims of the offence.

The breaking of the border between the "attacker" and the "victim" clearly appears, for instance, with respect to the unlawful relations between organized crime and enterprises obtaining public works' contracts; these unlawful relations were found following to various inquiries which led to know that, in many cases, the legal enterprises themselves asked the Mafia groups for funds to expand their markets.

The Mafia is focussing its interests on the public works' contracts which require - due to the afore-mentioned reasons - a close control of the territory, yet at the same time it would tend to act within the integrated criminal system more frequently as a "network" and less frequently as a structure linked to the territory: such an argument may appear as contradictory, at a superficial analysis. Actually, these two things are not incompatible, but they represent two complementary and indissolubly linked aspects of the Mafia action.

Mafia organisations will increasingly act on a transnational scale, in agreement or in competition with other international criminal organisations, namely with the new Mafias which have been operating also in Italy for a long time. Yet their establishment on the territory will still be the requirement for the control of the markets and, thus, for their existence as steady criminal structures.

Italian law four types of organized crime can be identified as a result of the whole set of criminal rules, both substantive and procedural ones:

- (i) Association for the purposes of committing offences (simple organized crime conspiracy - article 416 penal code);¹
- (ii) Association for the purposes of

- terrorism or subversion (subversive organized crime - article 270-bis penal code);²
- (iii) Mafia-type association (Mafia-type organized crime art. 416-bis penal code);³
- (iv) Association for the purposes of illicit trafficking of narcotic or psychotropic substances (Art. 74 of Presidential Decree N.o 309/1990).⁴

The differences between membership of a Mafia-type organisation and simple criminal conspiracy are summed up below.

¹ Art. 416 penal code (association for the purposes of committing of fences)

“1. When three or more persons form an association for the purpose of committing more than one offence, whoever promotes, establishes, manages, organises the association shall be liable, for that only, to imprisonment for a term of between three and seven years.

2. For the simple fact of taking part to the association, the penalty of the imprisonment shall be a term of between one and five years.

3. The bosses shall be liable to the same imprisonment settled for the promoters.

4. If the associates are armed, the shall be for a term of between five and fifteen years

5. Sentence shall be increased if the organisation consists of ten or more.

² article 270-bis penal code (association for the purposes of terrorism or subversion)

“1. Whoever promotes, establishes, organises or manages associations for the purposes of committing acts of violence aimed to the subversion of the democratic order shall be liable to imprisonment for a term of between seven and fifteen years.

2. For the simple fact of taking part in the association, the penalty of the imprisonment shall be for a term of between four and eight years.

³ Art. 416 - bis penal code (*membership of a Mafia-type organisation*)

1. Persons belonging to a Mafia-type organisation of three or more persons shall be liable to imprisonment for a term of between three and six years.

2. Persons who further the activities of or manage the organisation shall be liable to imprisonment for a term of between four and nine years for that offence alone.

3. A Mafia-type organisation is an organisation whose members use the power of intimidation deriving from the bonds of membership and the atmosphere of coercion and conspiracy of silence that it engenders to commit offences, to acquire direct or indirect control of economic activities, licences, authorisations, public procurement contracts and services or to obtain unjustified profits or advantages for itself or others, or to prevent or obstruct the free exercise of the right to vote, or to procure votes for itself or others at elections.

4. If the organisation is armed, members shall be liable to imprisonment for a term of between four and ten years in the circumstances described in the first subsection and between five and fifteen years in the circumstances described in the second subsection.

5. The organisation shall be deemed to be armed if its members have access to weapons or explosives for the purposes of furthering the aims of the organisation, even if hidden or stored.

6. If the economic activities which the members intend to acquire or maintain control over are financed in whole or in part by the proceeds of crime, the penalties set out above shall be increased by between a third and a half.

7. In the event of a conviction, articles which were used or intended to be used to commit the offence and the proceeds thereof shall be forfeited.

8. The provisions of this section are also applicable to the Camorra and any other organisations, whatever their names, that make use of the power of intimidation deriving from the bonds of membership to pursue goals typical of Mafia-type organisations.”

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While simple conspiracy only requires the creation of a stable organisation, however rudimentary, for the purposes of committing an indeterminate number of offences, membership of a Mafia-type organisation additionally requires the organisation to have acquired a genuine capacity for intimidation in their area. The members of the organisation must also exploit this power to coerce third parties

with whom the organisation enters into relations and oblige them to enter into a conspiracy of silence.

Intimidation may take various forms, from simply exploiting an atmosphere of intimidation already created by the criminal organisation to committing fresh acts of violence or making threats that reinforce the previously acquired capacity for intimidation.

⁴ Art. 76 of Presidential Decree N.o 309/ 1990
(*association for the purposes of illicit trafficking of narcotic or psychotropic substances*)

1. When three or more persons from an association for the purposes of committing more than one offence under section 73, whoever promotes, establishes, manages, organises or finances the association shall be liable to imprisonment for a term of not less than twenty years for this offence alone.

2. Any persons taking part in the activities of the organisations shall be liable to imprisonment for a term of not less than ten year.

3. The sentence shall be increased if the organisation consists of ten or more members or if any of the members are addicted to narcotic or psychotropic substances.

4. If the organisation is armed, in the circumstances described in subsections 1 and 3 above, the sentence may not be less than twenty-four years' imprisonment and twelve years' imprisonment in the case in subsection two above. The organisation shall be deemed to be armed if its members have access to weapons or explosives, even if hidden or stored.

5. The sentence shall be increased in the circumstances specified in section 80(1)(e).

6. If the organisation has been established to commit offences under subsection 5 of section 73, the first and second subsections of Section 416 of the Criminal Code shall apply.

7. The penalties provided for by subsections 1 to 6 shall be reduced by a half to two thirds if the person in question has acted effectively to obtain evidence concerning the offence or has deprived the organisation of vital resources for the commission of offences.

The “*Mafia method*” (or rather, the whole gamut of instruments on which it is based) is therefore identified under criminal law by means of three characteristics (“powers of intimidation deriving from the bonds of the organisation”, “coercion” and “conspiracy of silence”) and all three are essential and necessary aspects of this conspiracy offence.

In terms of aims, whereas a simple conspiracy aims to commit acts defined as criminal offences in law, a Mafia conspiracy can also be organized with the aim of obtaining direct or indirect control of economic activities, authorisations, public procurement contracts and services or profits or other unjustified advantages for the organisation or others or to prevent or obstruct the free exercise of the right to vote or to procure votes for itself or others at elections.

The aim of committing crimes, while inherent in Mafia-type organisations and an aspect of their structure since the organisations are characterised by the use of violence, is not, however, the final and sole aim of the organisation. In fact, the individual offences committed, such as “settling accounts” or acts against representatives of public institutions, are part of a broader strategy that seeks to acquire, increase and consolidate economic power as part of an entrepreneurial vision that makes no distinction between the

proceeds of criminal activities and legitimate profit and considers intimidation and violence to be normal tools of its trade.

This is why Mafia-type organisations attempt to acquire control of significant areas of legitimate activity as well as criminal activities, such as drugs or arms trafficking. It is important to stress that the legitimate activities are not conducted simply as a consequence of and a front for criminal activities. They are a natural outlet for criminal activities in the context of the Mafia mind-set. Crime is therefore a means to acquire economic and political power and it leads to an overall logic of continually expanding into areas of legitimate power.

This has all been clearly recognised by the legislature, which has defined the offence of membership of a Mafia-type organisation in such a way that, even if a series of offences have not been committed, it is still an offence for the organisation to intend to exploit Mafia methods to acquire a *monopoly position*, for *electoral or political* gains or to obtain an unjustified *advantage*.

The term organized crime was first used in Italy in the mid '70s when, upon the outbreak of kidnappings for ransom and the onset of terrorism, laws were amended as a result of the increasing awareness of the difference between offences committed by individuals and "organized" offences. Then, the distinction was based on two main features: the number of people involved and the steady and skilled nature of the organized criminal activity compared with the contingent and accidental nature of individual crime.

A couple of decades after those first analysis, criminal geography has completely changed. Individual crime

hardly exists. The organisation forcefully broke in the criminal world and by now any criminal activity has its own structured shape ranging from the exploitation of prostitution to the illegal immigration, trafficking of arms, illegal waste disposal, industrial or financial espionage, computer offences.

This updated notion of organized crime includes those criminal associations whose organisational structure is not only aimed at implementing the group's criminal plan, but it further reflects a global purpose which goes beyond the criminal activity and aims to achieve more power. In this respect, their common basis is founded upon the business logic of profit-gaining, of enrichment and of the illegal markets with the resulting (firm-like) highly developed organization. In this respect, the Mafia type conspiracy is regarded as prejudicial to the economic public policy.

It is known that the operational features of today's organized crime - Mafia type or not - have developed as a result of the globalization of both legal and illegal markets and of the abatement of frontiers according to a pattern based upon two guidelines:

- (i) the first one includes the increase in asset and capital inter-exchanges due to the development of computer science and the mobility of offenders on territories;
- (ii) the second one marked by interconnections among criminal aggregates which in the past were separated and unrelated.

Such a reality leads analysts to refer to an *integrated criminal system* characterised by a *transnational* nature and by its heterogeneous elements.

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The *transnationality* of organized crime is a feature other than its *internationality*. By the latter term, in fact, we mean the fact of a criminal group operating not only on the territory of the country where it arose and performing its activity also abroad. The former, instead, refers to the *co-operation* established by criminal groups among themselves so as to manage some criminal markets more profitably.

The international scientific community proposed various patterns to achieve a definition of the organized crime notion which may be agreed upon and accepted. A phrase was used, for instance - more a sociological than a legal one and exceedingly restrictive - identifying organized crime " *as the group of people steadily devoted to the commission of offences against property or of offences affecting the economy and provided with a complex organisation in which costs, profits, re-uses, investments are planned in a manager-like prospective so as to allow these groups to achieve advantages within the illegal market*" (World conference of ministries of justice on international organized crime, 1995).

By the way, I believe it is meaningful to remark that, at a European level, a discussion is still under way on this issue, i.e. the definition of a common notion of *organized crime* and the resulting identification of the behaviours expressed by it - an issue being indeed crucial with respect to the path towards the harmonisation of E.U. rules.

In fact, along with Mafia-type criminality and often intertwined with this latter, two more types of criminal activity work on a large scale, spread out in nearly all Member States, whose organisation is possibly more efficient than the Mafia's itself and also more capable to interact with governmental sectors and to affect the legal

economy: i.e. political - governmental corruption and the illegal lobbying. There is a widespread opinion that the entangled mingling of licit affairs, illicit affairs and criminal affairs is the fully-fledged element distorting the legal economy.

The first need highlighted by the Action Plan against organized crime, adopted by the European Council on April 28th 1997 - i.e. to make membership of a criminal organisation prosecutable in the legal system of each Member State - was satisfied by the adoption of a Joint Action (December 21st 1998) thanks to the efforts made by the High Level Group established within the Council General Secretariat to provide technical support with regard to the implementation of the Plan's political contents. The Joint Action provides a definition of criminal organisation and compels Member State to make it a criminal offence to participate in the criminal organisation ensuring that one or both of the types of conduct are punishable, i.e. the Italian-like pattern of participation and the common law "conspiracy" pattern.

According to the European Union situation report on organized crime, presented in Brussels on November 6th 1998, the term "organized crime" stands for " *a wide range of phenomena with many differentiations in types of activities, markets, people involved, crimes committed, levels of organisations and other aspects*". This make it difficult, if not impossible - according to the Report - to depart from a definition of organized crime that is commonly accepted and covering all its relevant manifestations.

The economic aspect, and generally the drive to accrue resources by any means, is the key aim, not to say the only one, which explains the strategic and tactical choices made by any kind of criminal organisation. Yet the possibility to make profits is not

enough by itself; it needs to be supported by a favourable environmental situation which can be defined a governmental and economic - financial vulnerability.

Economic and financial vulnerability is linked to low competitiveness and efficiency. Governmental vulnerability arises when the country's economic competitiveness and development are not ensured by the institutions and government bodies responsible for the safeguard of citizens' rights, the settlement of disputes and, in general, the compliance with laws.

In this respect, criminality paves the way for imposing its own non-economic and illegal instruments in the sectors of production and exchanges. Thus, the environmental vulnerability becomes a requirement to establish and spread out various criminal activities.

The illegal economy is on the increase, meaning by that all the exchanges and productions whose relations are disciplined by rules other than - and often opposed to - the institutional ones. The illegal economy due to the organized crime is made up by those illegal exchanges where either of the two players belongs to a criminal organisation. The illegal economy can take various aspects and concern both the "trading" and the "financial" part of the system: for instance, drugs manufacturing and trade, illicit trafficking of goods and people, loan-sharking, unauthorised credit, money laundering.

The action of the organized crime in some sectors of trading and financial economy results in the increasing distortion of the economic milieu and, inevitably, of the society and public life as well. A wicked situation is thus started: the environmental vulnerability helps the distortion caused by the organized crime

which in turn further impairs the environmental context.

In the light of the economic analysis, the equation "*economic development = legality*" proved to be out-of-date and erroneous since the ratio is to be definitively reversed: there can be no economic development without legality. Criminality, indeed, prevents the development of a healthy business and investment activity. Conversely, where private and public investments are not supported by a legal background, the risk is high for the flow of resources to be ineffective and to even feed the activities carried out by a spreading criminality. The economic principle has recently stressed the key role played by *security* and *trust* with a view to the growth and the good operation of the market economy regarded as a set of rules and processes allowing an efficient production and exchange of resources within a developed and democratic society.

Transactors' security and trust are based upon the belief that there exist complex standards ensured and monitored by governmental institutions (the judicial one mainly) which guide the behaviours, settle the conflicts of interest, and sanction unfair conducts. A threat to the ordinary development of economy is posed by the quantity, but mainly the quality of the illicit and criminal actions committed in this field. Indeed, the rejection by single individuals or complex organisations of the rules of legal economy implies two different layers of dangerousness: the mere infringement of laws; the replacement of legal processes by other illegal rules and processes which wrongdoers provide to autonomously sanction if they are not complied with.

Unfortunately, to explain (micro and macro) criminal phenomena, the sociological-criminological approach has

always prevailed over the economic approach (or at least it was useful to make it prevail), the former basically connecting the deviating behaviour to psychological or physiological features so as to blame either the single individual or the society.

The economic analysis of crime, instead, takes account of individual tendencies and explains that anyone can commit a wrong on the basis of a reasonable cost-benefit assessment. The person who infringes the law expects a clear benefit out of his action. The offence (think of corruption, for instance) turns to be almost physiological and related not to genetic anomalies, personal or environmental situations, but to a range of variables outlining the opportunities and the ties upon which one decides to commit licit or illicit actions, according to convenience. These variables can be grouped in two main sets respectively connected to:

- (i) efficiency of governmental institutions, namely justice;
- (ii) efficiency and equity with regard to the production and allotment of resources and market transparency.

Governmental institutions therefore have the responsibility to ensure citizens the competitiveness of goods and services markets, the transparency of capital and employment, the efficiency of criminal jurisdiction in the fight against the offences pertaining to the economic organized crime and to the public administration, the efficiency of civil jurisdiction, the safeguard of rights and the settlement of disputes with special reference to company and bankruptcy law. Consequently the legal system's inefficiency is a cause of denial of justice, but it also hampers the development and poses considerable problems with a view to the European integration.

II. DRUG TRAFFICKING: MAIN PLAYERS AND ROUTES

The considerable availability of data on drugs trafficking allows the development of a complex discussion which makes it easier to understand the profitability of drugs production and trade and, as a result, the reasons for its spreading and steady increase. From 1980 to 1996, seizures of opiates have increased five times as much whilst the seizures of cocaine ten times as much (Data are drawn from the report of the International Narcotic Control Board - INCB - of the United Nations and they refer to 1996).

Experts generally believe that seizures affect 10% of the trafficking at best, meaning that in fifteen years the production, the trafficking and, supposedly, the abuse have increased proportionally. Three widespread types of drugs can be identified: cannabis, cocaine, heroin.

A. Cannabis

Mexico is the leading source country with 7000 tons of marijuana per year followed by the USA (3000 tons per year; huge quantities of the most valued quality - the *sensimilla* - are produced in California), Canada, Colombia and other minor countries. It is also grown in many African countries with a massive concentration in Morocco.

The retail cost of "soft" drugs in Italy ranges from 7 - 10,000 Lire per gram of marijuana to 12 - 15,000 for some good quality hashish. It can be reasonably inferred that the wholesale cost is about two million lire per kilo in the Mediterranean market. Thus, the investment's return is low: about 9 times the initial investment.

Morocco is a major supplier of cannabis resin to the Member States. Pakistan is

another source country. Albania is developing into a major source country of herbal cannabis for Hellas and Italy. Smuggling takes place in lorries, vans and campers and by sea in trawlers and yachts. Central and Eastern Europe is a transit region for cannabis destined for the Member States due, to a certain extent, to the use of the Balkan routes for cannabis trafficking from Turkey.

Over 90% of cannabis resin seized in Spain in 1997 originated from Morocco and most was in transit to other Member States. Groups from various Member States have set up bases in Spain to facilitate trafficking towards their countries and in 1997 the Spanish authorities identified criminal groups from the United Kingdom, Germany, Italy, France, the Netherlands, Belgium, Sweden, Denmark, and Austria operating within Spain.

B. Cocaine:

Main producers are Peru, Bolivia, Colombia (main producer of cocaine destined for the Member States; here the national plans to reduce the coca cultivation have not been very successful), Brazil and Ecuador covering 90% of the world exportation.

In Italy, recent data on the organisations involved in the international drugs trafficking show substantial returns, about 611 times its purchase value. This is also due to the processing of the pure substance allowing to triple the quantity of the goods (failing to comply with such a limit, the product's yield would decrease). Five hundred kilos of leaves are needed to obtain one kilo of cocaine.

To the traditional routes used for the trafficking of these drugs (such as that of the Caribbean: Bahamas - Caribs - Florida; the European route through the

Netherlands) many others have been added in progress of time towards Europe: Brazil, Argentina, Venezuela, Morocco, Tunisia, Algeria, Ghana, Nigeria.

The trend is to traffic small quantities rather than many-ton cargos although this did not result in a decrease of the cocaine seized. The transit role of Central and Eastern Europe is increasing. Colombian groups co-ordinate and monitor the arrival of cocaine in the region and the subsequent transport overland to the European Union. This has led to the tendency to either "bypass" ports in the Member States or to use them only for transit purposes with a view to unloading the drugs in ports within Central and Eastern Europe. These ports often lack qualified staff and technical equipment to carry out assessments on the cargo. Analysis shows that increasingly non-existent Central and Eastern European companies are registered as consignee of the cargo.

The Iberian peninsula is also a gateway for the transport of cocaine to the Member States. In terms of quantity most cocaine is smuggled by sea although planes are the most frequently used means of transport. There is a major difference, largely due to historic and linguistic ties, between the role of the southern part of the European Union and its Nordic Member States in respect of cocaine trafficking. Whereas the amount of cocaine seized in 1997 in the Iberian Peninsula was 21,581 kilos, the total quantity in Denmark, Sweden and Finland was only 92 kilos.

C. Heroin

Opium production has increased in the "Golden Triangle" (Myanmar, Laos and Thailand) and in the "Golden Crescent" (Afghanistan, Pakistan, Iran) as well as in Lebanon and Mexico. To the traditional routes (Bangkok - USA - Europe - Oceania; Hong Kong, Nigeria, Turkey, Greece, Italy

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- the so-called "Balkan route" i.e. former Yugoslavia and Albania) others have to be added: the Baltic route made up by some Eastern Europe countries; the African route for the transit of heroin flows originated from Asia and directed to Europe and northern America.

The profitability is exceedingly high: about 1700 times its initial value. One kilo of pure substance produces up to 15 kilos made up by 50 mg doses which are sold in Italy between 30,000 and 50,000 Lire. About 80% of all heroin seized in the European Union originates from South West Asia. Afghanistan is one of the world's leading opium-producing countries with an estimated volume of 1265 tons in 1997 resulting in 134 tons of heroin. Opium production in Colombia is some 66 tons resulting in 6 tons of heroin.

Morphine base is transported from Afghanistan via Iran to Turkey for processing into heroin which is then smuggled - by sea and overland - into the Member States increasingly through Albanian traffickers putting a great deal of emphasis on Austria as a country of entry into the European Union.

D. Synthetic Drugs

As to synthetic drugs, their abuse has increased faster than any other drug and the European Union is one of the world's major production regions of amphetamine and ecstasy type stimulants, with large-scale production being controlled by criminal groups.

Most amphetamine seized in the Member States originates from the Netherlands, Belgium, the United Kingdom and Germany whilst the Czech Republic, Poland, Bulgaria and the Baltic States are major source countries from outside the European Union. Production in Central and Eastern Europe is partly

destined for the European Union, with Germany often being used as a transit country in particular for the northern Member States.

Long-term strategic alliances between criminal organisations create a bridge to new markets, undermine the position of competitive groups and reduce the costs for investment, as well as the risks. Also they guarantee a constant supply of criminal goods to those who already have access to the market. Some alliances such as the ones between Colombia criminal groups and the Italian Mafia, and between the Italian Mafia and Russian groups, have been known for years. However, more recently a Colombian-Russian strategic alliance was identified. Colombia groups have forged links with Russian groups which supply military equipment including AK-47 assault rifles and shoulder-fired missiles in exchange for cocaine which is allegedly transported to Russia and to Member States.

One characteristic of the higher echelons of organized crime, including those involved in international organized drug trafficking, is the level of sophistication used. Criminal groups have developed, and to a large extent depend on, expertise in computer technology, financial techniques, money laundering activities and other forms of economic crime and they have gained a prominent position through maintaining a sophisticated high-tech global communication and logistics network, whilst at the same time making use of legal and financial experts.

As it results from the findings of investigations, the use of experts by the smuggling organisations is also prominent. Trafficking of cocaine towards the European Union is dominated by a small number of criminal groups from Colombia, although Bolivian criminal groups, due to

the increased production of cocaine in the country itself, are expanding their activities. In cases of the trafficking of large amounts of drugs the groups operate in a temporary "joint venture" construction. This enables them to set up logistic and transport facilities, to spread the risk and to guarantee an appropriate infrastructure for large-scale cocaine distribution. The groups have created a network of cells in several Member States which are closely inter-linked and engaged in the distribution of cocaine once the drug has entered the European Union. The cells maintain firm links with indigenous groups who are engaged in the further distribution.

The splintering of traditional large scale groups and the use of "sub-contractors" - notwithstanding the spreading of the risk - means a certain loss of control and coupled with more people being involved makes organized crime groups more vulnerable to law enforcement activity.

Transportation of drugs has always proved to be a problem to organized crime groups. Routes are ever changing recently and the cessation of the Yugoslav civil wars has allowed increased activity along the traditional "Balkan route". The close proximity of places of production of synthetic drugs to the consumer markets eases distribution problems. This allows organized crime to limit investments in resources needed to set up complex routes.

There is an emerging trend of "sub-contractors", in which criminal groups hand over part of their activities to others with a view to spreading the risks. Independent groups offer their services to any criminal group. Others who own a fleet of ships offer transport facilities, irrespective of the type of drug and country of origin or destination.

Organized crime in the countries of the former Soviet Union (the so-called Russian Mafia) is constituted by a myriad of criminal groups (over 8000) of different origins and not always linked among them. It is characterised by the urge to prevail over the countries of the Eastern Europe (Bulgaria, Hungary, Czeck Republic and Poland). Some recent investigations, yet, led to the existence of a body standing above the small groups.

The criminal organisations of the former Soviet Union have huge finances mainly acquired by means of the "privatizations" followed to the change in the domestic political scenario. Currently, the so-called Russian Mafia controls over 50% of the banks of the former Soviet Union (the thirty bankers murdered in the latest years are a clear symptom). Criminal actions committed in Italy by citizens of the former Soviet Union - which have been found at trial - are characterised by (information source: Mafia Investigations Bureau, November 1998):

- (i) availability of outstanding finances;
- (ii) seeming lack of contacts with Italian criminal organisations;
- (iii) average young age of people involved.

Links between traditional Mafia type criminal associations and the Russian Mafia were found. Namely, with reference to purchases on the black market, members of the 'Ndrangheta and Camorra and Mafia gangs purchased exceeding quantities of roubles turned into a different currency on the international markets with a view to re-investing them in the purchase of real estate and companies in Russia.

Turkish criminal groups have engaged Central and Eastern Europe groups in the trafficking of heroin towards the European

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Union, Cape Verdians in intra-EU trafficking and domestic groups in the distribution at wholesale or street level. Turkish organized crime remains an active force in the trafficking of heroin throughout most of the European Union and has been identified as operating in twelve Member States. The groups have developed strong relationships with indigenous criminal networks and the distribution of heroin is often achieved through local groups. This variance illustrates the ability of Turkish criminals to adapt to local circumstances and requirements.

The proximity to traditional opium source countries (Iran, Pakistan, Afghanistan) and the bridge position between the Christian Western world and the Islamic East marked the role played by Turkey in progress of time as a transit country in the heroin trafficking directed to Europe (to Germany, Holland, France, Austria, Belgium, the United Kingdom, Sweden, and Italy as well).

The so-called Turkish Mafia has no pyramid-like structure. It is constituted by several criminal groups, each with a high number of associates belonging to a family-based structure. Some "families" are made up by persons of Kurdish ethnic groups (Turkish, mostly Iranian, Iraqi and Syrian) and are also involved in the drugs trafficking whose proceeds are mainly used for the so-called Kurdish cause, that is the liberation of Kurdistan. Prosecutor's Offices in several towns, mainly in northern Italy, conducted many investigations which stressed the unsteady operational links between the Turkish Mafia and Italian Mafia type criminal organisations among which the ones named "*Cosa Nostra*" and "*Camorra*".

A special focus must be placed on the various Slav ethnic groups scattered throughout the national territory and

responsible for the distribution of heroin originated from Turkey and Eastern Asia and helped by an extensive availability of fellow countrymen illegally immigrated.

The trend of this new threat can also be assessed through a compared analysis of the experiences in other European countries: actually, in Germany, Austria, Slovenia, Hungary and Romania the situation seemingly outlines some patterns which can be found in northern Italy since the storage of the heroin directed to central Europe in Hungarian, Romanian, Bulgarian and Slovak cities is managed by Albanians in close connection with Turkish people and fellow-citizens responsible for the trafficking also in the destination site.

In this respect, Albanians originated from Kosovo manage and control the Balkan route, on behalf of the Turkish yet increasingly autonomously, in all steps of the trafficking. Albanian Kosovar organisations play an ever-growing role in the distribution of drugs in Italy, Switzerland, Germany and in the United States. They are also becoming established in London where about 6000 of them can be found. It is a successful criminal network which has recently prevailed over any other criminal form by peacefully settling along with indigenous traditional groups step by step, and assisting them on an equal basis.

Although these criminals adopt a predator-like approach - since they are simultaneously involved in drugs trafficking, burglaries and prostitution - the primitive and unusual nature of their attitude makes them dangerous, unforeseeable and aggressive. Moreover, the religious factor amounts to an unprecedented uniting element among Albanian associations and between them and the Turkish ones, this latter

strategically controlling the interests connected to heroin.

On the one hand, the drugs trafficking is fed by the spreading of the Indian hemp cultivation in Albania yet, on the other hand, the strong links with other criminal entities in the Balkan area and in Middle East make it increasingly dangerous. Bulgaria is a punctual example. This country has attracted international traffickers of heroin and arms who benefit from a mild legislation brought about by a recessive economic situation.

The recent upheavals in the former Yugoslavia also contributed to bring about changes in the heroin routes and in the labour used by smugglers. A frequently used route departs from Sofia to Skopje (MKD), hence it carries on towards Tirana. From Albania, the drugs reach Italy through the fast motorboats also used in the cigarette smuggling which cross the Adriatic sea in a few hours and with low risks.

With a view to assessing the skills of the Albanian criminal organisation and their capability to establish connections with Apulian organisations operating in Montenegro, it is important to consider an agreement reached by them. According to this agreement, Albanian ships carrying illegal immigrants and women destined to prostitution, as well as marijuana and arms, dock along the Apulian coast south of Brindisi in order to avoid interference with the cigarette smugglers who exploit the area north of Brindisi for ships coming from Montenegro and to avoid the strengthening of police controls and the resulting damage to the detriment of that trafficking.

Albanian organisations also traffic in home-made marijuana. In southern Albania, indeed, the *cannabis indica*

cultivation is a mass phenomenon and it is not subjected to any control. Greenhouses have been arranged where Indian hemp ripens remarkably so obtaining a very high active principle. This production achieved an "epidemic" size, to quote the words used by the Prosecutor General of Albania in a survey on the situation.

Some investigations led to find trafficking of Albanian marijuana directed to Holland in exchange for cocaine meant for the Italian market. A few years ago this circuit had a low impact, yet today the type and volume of the illicit trafficking involving single individuals and Albanian criminal groups (drugs and arms trafficking, exploitation of prostitution, kidnappings for ransom, thefts and robberies, smuggling of tobaccos processed abroad, forgeries) allow us to affirm that the Albanian organized crime can be included among the prominent criminal phenomena, also due to its international connections with partner organisations operating in Italy.

In Italy, the Colombian cartels of Cali and Medellin - which have the availability of appreciable financial resources - have logistical centres which carry out drugs businesses with Italian organisations and attempt to implement the ultimate steps of refining on our territory.

With a view to a comprehensive analysis of this phenomenon, two levels of drugs trafficking must be distinguished. When big quantities are at stake, the Colombian cartels usually perform a drugs collecting function also in other source countries dealing with the management until the requesting market. The Mafia families based on those territories ensure the performance of business operations.

The cocaine shipments basically take place by sea, along routes used for a long

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time: some of them reach the United States, Canada and part of northern Europe, namely Belgium and the Netherlands, hence the goods are distributed in the rest of Europe. Other shipments originate from harbours in Venezuela mainly directed to Spain, which is the preferred country due to the linguistic and cultural proximity and to the existence of well-rooted criminal bases where significant quantities are stored while persons living there provide to ship them overland.

As to lower quantities, the Mafia families are not interested in the mediation because of the commercial travellers - i.e. Colombian citizens belonging to structures other than the cartels - who ensure an immediate supply. In such cases, small quantities are transported from the originating countries to Italy by plane and there is an increasing use of Nigerian persons as couriers; these persons are arranging real structures located in Italy and connected to their accomplices based in Latin-American countries.

In some cases, subject to the principles of the micro-market, cocaine is bartered with heroin or arms depending on the needs of consumers. With regard to the activities carried out by the Nigerian criminality in the drugs field, their organisational framework and their spreading in Italy lead us to affirm that Nigerians have no hierarchical structure, yet they amount to a set of groups made up by cells connected among them.

On an international scale, only in the mid '80s' did Nigeria show the first alarming forms of organized crime. Since the first arrest - which goes back to 1987 - the interception of Nigerian couriers carrying drugs consignments has been dramatically increasing up to 1990. Consequently, Police forces were convinced that they worked as low-cost labour for

criminal organisations originating from other countries or that they were low-profile players in a pushing activity self-managed or controlled by local traffickers. Then a reversal of trend was recorded and other African people were increasingly arrested because Nigerians - who had developed their importance and their business volume - had started to use them as couriers in their place so as to lead the controls astray.

The impact of this new criminality on drugs trafficking was the focus of a worrisome discussion held in Abuja (Nigeria) from 18 to 22 May 1992 during the meeting of the representatives of the African drugs services (HONLEA) who were aware that the inadequate law enforcement system of local police forces had a negative impact on the international community.

Nigerian organisations are mainly made up of persons of Ibo or Yoruba ethnic groups and they are involved in the heroin and cocaine trafficking; their wide scope extends to various countries: consumer countries such as Germany, Spain, Portugal, Belgium, Romania, United Kingdom, Austria, the USA, Croatia, Slovenia, Czech Republic, Hungary, Ukraine, Poland and Russia; source countries (Pakistan and Thailand) or transit countries (Turkey, India and Brazil). In Italy, the areas mostly affected are Naples, the coasts of Campania and the area around Rome.

Another foreign organisation active in Italy - although with a different degree of integration with domestic crime - is the Chinese one. The Triads, operating into the Chinese settlements in Tuscany and Lombardia, control the illegal immigration and some economic activities such as restaurants, leather and textiles processing. Chinese communities are

family-based organisations and therefore they prove to be resistant to external infiltration and dominated by the law of silence so much so that any possible control by the police is hardly feasible.

Data relevant to immigration show that in Italy the Chinese community is mainly constituted by citizens of the People's Republic, whilst Taiwanese and citizens of Hong Kong and Macao can be hardly found. Yet their limited number must not lead to under-evaluate their dangerousness due to the fact that some of the strongest "Triads" are based in Hong Kong, Taiwan and Macao. A kind of expertise in the international drugs trafficking by citizens of Hong Kong has been repeatedly reported, here the Triads have a strong presence. Reportedly, these organisations are connected to the "Golden Triangle" and have a growing influence in the southern Chinese provinces. In the Member States, Chinese ethnic groups are involved in the production of ecstasy and in the drugs trafficking towards the south east of Asia.

In the light of the aforesaid, there exist grounds to affirm the co-operation and/or the existence of business relations between them and the Chinese criminal groups in Italy. The action of the traditional criminal organisations (Mafia, Camorra, 'Ndrangheta, Apulian crime) is limited - as to the distribution in Italy - to big quantities upon the importation as mediators in the import-export activity.

In the most recent years, the mediation role played by Italian criminal groups in respect of the drugs trafficking favoured a sharp increase in the relations with similar foreign organisations skilled in the production and distribution of drugs and in the laundering of illicit proceeds. This was also brought about by the intercontinental scope of arms and drugs markets: the need to transfer outstanding

sums of money abroad in settlement of the illicit consignments. In many foreign countries, significant communities of migrants have been keeping close relationships with the originating families in progress of time which gave momentum to the management of the various Mafia interests.

Investigation conducted as of 1991 identified and affected some company-like structured organisations, mainly from Calabria, which had the availability of the primary supply channels and skilfully led - together with the producing Colombian cartels and the mediation of other Mafia groups - the import, transport, clearance through Customs and distribution by exploiting an extensive network of complicity while carrying out skilled transactions to launder the proceeds through the banks.

Recent inquiries conducted by the District Antimafia Prosecutor's Office in Naples found that the Camorra groups which traffic the drugs are the same as those which traffic trade mark-forged clothes (the so-called "*magliari*") by means of the same distribution channels, especially towards Germany and the Eastern European countries.

Apulia is the natural destination for the sea traffic originating from the Balkans and the Middle East and can be regarded as a meeting point of the Mafias due to its traditional willingness to provide criminal services to the benefit of non-regional and non-national Mafia organisations - it frequently was a reference point for illicit trades among Serbia, Albania, Macedonia and Montenegro aimed at by-passing the embargo ordered to the detriment of Serbia.

The Apulian coasts, the core function performed in respect of the routes of the

trafficking of drugs and arms originated from Eastern Europe, the mediation between the Italian and the Albanian crime - which by now have established interactive and systematic contacts - led to a fast development of the Apulian crime according to a pattern which include gangster-like and Mafia features.

Mafia's estimated all-embracing capability throughout our territory undoubtedly delayed a full awareness of the problem related to the infiltration in Italy by foreign criminal groups (Slavs, Turks, Colombians, Nigerians). Actually, in the originating areas, the traditional Mafia organisations still keep a full control of the territory and there is no room for others, save for co-operative and subordinate roles.

Yet in northern Italy, namely in Lombardia and Piedmont - major centres for illegal activities on a national and international scale, mainly in respect of the drugs trafficking and the resulting laundering of the proceeds - the integrated criminal pattern I was referring to is asserting itself. A pattern in which the various Mafia groupings peacefully share common interests and prefer economic interests to the traditional control of the territory and lay the foundations to host non-national organisations.

At first the Slav, Turk, Colombian and Nigerian logistical centres was aimed at an operational agreement with the Italian groups for the drugs trafficking, yet by now it represents the embryo of a more rational and systematic penetration into the Italian illegal market. The strong criminal repression implemented in the latest years to the detriment of Sicilian and Calabrian organisations - this latter detaining a nearly monopolistic power on the drugs trafficking - left unexpected room to foreign groups which in the past were restricted in a subordinate position. The overall

outline is therefore exceedingly unstable. The competitiveness to conquer new spaces brings about steady unrest among criminal groups resulting in uninterrupted clashes, slaughters and new alliances.

III. INSTRUMENTS AND COUNTER-MESURES

The seriousness of the criminal phenomenon of the international drug trafficking poses the priority need for an effective unitary international strategy divided into five areas of action already clearly indicated by the Convention of Vienna of 1998 as supplementary and indispensable:

- (i) action against the production sources and the first rings of the organized crime chain running this trafficking;
- (ii) fight to the smuggling of the so-called "precursors", i.e. those substances needed in the chemical processes to manufacture drugs;
- (iii) action against retailer consumption;
- (iv) international mutual legal assistance
- (v) fight to the money laundering of the drug trafficking proceeds.

In Italy the debate on the drug problem is hot, namely with reference to the treatment of the consumer (swinging from repression to rehabilitation) and to the possible amendments of the current legal system. Italy is one of the leading countries in the pursuit of such unitary international strategy which is unfortunately a long way from being implemented notwithstanding the efforts and the steady contacts among judges, prosecutors and judicial personnel.

I will focus my discussion on the criminal repressive system regarding the offences of drug manufacturing and trafficking and

I will leave out the current regulation of the consumer treatment. Following to a repealing referendum held in 1993, drug possession for personal use is no longer a criminal offence, it is a wrong punished by administrative sanctions applied by the prefect (suspension of driving licence, of licence to carry firearms, of passport, etc.).

Notwithstanding the repeal of 1993 - which partly resumes the principle of *differentiated strategy* which characterised the old law of 1975 based upon the distinction between trafficker, petty pusher and consumer - the current legislation mainly referring to the D.P.R. no. 309/90 has strongly repressive features. The base principle in force after the referendum of 1993 is the following: irrespective of the quantity, drug possession for the purposes of pushing is a criminal offence whilst drug possession for personal use is an administrative wrong.

Criminal repression of drugs can be divided into two major crime categories:

- (i) the offences of drugs manufacturing and trade;
- (ii) the offences of assistance or incitement to drugs use.

The system is made up by two criminal categories distinguished by the individual nature (article 73 D.P.R. 309/90) or the conspiracy nature (art. 74 D.P.R. 309/90) of the criminal conducts. Each of these sub-groups provides for different sanctions based upon the nature of the controlled substance depending on whether it is a heavy drug or a soft drug (this differentiation had been previously identified by the law-maker in appropriate tables attached to the law which can be amended or supplemented in progress of time). Sanctions punishing the conducts pertaining to the heavy drugs are considerably more severe.

Within the individual category, two types of criminal conducts can be listed:

- (i) the activity of drugs manufacturing and trade without governmental authorisation;
- (ii) the same activity performed having obtained the governmental authorisation but infringing its provisions.

The core rule set out under article 73 DPR 309/90 covers the individual conducts liable to criminal sanctions under a single provision. They pertain to alternative criminal model situations and thus to autonomous offences possibly committed in complicity and possibly linked by continuation (the pursuit of the same criminal design). The law provides for the following unlawful conducts:

- (i) growing
- (ii) production, manufacturing, extraction, refining
- (iii) offer or placement on sale (the mere affirmation to be able to procure drugs is punished)
- (iv) giving or sale (as to the former, a consignment for free is punished)
- (v) distribution
- (vi) trade
- (vii) procuring to others (mediation)
- (viii) import and export
- (ix) passing or shipping in transit
- (x) possession, not for personal use of course (material availability). Such sanctionative provision operates as a common element within the repressive system.

In applying this law, a special problem is posed by a common behaviour that is the group use of drugs. Prevailing court decisions held, in such cases, the complicity of all participants in the action of possessing the drugs purchased by either of them. Recently, yet, court decisions have

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held that the personal use of the quantity of drug consumed by each of them amounts to a mere administrative wrong save for the criminal liability of the person who procured the drugs for the common or group consumption.

Article 74 of DPR 309/90 sanctions the conspiracy for the purposes of drug trafficking. Within the framework of the varied approach arranged by the Italian law-maker in order to adjust penalties to the various degrees of seriousness of the offences involved, the conspiracy ranks at the highest level (promoters are liable to a term of imprisonment not less than twenty years; participants are liable to a term of imprisonment not less than ten years).

Such sanction was made mandatory for Member States by the Convention of Vienna of 1988, it covers any kind of conspiracy and is meant to repress any form of intervention and participation in the drug trafficking. It proved to be particularly effective with regard to the repression of the drugs production and trade, mainly to the detriment of criminal organisations operating at international level and it is frequently combined to other crimes such as the Mafia type conspiracy set out under article 416 *bis* of the Italian Criminal Code.

Within this association the following roles can be distinguished:

- (i) promoter (initiates the criminal association);
- (ii) establisher or founder (participates in the setting up);
- (iii) arranger (co-ordinates the activity of associates and ensures the operation of the structure);
- (iv) backer (invests capitals in the criminal association); this role is considered similar to the investment counsel and to the

person who works for the purpose of laundering illicit proceeds with a stable position within the organisation;

- (v) participant (generic membership).

Sanctions do not take into account the type of drugs involved in the trafficking operated by the criminal organisation and therefore it is the same with respect to both "heavy" drugs and "soft" ones. An extenuating circumstance is merely provided for in the - unlikely - case that the association is directed to commit "unimportant" actions. Special aggravating circumstances are provided when:

- (i) the association is made up by 10 or more persons;
- (ii) persons abusing drugs or psychotropic substances participate in it;
- (iii) availability of arms;
- (iv) adulterated or dangerously cut drugs are involved in the illegal trafficking.

A special extenuating circumstance bears significance rewarding the one who made efforts to avoid that the criminal action results in further consequences or to provide evidence of the offence. This provision is meant to encourage the person to repent after the commission of the offence and it can be applied to the conducts listed under article 73 as well as to the conspiracy under article 74. According to the law-maker's intent, such extenuating circumstance is directed to obtain a greater effectiveness in the repression of the activities connected to the drug trafficking and assumes that a considerable reduction of penalty may favour a helpful co-operation so undermining the structure of the criminal organisation which is difficult to attack from outside.

Implementation practices relevant to the offence of conspiracy for the purposes of drugs trafficking posed a significant problem in the identification of the court having local jurisdiction. The choice made by the law-maker to connect the local jurisdiction on uninterrupted offences (such as the conspiracy ones) to the location where the commission of the offence was initiated seemingly creates problems with regard to the association offences. In such cases the identification of the jurisdiction is no easy task due to the operational structure - which is not always restricted to a limited territory, but it frequently branches across various territories - and due to the "open" nature of these associations, always ready to receive new contributions and memberships.

In the search of ways to reduce the risk of different interpretation by judges, court decisions have seemingly disregarded the traditional standpoint according to which the commission of the conspiracy offence initiated when the agreement among the participants was reached, the achievement of the association purpose being unnecessary.

By now, court decisions have steadily held to favour the location of where the established structure is deeply rooted - the site where each offence committed in pursuance of the association's criminal design being unimportant - and the location where the association's strengthening and development was achieved. These arguments are certainly valid with regard to the Mafia type conspiracy - which is strongly linked to the territory - but they are hardly useful with regard to the conspiracy set out under article 74 of DPR 309/90. Here the decisions of the courts vary significantly.

On this point, it is worth considering a judgement recently pronounced by the

Italian Supreme Court with reference to a prominent organisation involved in drugs and arms trafficking at international level whose leaders always met in different countries to arrange their criminal strategy, neither location prevailing over the others as main site for the association's activities. The Supreme Court held the principle according to which - where a criminal organisation is made up by various groups operating on a wide domestic and foreign territory whose connections to achieve the association's purposes are not related to the territory - the main rule providing "the location where the commission was initiated" and if necessary the one referring to the "deeply rooted activity" shall be disregarded. Instead the supplementary rules set out under article 9 of the Italian Code of Criminal Procedure shall be considered (the ultimate site where part of the action occurred, the defendant's residence or domicile, the venue of the prosecutor's office which initiated the investigation).

IV. UNDERCOVER OPERATIONS IN RESPECT OF DRUGS AND ARMS TRAFFICKING AND MONEY LAUNDERING

Along with the substantive criminal legislation, the law-maker also provided a set of procedural provisions on drugs offences capable to enhance the effectiveness of prevention and repression of the illicit activities connected to the drugs trafficking. Such provisions concern the investigative activity of law enforcement forces, namely the law enforcement national services (State Police, *Carabinieri*, *Guardia di Finanza*, Mafia Investigations Bureau) responsible for carrying out co-ordinated inquiries on organized crime.

Article 97 of DPR 309/90 introduces in our legal system the *undercover agent* so

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allowing law enforcement forces to secretly infiltrate inside the illicit circuit and also provides the possibility of a simulated drugs purchase in order to obtain evidence as to the drugs offences without being liable to criminal sanctions. This provision was later extended -in 1992- to include investigations on money laundering and the result was a new legal excuse in respect of the undercover agent to facilitate the finding at trial of money laundering and of the re-investment of illicit capitals; with a view to this, the undercover agent favours, if needed, the replacement and re-use of money or other illicitly obtained goods or benefits and is involved in the sale of arms, ammunitions and explosives also in the capacity of middleman.

The execution of such activities shall be immediately reported to the competent prosecutor who - by way of a grounded decision - is entitled to postpone the seizure of the money, property or other benefits or of the arms, ammunitions and explosives as long as the investigation is completed also issuing orders to keep them, if needed. For the same investigative and evidential purposes, article 98 of DPR 309/90 provides the possibility to *delay or forbear such actions as the apprehension, arrest or seizure* so as to facilitate the identification of the drugs trafficking main units. The lawmaker took account of the great obstacles faced in the investigations aimed at finding this type of offences and identifying their authors.

An active role of the law enforcement forces has been cautiously provided in respect of the functioning of specific operations on matter of drugs and arms trafficking and money laundering with a view to acquire evidence. In substance, law enforcement officers are allowed not to interfere with the traffickers claiming to be purchasers, until the illicit transaction has been materially executed.

This situation cannot be included in the scope of the undercover agent although this behaviour - which is not liable to punishment - has some common features with it. After lots of uncertainties, Italian court decisions adapted to this matter the general principles adopted on the issue of the undercover agent. Under the former principles on the *agent provocateur*, the undercover agent's exception of criminal liability would require that he should not go so far as to causally contribute by his behaviour to the commission of the criminal action which should not be caused by him and should be conceived and executed by the will of the trafficker or the launderer.

The role played by the undercover agent, yet, cannot be limited to an activity of control, surveillance and restraint of the illicit action of others; it must necessarily involve the infiltration in a criminal organisation, the enticement to sell and, if necessary for the purposes of the successful operation, in a range of other illicit activities aimed at gaining the trust of the criminal organisation and closely connected to the trafficking for which the infiltration is allowed. Therefore, the purchase of drugs and arms as well as the use of forged cover documents or the carrying of unlawful arms cannot be punished.

Because the introduction into the unlawful drugs and arms market and the contact with the people involved imply many risks - in terms of the agent's possible involvement and of his safety - the law provides for a range of precautionary requirements. The lack of either of these requirements results in the loss of the legal excuse.

First of all, agents are required to be highly and specifically trained. The undercover investigation shall concern

offences listed by the law. In case of concurrence of crimes, of course, the operation can legitimately take place provided that the offences which are being committed include a violation of law on drugs, arms or money laundering.

In respect of money laundering operations, the responsible officers are allowed to receive and replace money, goods or other benefits originated from Mafia crimes as well as to act in such a way as to hamper the identification of their origin or as to allow their use.

The power to order the delay in the execution of apprehensions, arrests or seizures falls into the jurisdiction of the prosecutor who co-ordinates the inquiries and who authorized the undercover operation. This provision can be applied to the drugs and arms trafficking as well as to the action against money laundering. In urgent cases, this decision can be taken by the police officers involved who shall give immediate notice, also by phone, to the prosecutor - who can validate the decision or take different measures - and send him a grounded report within 48 hours. In respect of drugs, similar notice shall be sent to the *Direzione Centrale Servizi Antidroga* (National Drugs Services Bureau) which is responsible for the co-ordination of operations with police bodies from other countries interested in the trafficking.

The two notices have different purposes. The information sent to the prosecutor ensures an immediate control on the operation and can result in the adoption of different measures, if any, also in connection with other prosecutors. In fact, the prosecutor responsible for the supervision on the operation shall give notice to his partners of the measures adopted by him, in respect of the in-coming and transit sites on the domestic territory and of the site where the operation is

expected to be carried out so that they may be able to control and take action in their turn.

The information sent to the National Drugs Services Bureau allows the adoption of co-ordination measures among the activities of the various bodies responsible for control and investigation. These activities are absolutely necessary, above all in case of transnational controlled delivery operations. The controlled delivery was introduced in international legislation by article 11 of the UN Convention on drugs trafficking adopted in Vienna on 20 December 1988, ratified in Italy in 1990⁵.

The judicial acts which can be delayed are rigorously indicated by the law and include the apprehension, the arrest, the seizure of the *corpus delicti* and of the things pertaining to the offence. The reason for this postponement lies in the need to acquire significant evidence or to identify and apprehend the authors of the offence. The reference to the need and significance of evidence highlights the exceptional nature of this provision, which shall be applied only when any other investigative activity already carried out proved to be unsuccessful or insufficient.

Moreover, the law allows police officers to forbear or delay judicial acts falling into their own jurisdiction other than the

⁵ With regard to the exact notion of "controlled delivery", reference must be made to the definition included in the Convention of Vienna (art. 1 G) where it is indicated that the expression means "*the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences*"

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apprehension and the arrest - i.e. searches - provided that immediate notice be sent to the prosecutor. This power is also vested in the Customs authorities that play a major role in the control of the international illicit trafficking at frontiers, ports and airports.

While the execution of such measures as apprehensions, arrests or seizures can merely be delayed, in the cases listed above the "forbearance" is also provided for. The difference is explained by the fact that judicial acts are necessary procedural activities which can only be delayed, whilst some police or customs acts can be forborne without prejudice to the procedure.

Article 99 of DPR 309/90 regulates the *search and apprehension of ships and aircrafts* suspected to be used in drugs trafficking. Under this rule, the Italian warship or patrol boat crossing in territorial waters or on the high seas a domestic ship (even a pleasure craft) suspected to carry drugs is allowed to stop it, visit and search its cargo, apprehend and lead it to an Italian harbour or to the closest foreign harbour where a consular authority can be found. The same powers can be exercised on board non-national ships in territorial waters and, in compliance with the international law regulation, also outside the territorial waters. The provision concerns aircrafts as well. The reason for this significant enhancement of the controlling powers vested in the law enforcement forces lies in the fact that Italy imports drugs and that vessels and aircrafts are the most frequently used means of transport in this illicit trafficking.

Article 103 of DPR 309/90 extends to the *Guardia di Finanza* the power to control and inspect in the premises subjected to customs control, a power which at first was only vested in the customs authority; moreover, it entrusts any law enforcement

force with outstanding powers to control, inspect and search with respect to the activities for the prevention and repression of illicit drug trafficking also outside the customs areas. These provisions undoubtedly increase the powers vested in the law enforcement forces as to the prevention activity aimed at the detection of drugs quantities.

Along with these specific provisions, with regard to the drugs offences – and to the other organized crime offences alike - the rules contained in the code of criminal procedure provide more extensive limitations as to the admissibility and the duration of telephone or computer tapping and electronic surveillance; it also provides longer time-limits in the conduct of pre-trial investigations and in the enforcement of precautionary measures on the person, if compared with other offences.

In respect of procedural instruments, moreover, it is worth noting the provisions directed to enhance the prosecutor's investigating powers. The Italian legal system entrusts the prosecutor with autonomous investigative powers combined to those of law enforcement in the search of the report of offence as well as the power to direct law enforcement forces in the investigations. A special propelling activity as to the intelligence and investigations in the field of the fight against *international drugs trafficking* is performed by the *Procura Nazionale Antimafia* (National Antimafia Bureau).

Starting from information on the arrest of Italian citizens in foreign countries on account of drugs offences, this Bureau acquires any possible information relevant to the investigations under way in the foreign countries where the arrests have been made in order to take the appropriate steps to propel and co-ordinate the inquiries in Italy on the persons arrested

and on the criminal organisations they belong to, if any. In this respect, the Bureau acquires the records originated in the foreign authority on the basis of which reports had been made.

On the basis of these records, the National Antimafia Bureau first makes a survey of the overall information available so as to obtain a comprehensive outline of the facts and then possibly undertakes to propel and co-ordinate the investigation in Italy. Investigations are specially initiated to find out:

- (i) whether the person is currently in custody or has been released;
- (ii) which is the prosecuting foreign judicial authority or law enforcement office;
- (iii) which is the object and the stage of the relevant proceedings;
- (iv) whether there exist documents already obtained as to the facts;
- (v) whether some features can be detected being directly or indirectly connected to money laundering;
- (vi) any useful datum on the person arrested.

Information obtained are entered into the databank of the National Antimafia Bureau and a control is simultaneously made to find whether the reported persons can already be found in the judicial records previously entered into the computer system so as to obtain a comprehensive outline pertaining to each person.

This undertaking is bound to be enhanced since the *Direzione Nazionale Antimafia* - which plays a leading role in the co-ordination of investigations and prosecutions in the Italian procedural system - has been identified by the Ministry of Justice as the *central point of contact* within the European Judicial Network

established by the Council of the European Union through the Joint Action of 29 June 1998 in order to promote the judicial co-operation among Member States

V. CORRECTIONAL MEASURES

Subject to the sacred rights of the person who is in custody, the Italian experience shows the importance of the legislation relevant to the correctional field with a view to the fight against organized crime.

In the last decade, this system has undergone multi-functional changes, a distinction has been made between ordinary in-mates and in-mates linked to organized crime and, within them, between those who cut such ties (possibly co-operating with justice) and those who still keep them.

Briefly, the Italian correctional system is currently based upon three principles corresponding to the three purposes of the sentence: punishment, re-education, benefits. This multi-faceted system allows a strategic approach in view of the needs in the fight against organized crime based on a standard implying the individualisation of the sentence depending on the specific personal conditions of in-mates.

It is necessary to prevent the most dangerous people from keeping on directing and managing the illicit activities also from the jail by way of contacts with the outside criminal environment. In this respect, in 1992 - following to the Mafia massacres - a rule was introduced into the Italian correctional system - Article 41 bis of the Penitentiary Law - aimed at efficiently marking the differentiation among in-mates referred to above.

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A class of special in-mates was introduced, in respect of whom the law allows to discontinue the ordinary standards of treatment (periodical talks with relatives, "social" activities inside the jail, contacts with other in-mates) due to serious public order and safety reasons allegedly connectable to a close link between those in-mates and the criminal organisations they belong to.

Yet, the enforcement of this separate treatment - which has a six-month duration and can be extended - is not left to the discretion of the Correctional department and therefore requires a necessary computer-based co-ordination between the Ministry of Justice and the prosecutors so that the measures enforcing the special correctional regime be adopted on grounds of established and adequately justified reasons.

One of the typical traits of a Mafia type conspiracy is the persistence of the association bonds even under custody. Indeed, the subject under custody still keeps the role played within the organisation. This factual element was unanimously and indisputably reported by any co-operating witness and highlights that - failing a clear choice to opt out of the conspiracy - the in-mate's decision-making power on the organisation's action remains unchanged. Moreover, when some of the in-mate's tasks are temporarily assigned to a person who is free to move, this is anyhow insignificant since the in-mate is constantly informed of what happens outside the prison and can fully and actively resume his role whenever he is allowed to by external conditions.

Indeed, it is proved that these links have an operational nature and, vis-à-vis the heads of the criminal association who are in custody, they constitute a necessary requirement to keep the control over the

illicit activities and, often, to preserve the criminal structure itself. To the member of the *Camorra* organisation, keeping contacts with the outside criminal world is a rule which has no exceptions, a rule applied on the occasion of meetings at recreation times as well as during the talks with relatives; they also use other in-mates' talks with a view to a faster exchange of information from the inside to the outside of the prison.

Providing the grounds for the initial proposal to apply the special detention regime is undoubtedly simpler than providing the grounds to extend it: this is because, for the purposes of the first application of the special custodial regime, an adequate indication of the charges, precautionary measures and convictions imposed is sufficient since these measures usually mention the role played by the in-mate which shows his present social dangerousness and the one he could possibly exert inside the prison. For the purposes of the special regime effectiveness, it shall be restricted to the following categories of in-mates:

- (i) heads, arrangers, promoters, heads of the organisations set out under article 416 bis of the Italian Criminal Code and article 74 of DPR 309/90;
- (ii) principals, arrangers, financiers in respect of murders, massacres, etc. committed by the use of the association bond;
- (iii) arrangers of the offences set out under article 630 Criminal Code, aggravated extortion;
- (vi) authors of the above-mentioned crimes when such a role is played uninterruptedly and in a professional way;
- (v) *liason* members with governmental corrupted areas, masonry, subversive or terrorist

organisations, with foreign military or political groupings involved in subversive or terrorist activities;

- (vi) subjects involved in the international laundering of illicit proceeds at high-ranking levels or playing prominent roles.

The grounds provided to justify the requests and opinions on the extension of the regimes already applied shall undoubtedly be stricter because the more the need for the persistence of the special custody regime is stressed, the stricter the grounds accompanying such a request.

In these cases, in addition to the elements listed above, other different elements shall also be indicated not depending on the former. Mention shall be made about these latter, an indication which shall not be comprehensive yet useful as an explanation. Namely, the following criteria shall be stressed:

- (i) carrying on of the criminal activities, the control of the territory, the operational connections by the organisation the subject belongs to (which can be inferred from police investigations);
- (ii) presence of prominent fugitives belonging to the said organisation, with the resulting danger of exchange of messages and information between the associated members inside the prison and those outside;
- (iii) persistence of leading roles, or anyhow outstanding roles, within the organisations also following to the onset of custody (which can be inferred from co-operating witnesses' statements, from the leading role played and/or acknowledged at trials in courts);

- (iv) carrying on of supporting activity also inside the prison which can be inferred from new affiliation ceremonies, promotions, etc (as resulting from co-operating witnesses' statements, electronic surveillance even inside prisons, and so on);
- (v) established activity of tampering of evidence or attempts;
- (vi) any pending criminal proceedings versus the in-mate and, if this is the case, the court venues dealing with them so as to verify the possibility of transfer from a correctional institution to another with the consequent possibility to have contacts with other in-mates in custody in other places or with the external environment;
- (vii) the occurrence of facts outside the prison (Mafia murders or massacres, kidnappings for ransom, tampering of evidence, etc) from which it can be inferred, also on the basis of circumstantial evidence, that they were ordered by in-mates.

These elements, of course, shall not always bear a real evidential worth - since in this case we would be faced with the finding of criminal events - the mere proofs, even simple ones, are sufficient and adequate to ground administrative measures.

In-mates still linked to organized crime - yet not subjected to any special custody regime - receive a correctional treatment whose function is to severely punish by restricting personal freedom, compared to the one envisaged for ordinary in-mates, whose function is to re-educate and socially rehabilitate them.

Finally, an exception to this strict regime is only provided in respect of in-mates that

co-operate with justice, a circumstance that - by itself - shows that the previous links with the criminal organisations have been overcome. Prisoner witnesses benefit from a *rewarding* treatment mainly constituted by "softer" prisons and by non-custodial punishments which are usually granted to ordinary in-mates (external employment, reward leaves, placement under the supervision of a social worker, probation).

The worsening of the correctional regime in respect of the *hard-liners*, and the simultaneous extension of the ordinary benefit regime to co-operating witnesses, produced remarkable positive effects with regard to the safety and order inside and outside prisons (prohibition to the exercise of power by the most dangerous in-mates inside prison and in the external criminal environment) and with regard to the investigative and procedural aspects (increased co-operation with justice).

Furthermore, a special *extenuating circumstance* (reduction by a half to two thirds of the penalty) bears significance rewarding the one who made efforts to avoid that the criminal action results in further consequences or to provide evidence of the offence. This provision is meant to encourage the person to repent after the commission of the offence and it can be applied to the conducts to a Mafia-type organization or expressive of organized crime. According to the law-maker's intent, such extenuating circumstance is directed to obtain a greater effectiveness in the repression of serious offences and assumes that a considerable reduction of penalty may favour a helpful co-operation so undermining the structure of the criminal organisation which is difficult to attack from outside.

VI. THE IMMUNITY SYSTEM AND THE WITNESS PROTECTION PROGRAMME

The matter of co-operating witness is reputedly exposed to tension and diverse assessments. Some of them are connected to the protection system and, in this respect, there is concern that it might collapse due to the significant number of subjects protected. Other ones can be related to the procedural aspects of the statements made by these subjects and, namely, to the nature of the checks that shall corroborate them and to their outcome, in case they are made during the stage of pre-trial investigations and cannot be verified during the examination at trial. Witnesses who co-operate with justice constitute a necessary and irreplaceable tool in respect of organized crime proceedings. Their contribution has been precious with a view to the knowledge of the deep Mafia world and mainly to the final conviction of countless organized crime members.

In Italy, the use of the statements made by a co-operating co-defendant at trial goes back to thirty years ago, yet only in 1991 was the need to arrange a protection programme for these persons - as well as for non-criminal witnesses - regulated by a legislation at the very same time when the procedural system was reformed on the wake of the adversary system in force in common law.

The new procedure, indeed, stressed the need for a serious protection and assistance programme in respect of co-operating witnesses considering that the basic principle at its foundations is that evidence is formed in a contentious proceeding between opposing parties. Thus, the accusing statements made during the pre-trial investigations have no evidential value if they are not confirmed at trial.

Hence, the need to protect and assist those who make significant statements for the purposes of the investigation and the following trial in result of which they - and their relatives as well - are exposed to a serious and present danger of violence or threats aimed at preventing them from witnessing at trial or compelling them to withdraw the charges.

The responsibility to subject a person (and his family members) to the protection programme - and to keep them as long as it is necessary and possible - is vested by the law in a range of bodies and authorities including the Chief Prosecutors or the Head of the Police (who have the power to recommend and propose); the National Commission of the Ministry of the Interiors which adopts the measures related to the special protection programme; the National Protection Service which deals with the special programs decided by the Commission and manages the material execution of the programme by its own branches - the Protection Operational Units - throughout the domestic territory.

Prior to any recognition of the co-operating witness *status*, the statements are deeply analysed (or at least they should be) and immediately subjected to a first check including the interactive comparison between the judicial information and the overall data owned by the police forces and the National Antimafia Prosecutor. This system has been in force for a decade (the law on co-operating witnesses goes back to 1991) and I could talk for many hours of countless experiences I made. Yet, I believe it is more useful to draw some lessons with reference to the most urgent problems relevant to this system which is going to be dramatically amended very soon.

Sensibility and legality shall be always applied in respect of the system's implementation practice on the basis of

four chief guidelines: 1) personal safety of the co-operating witness; 2) psychological safety of the co-operating witness; 3) security of investigations; 4) third-party position in the management of the collaboration, which is essential to prevent an instance where the police may suggest the answers to the suspect (principle of separation between protection and investigative agencies).

The physical safety of the one who declares to be willing to co-operate with justice shall be safeguarded, as a rule, by restricting the person in suitable correctional institutions purposely identified and equipped by the Correctional Department; non-correctional institutions should only be used in those cases where this is absolutely impossible and there exist serious, urgent and grounded safety reasons.

In conditions of "differentiated" custody in jail, the co-operating witness shall be granted the best possible conditions to ensure the psychological safety necessary to carry on the co-operation. In this framework, the safeguard and assistance - also on an economic level - of the family are essential, although exceeding requests - compared to the objectives and limits of the protection - shall not be granted.

The certainty of the investigations may actually originate from these two requirements since the gathering of statements and the necessary checks will be possibly carried out in due course, resulting in a positive evaluation of the collaboration's truthfulness and reliability, which is the necessary requirement for the application of the special protection programme. Such an approach, finally, implies a total third-party position in the management of the co-operating witness and separates the protection responsibility from the investigation responsibility right

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from the beginning, to the benefit of either one and of a correct exercise of jurisdiction.

The reform of the legislation on co-operating witnesses' protection and punishment - which is going to be passed by the Italian Parliament - introduces significant amendments without radically changing the major role played by co-operating witnesses in the fight against organized crime and aims at a more sensible protection system, on the basis of the said guidelines, and of operational needs felt by the practice for a long time. In short, the new legislation is founded upon the following further principles:

- (i) security of the co-operating witness;
- (ii) guarantee for the accused;
- (iii) truthfulness of evidence;
- (iv) separation between the protection and the benefit;
- (v) different treatment for witnesses in respect of subjects originating from the criminal milieu.

The first aspect radically affected by the bill involves the admission to protection. This is limited to subjects making statements on terrorist or Mafia offences. The new law outlines the quality aspect of the co-operation more precisely than it does in the current legislation.

The co-operation shall be marked by its significant importance in respect of the stage of pre-trial investigations and the trial stage. The concept of significant importance is linked to the inner features of the statements made, which shall be reliable and comprehensive. For the purposes of the assessment of the dangers run by the person, the law-maker also indicated such standards, as the worth of the collaboration and the intimidation capacity at local level of the criminal groups accused.

From this point of view, a kind of "two-way" protection measure is introduced. The special protection system is basically granted in those cases where the statements made are indispensable for investigations on the functioning, strategies and branches of Mafia type or terrorist-subversive criminal organisations, as well as on their equipment and properties.

In other cases, reinforced common measures are applied which ensure the co-operating witnesses' safety and provide, if necessary, to support them although they do not amount to a real "life style" as in the case of the special protection programme. The latter is linked to its original nature of exceptional legal protection tool which, in addition to the co-operating witness protection, promotes his prospective social rehabilitation by means of a set of administrative and financial measures.

The "reinforced" common ordinary measures should consist of temporary safeguard services in respect of the co-operating witness and the family members. They are not disciplined in detail by the bill since it is understood that this function might be accomplished by a later regulation. This regulation shall be absolutely necessary if we consider that the crisis of the current system was indeed brought about by the malfunctioning of the ordinary protection measures which determined the remarkable increase in the number of special protection programs. The entry into force of the new legislation should allow a stricter selection of collaborations and the special programme (whose implementation starts a complex mechanism) would only be applied to cases which cannot be dealt with differently.

The second aspect, dramatically affected by the bill, is the procedural and beneficial

treatment of co-operating witnesses. The bill is based on the principle according to which the entitlement to the special protection programme does not automatically bring about the granting of punishment benefits - as it occurs today - which instead shall be linked to the conduct.

In the past years, the admission to the special programme and the granting of the benefits were marked by a nearly automatic cause and effect relation. This trend may bring about a malfunction in the legal safeguard mechanism due to two factors. The first one includes the submission of proposals for admission into the protection programme aimed at obtaining non custodial punishments which, in respect of co-operating witnesses, are granted in derogation to the current provisions on the limits of sentence; the second one includes the increasing difficulty in the surveillance of the co-operating defendants admitted to the said non-custodial measures, as a result of the camouflage mechanisms adopted to protect them (today the system does not even allow the prosecutor or the judge to know whether the co-operating witness has had contacts with other co-operating witnesses, when the protection takes place outside prisons).

The bill is aimed at diminishing such risks by clearly separating the admission to the protection programme from the benefits. This latter can be granted after service of at least one-fourth of the sentence imposed or after 10 years in case of life imprisonment. This provision favours the largely felt need that the liability for serious offences should not be annulled due to the collaboration and the need to grant benefits exclusively to those subjects whose collaboration is validated by judgements.

The new law also subordinates the possible withdrawal of pre-trial custody in jail to the lack of current connections with the Mafia or terrorist organisation, to the compliance with the engagements made upon the subscription of the special protection programme and to the significance of the co-operation. The bill purposely provides that the co-operating witness shall undertake not to make statements relevant to the facts covered in the proceedings where he has co-operated to bodies other than the judicial authority, the police forces and his own defence counsel and not to meet or contact other people who co-operate or are involved in crime.

The stricter admission to non-custodial punishment is counterbalanced by the provision under which co-operating witnesses in custody shall be restricted in adequate units inside the correctional institutions depending on different approaches which may favour the social rehabilitation. This differentiated regime of custody in jail shall be arranged so as to hamper the statements agreed upon by more co-operating witnesses or suggested by external people. Such a solution - if it is approved - would result in the ballooning of the number of co-operating witnesses subjected to pre-trial custody in jail and thus would require the arrangement of adequate equipment.

Under the condition of a "differentiated" custody in jail, the best possible conditions to ensure the statements' truthfulness shall be guaranteed. In this respect, an adequate provision exists under which the in-mate is not allowed to have investigative talks with police bodies - at least until the record of the co-operation is drawn up - and neither is he allowed to meet other co-operating witnesses and receive or send mail outside, save for purposes connected to protection needs. The withdrawal of the

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pre-trial custody in jail or the replacement by house arrests shall be possibly granted only after a first instance judgement and only after the *significant importance* of the collaboration has been found by the judgement. In any case, the co-operating witness shall serve at least one third of the sentence in jail.

One more innovation introduced by the bill is the identification and acquisition of properties illicitly obtained by co-operating witnesses. Co-operating witnesses shall declare in the record - which shall be drawn within six months from its beginning - all the properties owned or managed, even indirectly, and shall undertake, upon the admission to the protection system, to hand over the money and transfer the assets illicitly obtained, even if they own them indirectly.

The reform which is going to be passed also regulates the destination of properties transferred by co-operating witnesses or anyhow forfeited. For the sake of accountability, the regulation on the forfeiture of Mafia members' properties was also extended to properties forfeited to co-operating witnesses with no reductions or exclusions. A quota of the properties seized and forfeited - identified by separate inter-ministerial decrees - shall be destined to the implementation of special preventive measures as well as to a Solidarity Fund for the victims of offences.

The bill also focused on the complex issue of the social rehabilitation of protected people. In this respect, some inter-ministerial shall be purposely issued and they will indicate ways to keep the employment or the transfer to other venue, specific measures for the assistance and social rehabilitation of minors and witnesses included in the programme.

The current system does not separate the position of persons originating from the criminal world and the position of those who do not belong to that world and are merely victims, witnesses or persons informed about criminal facts. This deficiency heavily contributes to refrain from collaboration, mainly in those social contexts where the law of silence has a major impact.

Needless to say, major progress in the fight against organized crime might be obtained by attacking the settlement of criminal groups on the territory. In this respect, a significant approach would imply encouraging citizens to report intimidation exerted by delinquent groups to the law enforcement authorities, mainly those groups involved in extortion and drugs trafficking also by means of an economic support, as I will mention later with reference to the Solidarity Fund for the Victims of Extortion and Usury.

The reform of the system provides that protection measures to the benefit of witnesses be applied even in cases when their statements do not amount to significant importance and are not referred to terrorist or Mafia offences provided that they expose the person making the statement to a serious and present danger. The National Commission - which is the body responsible for the admission to protection programs - shall ensure witnesses such economic support as to guarantee an *adequate way of life*. The Commission shall also favour the rehabilitation of these persons into the economic system by indicating ways and necessary funds.

A special provision deals with remote hearings with co-operating witnesses through audio-visual equipment (the so called video conference), which is regulated by the recent law no. 11 of 7 January 1998.

The text extends the use of the videoconference to all depositions by co-operating witnesses on the presumption that, being a tool directed to protect the witness, it shall be increasingly used in respect of people exposed to exceptionally serious danger.

Finally, amendments to the code of criminal procedure are envisaged with reference to the defence counsel's incompatibility. Specifically a rule will provide the incompatibility of a common defence for more defendants who made statements concerning the liability of another defendant in the same criminal proceedings or in other connected proceeding. These provisions are clearly intended to ensure the truthfulness of statements and to avoid undue influence by a common defence counsel - as it occurs sometimes.

Under the legislation in force - and also under the provisions contained in the bill currently under consideration by the Parliament - the National Antimafia Prosecutor has the responsibility to express opinions as to the admission of a person to the protection programme, as to the discontinuance or modification.

The large number of co-operating witnesses - and their family members - protected, the range of measures concerning them, as well as the exceptional confidentiality of the matter, led the National Antimafia Prosecutor to establish a Department equipped with a computer system so as to list and easily retrieve all the records relevant to a subject. Upon expressing the opinion, he acquires all the possible information on the criminal facts referred by the person, the reliability judgement issued by prosecutors as to the statements, as well as the path followed by the co-operating witness after the admission to the protection programme.

My Bureau is also involved in an analysis aimed at detecting the most common violations of the programme rules and identifying the "sanctions" which shall be proposed to the Ministerial Commission upon expressing the opinion so as to avoid inequalities. The establishment of the Department is therefore aimed at pursuing this target.

VII. TECHNICAL INVESTIGATIONS - ELECTRONIC MONITORING

Co-operating witnesses remain a fundamental tool in the fight against organized crime, as it was recognised by prosecutors and law enforcement officers of E.U. Member States during a meeting recently held in Rome upon the initiative of the ministries of Justice and Interiors. Yet, on the one hand, it is absolutely necessary to identify adequate checks for the statements and, on the other hand, prosecutors are fully aware that the *corroboration* can be also obtained by technical investigations and that this latter can provide, by themselves, evidence of guilt in respect of serious offences.

General complaints arise due to the insufficient tools in the availability of prosecutors and police forces, tools which are necessary to carry out this type of investigation. For instance, this occurs in respect of wiretapping operations, due to the communication companies' inability to execute all the requests made by the judicial authorities. In this sector, the National Antimafia Bureau performs a regulating function establishing priorities more connected to the urgency of requests than to the chronological order - for this reason, dangerous fugitives have been recently apprehended and authors of heinous crimes have been discovered immediately after the fact.

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The shortage of equipment for expert technical operations led the district prosecutor offices to turn to private companies (acting as advisors) which own such equipment resulting in a dramatic increase of expenses. The issue of technology yet affects a more general problem. Today technology provides the criminal world with a wide range of tools in respect of communications, of the movement of money flows, of money laundering as well as in respect of paedophilia (ex. Internet). Technological progress cannot be arrested, of course, yet it takes licit or illicit forms depending on the uses.

Yet, while criminal groups - assisted by experts in various sectors - are always ready to use new technologies for their criminal purposes, the State cannot promptly identify the technical tools to fight the misuse of new developments, which is quite discouraging. Hence, the idea that the Ministry of Justice might set up a technical and scientific pool with highly qualified bodies capable to foresee the technological developments in the relevant fields and arrange the adequate "defences".

One of the most serious and urgent problems we are faced with concerns telephone interceptions. A widespread investigative tool is the wiretapping of international calls from unidentified phone numbers in Italy to a foreign identified phone number or to a whole district abroad, i.e. to foreign phone numbers identified by the first figures which are the same in the whole number (so-called *re-routing*). Wiretapping operations are carried out by Italian phone companies which act as carriers of communications originated in Italy to foreign countries.

On the matter of interception, the E.U. Convention on mutual assistance signed by

the fifteen Member States on 29 May - which has obviously not been ratified by Italy yet - contains a rule (art. 20) on whose heading is the "*Interception of telecommunications without the technical assistance of another Member State*" which provides that "where the telecommunication address of the subject specified in the interception order is being used on the territory of another Member State", the intercepting Member State shall inform the other Member State before executing it (save for the case in which it is not aware that the intercepted person is abroad; in this case it shall inform the other State as soon as he knows it). The rule has apparently been conceived with regard to satellite interceptions and of electronic surveillance in cars, yet it might be applied to the re-routing as well.

If we agree that the Convention does indeed regulate the case of re-routing, we support the argument according to which - irrespective of the ratification - this kind of interception does not fall into the domestic jurisdiction. Then the point is to estimate the risk that re-routing interceptions may not be used and the possibility to immediately turn to the legal assistance. Secondly, to assess whether the legal assistance should be provided by way of rogatory letters or by the far simpler form indicated by the European Convention, yet to be ratified. The Convention, of course, only concerns the EU countries and thus the rogatory letters would still be necessary in respect of the rest of the world.

No doubt exists as to the value to be attached to the privacy which affects the area of the person's character. Yet, the safeguard of privacy shall be counterbalanced by the safeguard of the effectiveness and confidentiality of investigations and the protection of the community from crime. I can quote an

example relevant to the situation in Italy where the two opposing needs clash in respect of the debate on the apparently opposed needs to relieve the correctional system by decreasing the number of in-mates, without waiving to the principle of the sentence enforceability, on the one hand, and the heavy demand of security by the society, on the other hand.

Needles to say, a multi-function correctional system which requires benefits for good behaviour in-mates is indispensable. Controls are needed which, for obvious reasons, cannot be exerted directly, but through electronic means. Yet this is not enough. A deterrent is also needed to punish those who escape controls: for instance, an increase of the sentence and the ban to obtain other benefits.

This form of electronic monitoring is no violation of the in-mate's privacy. This assessment would be erroneous. Actually anyone should not feel free in a cell accommodating eight persons, yet would rather stay at his own place wearing a device which neither intercepts one's voice nor "sees" what one is doing but only monitors one's movements.

The home-detention bracelet, which allows to remotely monitor a person subjected to correctional regime, is a very simple instrument: a transmitter, inserted in a box as big as a cigarette packet, is fastened to the in-mate's ankle by a plastic band. The device sends signals to a computer connected to a phone line. If the in-mates leaves the surveillance area, an alarm received by the monitoring centre immediately goes off. The same if the "virtual prisoner" tries to tear off the plastic band. The system works thanks to a one-year battery. The costs amount to an average 10,000 lire a day and in the United States, for instance, they are supported by

the in-mates themselves who choose to afford their conditional release.

In all countries where the "electronic monitoring" has already been tested, its use has been restricted to final convicts. As a point in fact, this measure is deemed too "harmful" to be applied to pre-trial custody in jail, that is in respect of a person for whom the presumption of innocence still exists.

In Italy the monitoring through home-detention bracelet should be tested in a while since it has already been approved by the Ministry of Justice. The project should be referred to two categories of sentence enforcement:

- (i) as an alternative to short sentences restricting personal freedom (today in Italy in respect of terms of imprisonment less than three years, it is already possible to challenge the warrant of arrest and benefit from house arrest pending alternative measures);
- (ii) in the late stage of execution before the release from jail (for up to six months).

The sanction consists in the restriction of the freedom of movement; the convict is assigned to his/her own abode and is allowed to leave it only at certain times fixed by the decision agreed with the body responsible for the execution.

When the terms set by the execution programme are not complied with or the monitoring system has been dodged, sanctions shall be adopted the most serious of which being the withdrawal of the benefit and the re-enforcement of the custodial sentence. o be entitled to benefit from this new way to serve the sentence, the convict shall:

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- (i) express his/her consent;
- (ii) have an accommodation equipped with a fixed phone line;
- (iii) obtain the agreement of any adults who live with him/her;
- (iv) be included in a working, training or voluntary activity keeping him/her busy for at least 50% of his/her time;
- (v) be subjected to a social service programme covering various needs (ex. regular controls for drugs or alcohol abuse);
- (vi) contribute to the execution expenses to a daily percentage extent.

Once the principle according to which the house-detention bracelet does not undermine the privacy at all - and that it is to be preferred to the pre-trial custody in jail - is accepted, this tool might be applied also as a non-custodial precautionary measure to subjects under house arrests. This solution would allow to pursue a two-fold objective: to thin out prisons and, at the same time, ensure a stricter control on the execution of house arrests which - as it occurs in Italy - is entrusted to the occasional control by the police forces spread out on the territory and is too easily exposed to be avoided.

**VIII. ECONOMIC ORGANIZED
CRIME AND MEASURES ON
PROPERTY**

A general forward on the relationship between entrepreneurs and crime is necessary. It is useful to stress that the relationship between organized crime and the crisis of legal enterprise is a three-stage process. In the first stage, the enterprise is in difficulty when the crime works as a negative external (or environmental) factor, systematically destroying profits through extortion and through serious distortions of competitive mechanisms, resulting in

forms of unfair competition, which may go through the illicit financing and the corruption. Faced with such distorting instruments, the entrepreneurs' attitude is conflicting or passive. However it is not collaborative.

In the second stage, the legal enterprise - already on the wane or in liquidity crisis - is definitively undermined when its corporate finance policies undergo the action of criminal financiers (usury). Under this point of view, usury exerted by criminal organisations to the detriment of enterprises allows to clearly perceive the distinction between usury credit and legal credit. This latter is conceived so as to maximise the probability for the return of the credit whilst the usury contract is conceived in order to minimise such a probability, so as to take possession of the guarantee or to re-negotiate the credit at higher rates.

In the third stage, criminality brings about the enterprise insolvency when it alters the structure of ownership and controls and becomes an inner factor of crisis. This phenomenon is usually based upon the interaction between concealed criminal owners and straw executives or entrepreneurs and it can follow two paths leading from the criminal intervention to the crisis.

On the one hand, the contaminated enterprise may be more vulnerable since its target is not oriented to maximise profits, yet it is altered and exploited in order to conceal and re-introduce flows of illicit liquidity into the legal system (money laundering). On the other hand, the contaminated enterprise can be profit-oriented yet its vulnerability grows because its activity can be discontinued due to a preventive or repressive intervention by courts. In this case, the straw entrepreneurs or executives are likely to

have a co-operative or collusive attitude to the benefit of the real criminal owners.

For a correct construction of the overall framework which can be drawn from investigations conducted in Italy, it is necessary to make some previous remarks relevant to understand the mutual convenience of a relationship where both the subject apparently alien to the criminal organisation, and the organisation itself, take advantages from the mutual interaction, specific advantages which they would not acquire otherwise.

The three subjects listed above (the Mafia, politics, the enterprise) share common criminal interests where the features and the power of either of them provide the alliance with more benefits than their individual action would have permitted. The existence of real business committees constituted by politicians, entrepreneurs, owners of engineering offices and representatives of Mafia organisations has been found, a kind of mutual contract bound to be perpetuated in progress of time and aimed at exercising the power and acquiring huge illicit proceeds.

Basically, through the help of criminal groups, those politicians secured for themselves the control on elections throughout a wide area and in respect of an extremely high number of votes whilst, through the enterprises, they obtained an uninterrupted flow of funds for personal needs and for the expenses of the political machinery. The Mafia group in turn obtained:

- (i) significant funds from enterprises (not only as percentages on procurements, but also in terms of the agreement in the management of sub-contracts and the establishment of slush funds,

which is the core of the common business system between the enterprise and the criminal group);

- (ii) the subsequent, systematic control of the domestic economic activities, the possibility to offer jobs and marginal quota of corporate profits and, thus, a wide social consensus up to the open legitimisation;
- (iii) through the politicians, the necessary governmental covers were secured, namely in terms of police forces, as well as the possible intervention on judicial processes, if any.

Finally, due to this agreement, entrepreneurs steadily acquired a significant quota of the government contracts market, distorting the mechanism of competition and obtained:

- (i) the security of building sites scattered on the territory;
- (ii) no litigation with trade unions;
- (iii) tools to establish slush accountancy whose target was not tax evasion, yet the availability of unaccounted funds to pay kickbacks to politicians and Mafia members involved and, in some cases, to afford transactions in Italy and abroad.

In this context, extortion and usury to the detriment of entrepreneurs undoubtedly constitute the most worrisome development of the criminal emergency because thanks to them a vital part of the economy, that is the minor and medium-sized business concern, risks to be wiped out.

The integration of these two offences can be found in the Law no. 44 of 23 February 1999 containing provisions on the solidarity fund for the victims of extortion and usury. In the light of the relationship between the enterprise and the criminal organisation, it can be easily understood

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the importance of disrupting the collusive relation between the victim of the extortion and the usurer from the beginning, at its initial stage.

This objective is pursued by the law by means of provisions aimed at showing victims that it is more convenient co-operating with justice than yielding to blackmail and thus:

- (i) on the one hand, to encourage the victim to report the illicit pressures by ensuring the anonymity in the pre-trial investigation stage and providing adequate financial support;
- (ii) on the other hand, to fix strict and clear terms with regard to the access to the allotments and to the material destination of these funds to entrepreneurial activities so as to, at least, hamper any criminal manoeuvre.

Yet, there is a manifest need for a co-ordination among bodies responsible for implementing the law in order to make it apt to the preventive and repressive action. For this reason, the law contains some provisions aimed at the speediness and confidentiality of the administrative procedures involving the allotment of funds to the benefit of the victim.

These provisions, in fact, compel all the bodies and subjects performing some functions within the procedures to abide by the classified information in order to ensure their confidentiality and also prescribes that similar caution shall be used also in the transmission of documents and in the notices sent to the persons involved.

Another rule provides the suspension of the time limit fixed to submit the application for the allotment of funds in

case the prosecutor - due to the existence of a present and material danger of retaliation acts - orders adequate measures to ensure that the identity of the person who declares to be a victim of extortion shall be kept confidential. Article 416-bis co. 7 penal code prescribes that:

"In the event of a conviction, articles which were used or intended to be used to commit the offence and the proceeds thereof shall be forfeited".

Furthermore, another basic instrument to counteract the accumulation of illicit profits is the provision - article 12 - sexies of the Law N. 356 of 1992 - that extend compulsory forfeiture of properties owned by convicts on charges of Mafia crimes, which turn out disproportionate in comparison with the legal income of the owner and this one cannot justify.

The list of offences which - when they are found - constitute the requirement for the enforcement of forfeiture includes all the conspiracy offences or those offences marked by a Mafia character and most of the offences considered as instrumental to organized crime. In particular, I refer to the Mafia type conspiracy (article 416 bis of the Italian Criminal Code), the offences committed exploiting the conditions set out under article 416 bis Criminal Code or in order to favour the activity of Mafia type associations, the conspiracy offences specifically dealing with drugs production and trafficking, extortion, kidnapping for ransom, usury, aggravated smuggling, fraudulent transfer of valuables, handling stolen property, money laundering and re-use of illicit capitals.

Finally, the Law No 646 of 13 September 1982 applies to person suspected to belong to a Mafia-type organization compulsory forfeiture of its goods, which turn out disproportionate in comparison with its

legal income and cannot be justified (so called patrimonial measures of prevention). According to the Italian jurisprudence, there is in such cases a sharing of the burden of proof: the prosecution has to first prove that the assets are effectively owned directly or indirectly by the convicted or the suspect (who usually use figureheads or straw men), and that the assets are disproportionate to the income of the convicted or suspect. The convicted or suspect thereafter must prove the lawful origin of the assets.

The regulation on the management and utilisation of properties forfeited to Mafia members, introduced by Law no. 109/96, is based upon the distinction between personal movable property owned by the dangerous subject (bound to be paid), immovable property and businesses. Immovable property forfeited - when they are included in the State's assets, that is when they are not sold - shall be destined for aims relevant to justice, public order, safety in case of hazards, schools and they are likely to be destined to the Municipalities for institutional or social aims.

Businesses can be leased to public or private companies or to workers' co-operatives where there exist founded possibilities to carry on or resume the productive activity. Sums of money obtained from sales or leases shall go to a fund established at the prefecture (local governmental authorities) and they shall be used for public interest activities among which one of the most important is the intervention in schools for education courses focusing on legality, cultural activities and entrepreneurial activities for unemployed young people.

The political significance of this new law is very clear in that it assigns a "visible" function in the fight against organized

crime not only to forfeiture, but most importantly to the specific destination of properties forfeited. The EU Commission, through a Group of experts purposely established at the General Directorate for Justice and Home Affairs, started an in-depth analysis on the issue of the relationship between organized crime and government contracts.

In compliance with the objectives set by the Action Plan of 1997 - namely, by Recommendations 6 and 7 aimed at reducing the risk of penetration by organized crime into government procurement contracts, public works and, thus, into the community legal economy - the works intend to favour an increasing integration among existing legal systems in Member States on this matter and the centralisation and circulation of information pertaining to businesses competing among the various governments in EU countries.

Special focus is placed on the need to harmonise the rules establishing the terms to admit to or exclude businesses from tenders and to favour the circulation of information within any State and among Member States. The Directive n.93/37/EEC - confirming the contents of Directive 89/440/EEC - establishes that the participation in tenders can be ruled out in respect of any entrepreneur who is in such situations as bankruptcy, winding-up, suspension of activity, litigation, composition with creditors or other similar situation; in respect of any entrepreneur versus whom either of the said procedures has been initiated; any entrepreneur who has been convicted with final judgement on account of any offence affecting his/her professional ethics; who has committed a serious professional error found by any means of evidence produced by the administration granting the contract, who has not complied with obligations relevant

to the payment of duties and taxes; who was guilty of false declarations in providing information which may be requested by the administration granting the contract.

The Group shall provide the Commission any useful information to establish new standards to be introduced as amendments to the existing Directives and shall also identify joint guidelines for action within the Third Pillar (collection and exchange of information among the different authorities, possible complementary measures in the judicial field, in the market sector, etc.). Significant differences among the various legislation still exist. And the political will to counteract the phenomenon of criminal infiltration into public contracts does not seem to be strong.

A crucial issue in the path towards the harmonisation of community rules still remains on the background: the definition of a common concept of "organized crime" and the resulting identification of the conducts expressed by it. The question is still open because the European Commission is apparently oriented to specify in its prospective Directives the illicit conducts "manifesting organized crime" which should be the common platform of standards to exclude businesses from public tenders in Member States.

The issue under consideration concerns all government contracts; yet, although many cases of criminal infiltration into government contracts for services, this phenomenon mainly affects the public works sector which - since it has always been a milestone within the development policies in our country - is the traditional enrichment source for Mafia type criminal organisation and the main channel in the system of parties' illicit financing.

A watchdog authority on public works has been working also in Italy for some

time. The National Antimafia Prosecutor has already contacted this Authority to acquire - for the purposes of co-ordination and investigative impulse - information on contracting and sub-contracting businesses, on bids of tender and on the awarding procedures, with specific mention as to the reasons why competitors have been excluded.

IX. THE BANKING AND FINANCIAL CIRCUIT AND THE SEIZURE OF ILLICIT CAPITALS

The volume of criminal proceeds transferred yearly on the economic and financial circuits has not been precisely estimated yet. To give an idea, the International Monetary Fund estimated in 1996 the yearly income of criminal organisations at 500 billion dollars of which at least 400 billion are supposed to be originated from the drugs trafficking. Yet this is likely to be an underestimate since it takes account of the turnover connected to the drugs trafficking only. To these proceeds, those originated from other trafficking directly run by organized crime should be added (arms, tobacco smuggling, noble metals and clothes and, recently, harmful or radioactive waste trafficking) as well as those originated from their reinvestment in other illicit activities in turn resulting in huge proceeds (such as usury and unauthorised financing and credit whose turnover is an estimated 10,000 billion Italian lire).

The overall figure leads to estimate a global turnover equal to about 1000 billion dollars per year. The EU Report reads:

Criminal activities run by organized crime generate an immense amount of money, a significant part of which needs to be laundered in order to be re-invested in legal activities or entities or to be used by criminals as

their own income. The International Monetary Fund (IMF) has estimated that about 2% of the global economy involves drug trafficking. Even though drug trafficking certainly ranks amongst the most lucrative criminal activities, it gives an idea about the fact that the sum of all-crime related money is an important part of the overall economy.

The Action Plan against organized crime, adopted by the European Council on 28 April 1997, provides interesting binding indications to Member States among which:

- (i) the urgent need to tackle the issue of money laundering on the Internet and through the electronic payment instruments (the digital cash which risks to make the existing money out-of-date) and the new technologies; moreover, the need to require electronic transfers to mention the details of the payer and the payee;
- (ii) the need to link investigations on money laundering to those on tax evasion and frauds: the channels whereby money escaped from domestic tax and currency authorities is laundered often proved to be particularly apt to shelter and provide anonymity to the criminal proceeds to be concealed;
- (iii) the need to enlarge the scope of subjects falling into the scope of money laundering provisions also increasing Europol's investigative function in this field;
- (iv) the need to enforce new rules allowing to forfeit illicit proceeds also in case of the criminal's death (it is the origin of Mafia property which makes it dangerous and contaminating to the economy,

- irrespective of the owner);
- (v) the need to enlarge the scope of subjects falling into the scope of money laundering also to the *negligent* conduct of the agent (yet this hypothesis was firmly rejected by the EU Parliament in its resolution of 1997);
- (vi) the expectation to extend the duty to report "suspicious" transactions - with the relevant sanctions in case of non-compliance - to professions other than the financial brokerage.

Among the countries which took the hard line against money laundering, Italy has progressively adjusted its own legal system to the EU directives starting from the Law no. 197/91 regulating the mechanism of the report of suspicious transactions. The new legislation and the new effort in the international co-operation are expected to strengthen the criminal repression against money laundering and the use of illicitly obtained properties. Therefore it should be easier to obtain the necessary evidence to attain a number of trials, convictions and forfeitures proportionate to the magnitude of the criminal phenomenon⁶.

There exist many surveys and reform proposals on the issue. Under this point of view, a significant reform - recommended by the Community - is expected to introduce a fresh institution into our legal system: the criminal and administrative liability of companies for offences committed by its own corporate bodies.

The following legislative decree no. 153/97, issued to supplement the enforcement of the EEC Directive no. 308/91, radically changed the law no. 197/91. In particular, it provided more confidentiality guarantees to safeguard brokers bound to report the transactions deemed as "suspicious" on the

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⁶ In Italy, the criminalization of the laundering of proceeds of crime is embodied in the following provision.

Article 648-*bis* penal code (*Money Laundering*)

Except in cases of participation in the [predicate] offence, any person substituting or transferring money, goods or assets obtained by means of intentional criminal offences, or any person seeking to conceal the fact that the said money, goods or assets are the proceeds of such offences, shall be liable to imprisonment of 4 to 12 years and to a fine of LIT 2 to LIT 30 million.

The penalty shall be increased when the offence is committed in the course of a professional activity. The penalty shall be decreased if the money, goods or assets are the proceeds of a criminal offence for which the penalty is imprisonment of up to 5 years. The final paragraph of article 648 shall apply.

Article 648-*ter* penal code (*Use of money, goods or assets of unlawful origin*)

Except in cases of participation in the [predicate] offence and in the cases provided for in articles 648 and 648-*bis*, any person using for economic or financial activities money, goods or assets obtained by means of a criminal offence, shall be liable to imprisonment of 4 to 12 years and to a fine of LIT 2 to LIT 30 million.

The penalty shall be increased when the offence is committed in the course of a professional activity. The penalty shall be decreased pursuant to paragraph 2 of article 648.

The final paragraph of article 648 shall apply.

Article 12-*quinquies* Decree-law n.306/1992 (*fraudulent transfer of valuables*)

Any person fraudulently transferring to other persons the ownership or availability of money, goods or other assets with a view to avoiding compliance with the provisions of the law concerning the prevention of smuggling and offences against property, or to facilitate committing any of the offences referred to in articles 648, 648-*bis* and 648-*ter* of the Penal Code, shall be liable to imprisonment of 2 to 6 years, unless the offence is more serious.

basis of the standards identified by the Bank of Italy as of 1993; it assigned the *Ufficio Italiano Cambi* (Italian Exchange Bureau) the role of an “anti-money laundering agency” responsible to receive the suspicious transactions reports and to analyse and process them - also by means of the accounts and deposits register provided for by the Law no. 423/91; can immediately order the suspension of the transaction and informs the Currency Police Special Unit of the *Guardia di Finanza*.

It also established the duty to inform the National Antimafia Prosecutor - in relation to the specific functions of co-ordination and impulse vested on him by article 371 bis of the Italian Code of Criminal Procedure - as to the reports resulting to be linked to organized crime.

To enforce this provision, the Suspicious Transactions Department was established at the National Antimafia Bureau, constituted by three prosecutors, in order to analyse and deal with this information. The activity performed by this Department involves various aspects: the analysis and focus on the main interpretation issues resulting from the legislation in force; steady and systematic contacts with governmental bodies involved in the same activity (Italian Exchange Bureau, Antimafia Investigations Office, Currency Police Special Unit) identified by this law; analysis of information received; focus and arrangement of operational patterns apt to make the action against money laundering uniform and effective. In case that suspect turn out to be grounded, all information collected and processed are reported to the competent Prosecutor for the pre-trial investigation.

Awaiting to verify the effectiveness of the new legislation in view of the fight against organized crime, it must be noted that the

banking system - especially in some southern regions - is still one of the most preferred channels for money laundering operations, often intertwined to usury and unauthorised financing and credit operations. In these areas, even irrespective of any inner complicity, banks are often used in criminal actions where money laundering and unauthorised credit are mutually strengthened, due to the heavy demand of unauthorised credit brought about by the malfunctioning of credit institutions themselves.

I already said that the management of the payment system and credit - also due to the recent technological developments within the globalisation of economic relations - is particularly exposed to money laundering irrespective of the operators' awareness. Moreover, the control of the brokers is perfectly inserted into the criminal logic including the control of territory and of the economic activities carried out therein even - and maybe above all - through information owned by banks. This information allow criminal organisations to maximise profits by attacking without any risk the most profitable economic subjects (by way of extortion or usury financing or the two alike, depending on the case).

There exist one more fundamental aspect in the counteracting approach which we must focus on. The Directive of 1991 was enforced by EU Member States in various degrees and it led illicit capitals towards forms of *non financial money laundering*, therefore the current suspicious transactions report regime affects only some of the flows of dirty money. And maybe neither the most significant one.

The quantity of reports is on the increase. Yet this is no positive factor since the issue is the *quality* of reported

transactions, that is we still wonder how effective they are in terms of usefulness of information collected. The situation is uninterruptedly developing because money launderers are increasingly skilled and they always seek new concealing techniques capable to dodge investigations and because the only border to the possibilities of money laundering is the inventiveness of money launderers.

The need to address a non-criminal financial or credit broker to perform activities which do not seem suspicious and do not draw the attention of the monitoring authorities urges the money launderer to accomplish layering operations before inserting the money into the legal circuit. Hence, the need already called for by the European Council to urge EU governments - probably through a new Directive - to generally extend the duty to report suspicious transactions to persons and companies operating outside the financial sector.

A first response is the new legislative decree no. 374 of 25 September 1999 which marks one more step forward towards the total enforcement of the Directive 308/91/EEC on the prevention of the use of the financial system for the purposes of the laundering of criminal proceeds. Many investigations were conducted in the latest years on persons and companies operating outside the financial sector and many cases mainly concern gambling house, valuable items outlets, that is economic subjects who, out of convenience, accept to shield the launderer by concealing the origin of the dirty money behind their apparently licit activity.

The legislative decree no. 374/1999 affects this sector, yet the duties imposed by the new legislation are not the same for all the subjects involved. The law-maker took account of the nature of the activities

involved and distinguished two professional categories to which the confidentiality duty, set out under article 3 bis of Law no. 197/91, and the sanctions provided for by the same law in case of non-compliance shall be extended.

The first category is supposed to include the most exposed activities and pinpoints the subjects compelled to identify, register, and report the suspicious transactions: those involved in debt recovery on behalf of third parties; guardians and carriers of cash and securities or valuables through special watchmen; carriers of cash, securities or valuables without special watchmen (road haulage of items on behalf of third parties); estate brokerage agencies; dealers in gold; managers of gambling houses.

The same duties are imposed upon the financial activities agencies listed under article 3 of the new legislative decree. They are financial brokers whose activity in respect of the public is restricted to the subjects registered in a list set up at the Italian Exchange Bureau. The reporting duty was extended to the financial promoters, that is to the subjects used by the authorised financial brokers for off-premises offers. In this case, reports of suspicious transactions shall be sent by the promoter to the broker for whom he acts who will forward the report to the Italian Exchange Bureau.

The second category includes subjects compelled to identify and register customers accomplishing transactions worth of over 20 million lire: dealers in antiques, auction houses or art galleries managers, manufacturers of and dealers in valuables, craftsmen manufacturing valuables. This regulation, still, does not extend the reporting duty to independent professionals and audit companies, two categories which should be dealt with by

the next European Directive.

In this respect, EU bodies had already focused their attention on independent professionals and, namely, on legal professionals (lawyers, notaries, accountants and audits). In particular, the possibility had been verified to separate the activity providing legal advice, legal defence and court representation from other trade activities - such as the estate brokerage - related to the same professional subjects.

A useful suggestion in order to prevent that these professions be exploited for money laundering purposes is included in the Action Plan against organized crime which provides the enforcement of measures aimed at safeguarding some professions exposed to criminal influence, for instance by way of codes of conduct.

With regard to auditing companies, in Italy, the increased need for a regulation which impose the duty to report suspicious transactions is due to the fact that - while under the previous law the board of auditors were also responsible for auditing of listed companies - pursuant to the legislative decree no. 58/98 such activity is exclusively vested in audit companies.

X. EUROPEAN MONETARY UNION AND MONEY LAUNDERING IN THE AGE OF INTERNET

The onset of the European Monetary Union might have a multi-faceted impact on monetary and financial flows linked to the development illegal and criminal economic activities. This impact brings about unprecedented issues relevant to economic policy and then to criminal policy.

For instance, one of the effects that the EMU (Economic and Monetary Union) should bring about, through different

channels, is the reduction in the transactions costs which hamper the development of illegal economy. If a reduction of the transactions costs should be welcomed, with a view to the development of legal economy, it must be considered that, lacking adequate measures, it would also favour the illicit economy.

The National Antimafia Bureau, together with the "Bocconi" university in Milan, undertook a survey on the foreseeable impact that the entry into force of the single currency - both in the stage of conversion of domestic currencies and in the following one of intra-community and extra-community circulation of Euro - will have on money laundering strategies also taking into account the different levels of surveillance still existing, notwithstanding the uniform community standards, among the eleven EMU countries, in particular due to the different tax and bank secrecy regulations.

The target of the DNA - Bocconi survey is to build analysis patterns allowing to identify the conditions in which - in respect of the monetary, banking, financial and computer science sectors - the EMU might increase the possibilities for money laundering and, thus, the criminal organisations' capacity to corrupt markets and the legal economy. In this respect, the E.U. Report remarks:

"Several esteemed experts are debating that the next introduction of Euro as a single EU currency can provide further good opportunities for money laundering, for the fundamental reason that there will be no need to change the money earned from one currency into another, when it is moved within other Member States. The future Euro bills with the denomination of 100, 200 and 500 could be an attractive option to the US dollar and can be spent

everywhere in the EU or easily exchanged when the European currency will circulate in the international markets.

There are also concerns of the possibilities offered in the next future by modern technologies such as the Internet and electronic banking cards, even though up to now investigations give no evidence related to these issues."

As a result, Member States have two sets of objectives: a) identification of special monetary, banking and financial channels which by EMU might decrease the transactions costs for the illegal economy; b) implementing adequate measures to regulate and monitor the system of payments and the banking industry to find balanced solutions in the relation between the defence of the system from the criminal economy distortions and the boost to the efficiency and the development of legal markets.

Monetary aspects must be separated from banking and financial ones. On the monetary level, the Euro is seemingly bound to become a significant reserve currency in international exchanges, both legal and illegal ones. A recent survey presented at the last meeting of the Italian Economists' Association analysed the effects that might be brought about if the Euro becomes the currency used to settle the exchanges made in order to launder cash originated from illegal markets.

This analysis results in interesting indications for domestic law-makers. Basically, the more effective the legislation against illegal and criminal activities generating profits is, the more the pressure on the monetary, banking and financial markets increases. The more the laundering techniques use cash, the more this pressure affects the demand of Euro, mainly in big denominations.

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With the single currency and increasingly integrated banking and financial markets, we must not overestimate the effectiveness of monetary measures against money laundering such as the limits to the issue of Euro in big denominations. The demand for money laundering might be simply affected by a replacement so favouring camouflaging and laundering techniques deemed as safer through banking and financial channels.

Turning to the credit and financial aspects, the EMU will expectedly result in an increasing integration of the agents' activities and the European markets. Illegal and criminal capital flows might benefit from this integration. The simultaneous existence of integrated credit and financing markets, with the incomplete harmonisation of the regulation and surveillance schemes, favours the illegal financial flows.

Interesting remarks can be found in the Final Report of the project "*Euroshore. Protecting the EU financial system from the exploitation of financial centres and offshore facilities by organized crime*" financed in 1998 by the E. U. Commission's Falcone Programme published on 25 February 2000. They can be summarised as follows: the distinction between offshore and onshore is losing many of its conventional meanings, i.e. opacity and transparency.

Some offshore jurisdictions move towards the adoption of better criminal laws and better forms of international co-operation resulting in an acceptable level of transparency (Group 1: European financial centres and offshore jurisdictions; Group 2: Economies in transition).

- (i) others (Group 3: offshore jurisdictions outside the EU) keep all the opacity features of their

regulation systems which created the commonly perceived correspondence between the concept of offshore and the opacity one. Meanwhile, onshore countries which have a long-standing tradition of financial centres and are located in Europe have transparency levels equal to or lower than those of the countries officially defined as "offshore" centres.

- (ii) association agreements work: countries which applied to enter the EU are amending their criminal legislation and introducing financial regulations directed to an increased transparency.
- (iii) the political and economic proximity works: the closer the offshore jurisdictions are to the EU and the less they stray away from the accountability standards fixed by the international community and by the EU ones.
- (iv) the European financial system should become more transparent before asking the same to other countries. In particular, in respect of company law - which has a major importance to the transparency of any financial system - EU Member States have opacity problems, although less than other countries, and they had better solve them before asking other countries to do it.
- (v) company law exerts a chain effect on the opacity of other sectors of regulation: financial law and banking law. If company law - due to efficiency reasons - tends towards anonymity, it carries the two other sectors of regulation with it resulting in the inevitable failure of investigative and judicial co-operation in respect of criminal

organisations which exploit this company anonymity as a shield.

The said differences in the regulations of “strict” countries - the more industrialised and thus stronger countries, yet for this reason more exposed to criminal aggression - and “lax” countries - the traditional *tax havens* and, more generally, those countries having weak economic structures and lacking resources to spend on the international markets - results in the frustration of the action against money laundering.

The choice between strict and lax policies depends on a range of structural factors being difficult to overcome in the medium and in the long run; yet a stricter attitude, at least at the European level, will undoubtedly allow and maybe impose stricter domestic policies. On the contrary, a low level in common rules might even drive potentially strict domestic systems towards lax attitudes.

In other words, the *competition in regulation* shall be fully considered by the European anti-money laundering front since a two-fold order of rules would widen the gap and so contribute to strengthen the transnational criminal organisations who would be left free to exploit diversities to widen their scope and frustrate the efforts made by the most strict countries.

The solution to this issue will undoubtedly imply long-range efforts and it needs to be applied on an international and global scale as in the current community prospective. In view of the introduction of the single currency, the EU Commission warned with concern that counteracting measures implemented by the European Union - albeit strict - will be easily jeopardised within the globalisation of markets by the legislative voids still existing in too many EU countries.

The special European Council, held on 15 and 16 October 1999 in Tampere regarding the implementation of an area of freedom, security and justice within the European Union re-launched the specific action against money laundering defined in the final document as “the very heart” of organized crime and urged the adoption of a new anti money laundering directive which may promote the balance between the system’s global defence from the distortion of organized crime (money laundering, corruption, Euro counterfeiting) and the safeguard of the rights of persons and economic operators. At this point, two specifications are necessary:

The concept of e-money goes back to the late ‘60s with the first electronic funds transfers (EFT) initially developed to allow the transfer of deposits stored by banks in the central bank and later extended to include transactions of significant unitary amount. Yet, while substantial transfers of conventional currency were developing, through the electronic networks run by telecommunication companies and by outstanding holdings, the very concept of e-money (or e-cash) has been changing, unrelated to the traditional deposits. Currently, the means of payment named e-money can be identified with the so-called “*virtual money*” which requires some necessary conditions: it is generated and transformed by computers; it is not dependent on the currency forms controlled by governments and on bank deposits, it is alien to the current monetary aggregates; it is not regulated by the watch-dog authority monitoring the financial markets; it can take various forms, of which only some are offered by banks.

When I talk about the “new financial subjects originated from Internet”, I refer to the *trading on line* phenomenon and to

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the asset management, both dramatically on the increase on Internet. Trading on line means the possibility to deal in securities, mainly shares, but also bonds or similar instruments, on the Internet which offers customers the possibility to interact with a dealing broker (and through this person with the market) exclusively using the Web so disregarding any form implying further interactions with the broker to complete the execution of the order. This phenomenon might be simply regarded as a development in the distribution process of a product - the securities - which banks and stock brokerage companies have always offered. Actually, analysing such markets as the US one - which have seen the development of the trading on line for a few years - it can be proved that we are not faced with a mere appendix of traditional dealing ways. This phenomenon, instead, is likely to radically change markets' organisation and brokers' and investors' behaviours, to bring about the onset of a new type of brokers marked by "low costs and efficient and adjustable service" but mainly by anonymity.

As to the Italian experience, decades of operators by now are able to offer trading on line services - with all the possible options listed above - which have increasingly spread in a few months. According to estimates on the overall market, the commissions amount to about 150-200 billion lire for the year 2000 and the number of on line investors in Italy is estimated to reach over 300.000 in three years.

As all the sectors within the financial brokerage, asset management also started to exploit the possibilities offered by the Internet and first appeared in Italy in 1999. The most varied services are offered on the Web ranging from the presentation of one's own products with the relevant costs to the possibility to subscribe funds quota and

manage switches from one fund to the other, and the management of the "education" unit which is a kind of financial primary school where basic information, researches on financial markets and helps for the planning of one's own savings can be found.

As to these issues, the European Commission submitted proposals for directives to the EU Parliament specially aimed at:

- (i) ensuring the financial accountability of non-banking institutions which issue e-money without hampering the development of the e-money within the Community;
- (ii) ensuring a high standard of safeguard of general interest targets, such as the protection of minors and of the human dignity, the protection of the consumer and of public health.

Yet we still have a long way to walk towards a legislation which cannot but be co-ordinated at international level in a field which was correctly defined as "no one's land". Meanwhile, investigations led to find - not simply suppose - many cases where the Web has been exploited by criminals for such heinous uses, as the videotape e-commerce for paedophiles between Russia and Italy recently discovered in Naples, which shows the existence of an international trafficking of minors who are the victims in these disgusting tortures until they die. These problems are faced in the draft Convention on Cyber-crime adopted by the European Committee on Crime Problems (CDPC) of the Council of Europe on 2 October 2000.⁷

XI. INTERNATIONAL CO-OPERATION

The theme of judicial co-operation with regard to transnational crime refers firstly to structures and secondly to criminal case and evidence. Further, the preconditions for effective judicial co-operation are knowledge of the fact and coordination of investigation, that are both ensured in Italy, in conformity with the Recommendation n.2 of the Action Plan of 1997, by the National Antimafia Prosecutor Bureau, central point of contact within the European Judicial Network established by the EU Council in order to promote the judicial co-operation among Member States.

The criminal judicial co-operation at European level against organized crime made significant efforts and marked a milestone with the Action Plan adopted by the European Council on 28 April 1997. Among the Recommendations contained in Chapter VI of the Plan - entirely dealing with the issue of the relationship between organized crime and money - I believe it is worth mentioning the ones from 26 to 30 focusing on the various types of connections among criminality, capital accumulations and economic circuits, with special reference to the issues of money laundering, corruption, tax frauds and the so-called "forfeiture of worth".

The first need highlighted - that is to make membership of a criminal organisation a criminal offence in the legal system of any Member State - was satisfied by the adoption of the Joint Action of 21 December 1998 which provides a definition of criminal organisation and compels Member State to make it a criminal offence to participate in the criminal organisation ensuring that one or both of the types of conduct are punishable, i.e. the Italian-like pattern of participation and the common law "conspiracy" pattern.

The Plan was further implemented by the Joint Action of 3 December 1998 on money laundering, detection, seizure and confiscation of criminal proceeds which aims at eliminating or at least reducing the reservations which can be opposed to the Convention of Strasbourg of 1990 on money laundering and confiscation. The Convention compels to introduce in domestic legal systems the "confiscation of worth", that is confiscation through payment of a sum of money corresponding to the worth of the price, of the product, or of the proceeds of a crime (this institution has already been introduced in our legal system - art. 735 bis code of criminal procedure - when the Convention of Strasbourg was ratified in 1993, yet it is restricted to provide assistance in relation to the execution of foreign confiscation measures).

I still have to mention the Joint Action adopted by the Council of the European Union on 22 April 1996 which entrusts the liaison officers with functions directed to favour and accelerate any form of judicial co-operation in criminal matters and, if necessary, in civil matters with a view to increase speediness and effectiveness namely through direct contacts with the competent services and with the judicial authorities of the destination State.

⁷ The most meaningful topics of the EC Draft Convention are: 1) measures to be taken at the national level about offences against the confidentiality, integrity and availability of computer data and system; 2) principle of corporate liability for those criminal offences committed for their benefit by any natural person; 3) binding principles relating to international co-operation (extradition; mutual assistance, also regarding provisional measures and coercive and investigative powers).

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On the wake of the Convention of Strasbourg, we have to welcome the draft Convention of the United Nations against organized crime which is going to be approved and signed next December in Italy and focuses on the issue of the fight against money laundering, specially following to the liberalisation of financial and trade movements after the opening to the Eastern European countries.

Moreover, the UN General Assembly called a Special Session (New York, 9-11 June 1998) on the fight against drugs at global level which was attended by nearly all the countries in the world. Notwithstanding the divergences expressed during the works, they resulted in three Resolutions. The first one contains a declaration of political commitment, the second one concerns the guidelines with a view to the decrease of drugs demand, the third one involves measures to strengthen the international co-operation to counteract the illicit trafficking, the criminal phenomena which support them and the laundering of criminal proceeds. This latter provision pays special heed to the control of precursors and the necessary international co-operation in the destruction of the illicit sources of natural drugs.

Following to these Resolutions, on 6 October 1998 the European Parliament approved the Recommendation A4-0211/98 on the policies that Member States are urged to implement in the fight against drugs. In brief, the United Nations are also accepting the idea that the economy is the new frontier of the fight against transnational organized crime and that a successful action against drugs trafficking and money laundering requires the coordination of domestic legislation and shall be connected to the development of payment means at international levels.

My opinion on the actual possibility that the international community may adequately and soon succeed in counteracting such criminal phenomena is that such a possibility does exist provided that governments are aware of the need of an effective and loyal co-operation, leaving aside the ambiguities and hypocrisies which marked the choices and policies in too many countries.

In conclusion, transnational organized crime is a serious threat for the economy and the security of the international community. But - as used to say my unforgettable colleague and master Giovanni Falcone, victim of Mafia in 1992 - Mafia and other similar criminal organizations are human phenomenon and, like any human phenomenon, they had beginning and they will have an end. Therefore it's up to us, members of law enforcement, to the international co-operation, but also to the worthy leagues of citizens who exercise the social control against crime, the responsibility to support, and if possible accelerate, this process toward a civil society's development in legality and in peace.

PARTICIPANTS' PAPERS

EFFECTIVE METHODS TO COMBAT TRANSNATIONAL ORGANIZED CRIME IN CRIMINAL JUSTICE PROCESSES

*Ruy Gomes Silva **

I. OVERVIEW OF THE SITUATION OF TRANSNATIONAL ORGANIZED CRIME

A. Illicit Drug Trafficking

The current situation of the illicit drug trafficking in Brazil in relation to transnational organized crime has presented itself in two different aspects. Firstly by the export of relatively small quantities of drugs by criminal organizations via the international airports of Brazil. The drugs are taken out in several different forms, by one or more persons. The second aspect, the export of large quantities of drugs by these criminal organizations generally by sea, in medium or large ships. Sometimes these large quantities are moved by air.

In the trade of illicit drugs traffic in small amounts, there are two groups of transnational organized crime that constantly sponsor this illegal commerce in Brazil. The mafia from Nigeria is a group that develops ample and routine like activity in the illicit traffic of drugs from Brazil (export of substances, basically cocaine). Their methodology consists of several phases. Initially there is one group of about ten thousand Nigerians established in the largest city of the country, São Paulo. They are involved in several common activities, but really render any type of service to this organization.

Several leaders of the organization in São Paulo acquire the cocaine in the frontier areas, by land or by air. Many Africans are trained in good manners, attire, etc and are sent to Brazil to serve as “mules” for the group. Sometimes, these people enter Brazil as tourists and spend some time working in simple services to get used to the people and the Portuguese language. In a few cases, the organization uses Brazilians for the traffic of the drugs.

For the transportation of cocaine, drug dealers use several forms of camouflage, from carrying the drug in the internal organs of the body (as well as below their clothes); inside utilities; in false compartments in their suitcases, etc. The quantities always vary between half a kilo to three kilos. The routes used by the drug dealers vary depending on the activities of the police rediscovering them. When the “mules” are arrested, the organization provides them assistance with a lawyer until the last interrogation by the judge.

Other criminal organizations, such as the Italian mafia, deal with the illicit traffic of small amounts of drugs in Brazil by purchasing cocaine in neighboring countries. They adopt simple measures for the export of the drug from international airports. The drugs are then transported in a distilled form by the “mules”. The majority of the “mules” are Europeans.

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In relation to the illicit traffic of drugs in large amounts in Brazil, done by groups of transnational organized criminals, we have noticed a change in relation to the action of the South-American mafia in the drug traffic trade within Brazilian territory. This is due to the fact that national organized groups are starting to act in a very specific form, in certain stages of the trafficking.

Brazil has always been a passageway for drugs, especially cocaine and heroine, coming from Colombia, Peru, Bolivia and destined primarily to European and North-American consumer markets. Brazilian criminal organizations are responsible for the transportation, storing, packaging and export of the drug to its destination, even though these organizations are not the owners of these drugs.

We also have the occurrence of the plantation refining laboratories for cocaine in the Brazilian Amazon. Able to hide in the demographically empty areas of that region, they avoid the problem of exporting the chemical products that are necessary for the processing of coca paste into hydrochloride.

B. Illegal Firearms Trafficking

The illicit traffic of firearms is, at the moment, one of the main activities of some frontier smugglers of Brazil. Firearms are the main product and their introduction into the national territory serves to supply the black market or to give support to any illegal activity that exists in the country.

Organized crime, that is acting nowadays in the country, uses firearms to arm their members. These members are in charge of the security of the organization and use the firearms to commit crimes of threat and murder. These activities are inherent to the criminal organizations. During the last few months, organized

crime groups that traffic in illegal drugs in Brazil, have exchanged firearms for cocaine with terrorist groups from neighboring countries. There have also been investigations regarding the importation of illicit arms in the country through the ports of Rio de Janeiro and Santos in São Paulo. The Russian mafia, has sponsored these activities.

In the frontier region of Brazil (with Paraguay) there are families that began smuggling activities. With the growth of their activities, they gained structures like the international mafia, keeping due proportion. These families began to acquire political power and influence in certain regions of Paraguay. They can easily develop any type of commercial activity between the two countries.

These families have started to act in other illicit activities such as the illegal traffic of firearms at the transnational level, only from that area. They mainly participate in relation to the illegal traffic of firearms because of the opportunity they have as buyers. Their most constant deliveries are for the groups of drug dealers in the slums of Rio de Janeiro.

In summary, referring to illicit firearms traffic, we can say that in Brazil there is only one focal area in the frontier region of the southwest. We do not currently have data regarding the existence of groups of other transnational organized crime groups with illegal arms trafficking as their basic operation or with any large volume of activity in this regard.

C. Human (Women and Children) Trafficking

The traffic of women in Brazil has intensified in the last years motivated by the socio-economic difficulties of the country. Unemployment has very high indices. Misery has become so widespread

in the Brazilian population that the pathway to prostitution for women and adolescents is a fact. As a result, the criminal organizations acting in Brazil take women to Europe and Asia, many times under the guise of giving them good jobs and with promises of a life with more security.

The most usual practice used by women traffickers in Brazilian territory is that of the selection of women with different proposals. These proposals may be of three different types: that of a good job in a regular company; that of work in a dance group or show house; or an explicit one of working in a prostitution house or striptease show. After the women are chosen the contractor pays all their travel expenses. They receive information about any questions they may have to answer to the immigration authorities of the countries of destination.

Many denunciations are made to the Police from the parents, relatives or friends of the women. They themselves propose to leave the country in such an adventure. The police can hardly prohibit this type of action due to the demands of the Brazilian criminal law that it be proven that the objective of leaving the country, by the woman, is for the practice of prostitution. This is a fact that these women never admit or it is difficult to prove. Several times the police have tried to use the testimony of many women who return to Brazil after having been obliged to work as prostitutes. Their aim has been to identify the person or criminal group that practised this action. These women, when they are in Brazilian territory, do not want to admit what has occurred because of the situation with their families and society. We cannot state with concrete evidence, but due to the incidence of cases where women leave the country to go to Europe, the Spanish mafia must be acting in the illicit traffic of women.

In relation to the traffic of children in Brazil, we have noticed the action of several groups of people who work for legal adoption by couples in Europe, mainly Italy. Nevertheless it is difficult to state that there is participation of organized crime in this activity in Brazil.

Some years ago people involved with facilitating adoptions acted in a way that necessary legal procedure and the legalization of the act would not be followed. In this way, the European couples took Brazilian children abroad with legal adoptions but with consent full of irregularities. These irregularities include the non-obeyance of the period of adaptation by the adopting couple with the child to be adopted. All of the irregularities were originating from acts practiced by officers of the judiciary being covered up by the judges of the district who sign the final order for the adoption.

Another routine action from the people involved in facilitating adoptions was to give money or goods to the parents of the needy children for them to give away their children to be adopted by foreign couples and provide them a way to live in a developed country. After the dissemination of information about these adoptions by the media, showing some situations of children taken for adoption, but against the will of their parents, the judiciary started to demand that the specific laws should be obeyed for the adoption of Brazilian children by foreign couples. These laws were specially based on the Haia Convention, which is in force. At present, children that are adopted are chosen in institutions that are formally registered for adoption, which are under the control of the government.

At this time, we cannot be certain about the existence of the traffic of children in Brazil. We must take into account the fact

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that many Brazilian children are leaving the country and being adopted by people from other countries without a formal process.

D. Trafficking in Stolen Vehicles

The vehicles that are stolen in Brazil have been done with two motivations: to commit other crimes, such as robbery, kidnapping, etc.; or to remove their parts and components. In the first case, generally the vehicles are recovered. A minority suffer some type of adulteration of documents to continue in circulation. In the second case, the majority have no possibility of being found, as a result of the dismantling process.

The organizations that are stealing vehicles in Brazil aim at meeting the needs of the domestic market. The majority of vehicles made in Brazil are not well accepted in neighboring countries due to the lack of spare parts. This creates dangers and difficulties for them to cross borders. Still there are occurrences of the delivery of stolen vehicles in Paraguay and Bolivia, mainly to exchange them for illicit drugs, with a much smaller number in relation to those that stay in the country.

In Brazil the presence of the transnational organized crime is not defined in the traffic of stolen vehicles. This crime is under the jurisdiction of the state police.

E. Card Fraud

A major problem that currently exists in Brazil is credit card fraud. The fraud is perpetrated by the cloning of credit cards, both at the national and international level. The cloning of these cards is done more easily abroad, where the machines that are used to do it, are sold without restrictions in specialized shops. In Brazil, the sale of these machines is forbidden in the open market.

Credit card fraud in Brazil is classified by the Penal Code as the crime of taking illicit advantage of another person by means of fraud. In this particular case, the fraud causes losses to a common person, and therefore falls under the jurisdiction of the state police.

F. Money Laundering

In the last few years it has become obvious in Brazil that there isn't a sufficient structure by which the public and the legislative branches can combat organized crime. The occurrence of large-scale cases of public corruption, the illicit movement of capital, improper usage of public monies and funds from campaigns has become frequent.

The insufficiency of norms, represented by the lack of specific types of penalty, favor impunity. It was because of this that Law 9613 was passed in 1998, aiming at specific punishment for the activity of "laundering money". Along with this legislation came the inauguration of a whole system to control the financial operations and the fiscalization of the movement of capital.

With this new law, criminal investigations began to detect the methods for laundering money in Brazil. Processes to verify this crime are ongoing in the country, without having gotten to their final stage for decision by a Justice. In some Brazilian states, the investigations are making it evident that there is the presence of money from international mafias on behalf of 'ghosts', false beneficiaries, front companies, fictitious companies, etc for the purpose of acquiring goods and valuables, and for the movement of money in the Exchange Bureau.

According to the public authorities involved in the processes of verification of the laundering of money in Brazil, it is still

too early to talk about the results of this special legislation and of the prevention agencies that were created i.e, The Council for the Control of Financial Activities, the Division of Organized Crime and Special Enquiries of the Federal Police Department and the Department of Combat to Financial and Exchange Illicit Acts of the Central Bank of Brazil.

G. The Traffic of Wild Animals

Nowadays, according to the Environmental Investigation Agency, the smuggling of wild animals runs to 10 billion dollars per year. Our country, with its incommensurable natural resources, is undoubtedly one of the most plundered by this profitable criminal activity. According to an estimation of the Brazilian Environmental National Council - 12 million wild animal are taken away from our forests, and 30% of them (3,6 million) are destined overseas.

It must be registered that the traffic of endangered species frequently occurs in connection with the illegal trade of others products or substances such as drugs, weapons, alcohol, precious stones and others. Sometimes the animals are used as a hiding place for these merchandise. For instance: a Boa Constrictor was discovered with plastic bags of cocaine hidden inside its stomach; and an automatic rifles' load was detected inside wooden boxes containing poisonous snakes.

Some kinds of wild animals, by virtue of their exuberance and consequent demand, are subject to intense traffic, such as *psittacidae* (parrots and macaws), eagles, toucans, turtles, crocodiles (for leather), primates and *Felidae* (felines). We must observe that the main buyers of live wild animals are laboratories, collectors, zoos, animal shops and circuses.

Wild animal traffic has similarities with its "cousin", drugs and weapons traffic. In the same manner, it is born in the interior, in the forest, where modest and poor people happen to be used to capture birds and wild animals in exchange for scraps. The catcher, a modest simple minded person, earns little or almost nothing for the service, just like the backwoodsmen during the planting of *EPADU*. In the end of this chain, toucans, macaws, pumas and spotted leopard are sold for thousands of dollars in consumption markets of the first world.

From the Amazon jungle to a golden cage in New York, from the *Pantanal* (a kind of Brazilian savanna) in Mato Grosso do Sul State to a madam's coat in Paris, the traffic of animals has particularities which we will analyze. Just as others illicit activities, the traffic of animals can certainly be countered by a net of inspectors and employees in strategic positions, in ports, airports and frontiers, regimented to facilitate embarking/disembarking legal channels for exportation. We will also find airline companies' employees involved in the perpetration of these offenses; the ones responsible for air cargoes and crew members as well.

Another singular detail, already observed in the international wildlife traffic, is the "laundry". Such activity is operated by the international traffickers, when there is a frontier country with "flabby" environmental legislation, in comparison to the others.

A real example would be the case of animals captured in Brazil (which has rigid legislation concerning fauna exportation) and smuggled, via land, to Argentina, whose legislation is considered complaisant. In Argentina the animals suffer the "laundry", i.e., they have their documentation altered, as if they were

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captured in that country and, this way, are “legally” exported to the USA and Europe. The animal is not returned to Brazil, modality known as “re-enter”, where documentation fraud occurs with the help of nurseries placed in foreign lands.

Another traffic modality presently used is the transport of tropical birds' eggs. The criminals are smugglings the eggs of macaws, parrots and toucans, concealed in executive suitcases which are portable incubators. Up to sixty eggs can be placed inside these suitcases.

We know that some rare *Psittacidae* are worth up to a hundred thousand dollars in European and North America markets. It is not difficult to conclude that inside only one suitcase can be transporting “merchandise” that can reach, in those market, a total of six millions dollars.

According to this explanation, the traffic of wildlife is as profitable an activity as the illegal trafficking of drugs and firearms. Thus we must say that it is a transnational organized crime activity, though we have not proven any links to organized groups for a while.

H. Major Transnational Organized Criminal Groups

Without a shadow of doubt, in Brazil, organized crime is evolving. Until a few years ago, Brazil was only a route for the traffic of drugs, and even continuing to be so, other criminal activities have expanded: groups are involved in stealing and robbing cars, stealing loads from trucks; large intensive drug traffic; public corruption, fiscal frauds, etc. Still, in relation to the issue of transnational organized crime, it is still too early to speak about the existence in Brazil with important national organizations. In spite of the existence of small groups that are active in the area of the frontier with Paraguay and Bolivia -

just as a matter of opportunity - the Nigerian, Italian, and Colombian mafia, which are the main groups of represented in transnational organized crime, operate in Brazil, but without headquarters here.

Finally, according what was stated. It is time for a question: Will Brazil be prepared to face this menace? The Brazilian strategy against organized crime supports itself in four important points: legislative modernization; cooperation between police organizations; the strengthening of the Federal Police Department and the Highway Federal Police; and increase in international cooperation.

II. TOOLS FACILITATING THE INVESTIGATION OF TRANSNATIONAL ORGANIZED CRIME

A. Current Situation, and Problems in the Utilization of and Solutions for Controlled Delivery

In spite of the principles of the Constitution of Brazil (1988) and the Brazilian process and penal laws, in effect for sixty years, with provisions that avoid the usage of controlled delivery due to what is established as: the duty of the police to arrest any person caught in the act of committing a crime or who is found attempting to commit; committing or right after committing the crime; and, if it is not done immediately, the police will commit a crime for not practicing an act in the fulfillment of their obligation, controlled delivery was admitted in Brazil only to combat organized crime according to the new Law 9034 from 1995.

With juridical justification of this new law, to stop unconstitutionality, criminal association in cases of macro-criminality would be a permanent passive offense, and those persons would be subject to

imprisonment at any moment, as long as the police are permanently following their criminal actions.

Still, this new law does not make it possible to make use of controlled delivery in Brazil by the police departments, due to the lack of detailed norms relating to some aspects, such as:

- (i) establishment of which authority is in charge of this control: the judge, the prosecuting attorney, or the police itself;
- (ii) modernization of the procedures of the police proceedings, to be adequate for controlled delivery;
- (iii) regulation of the procedures of controlled delivery in secretive normative instructions;
- (iv) to begin to use controlled delivery within the norms for its functioning and the modernization of the judiciary and procedures to be adequate to facilitate investigations of the transnational organized crime.

B. Electronic Surveillance (Wire-Tapping, Communications Interception etc)

Presently in Brazil, Law 9296 is in effect and since 1996, it authorizes, based on the Federal Constitution of Brazil, only the telephone interception of communications. So, this tool for electronic control is being used by the Brazilian police for criminal investigation and penal process instruction, on request from the police authority or prosecuting attorney to the judge in charge, whenever there is reasonable evidence of authorship, the fact that is being investigated constituting crime of high relevance - illicit traffic of drugs, kidnapping, laundering of money, etc - and the proof cannot be provided by another means available. According to this law, the judge must decide on the request for the telephone interception in a period

of twenty four hours and, in case it is authorized, the period will be for fifteen days (that can be extended for fifteen more days).

The Brazilian police and prosecuting attorneys have used telephone interception to solve many cases, when authorized. Mainly, due to dissemination (by the media) of the usage of this tool by the authorities, the criminal organizations have become more and more organized in order to avoid it. As well, some programs and systems for mobile phones nowadays make it difficult to breach the secrecy of their telephone calls. The Brazilian police agencies also have several difficulties in using the telephone listening device. The most constant problems are the following:

- (i) resistance on part of the judges to grant authorization for the telephone interception, because these judges think that the police are able to get the proof they need by means of old methods, and are not accustomed yet to the technological developments in the world;
- (ii) interrupted service in the telephone companies to attend to the judicial authorization for telephone interception during the weekends, holidays and night shifts; and
- (iii) the legal term for the period of eavesdropping of fifteen days, which can be extended for fifteen more days, is not sufficient in most of the cases, mainly when it has to do with transnational organized crime.

It would be a great achievement for the solution of these problems in telephone interception if the Brazilian judges (who are (at present) starting their careers being less than thirty years old) had more life experience and more factual participation in police work. The government could also establish norms obliging the telephone

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companies to attend quickly to these types of authorization, when it is related to transnational organized crime. Another solution would be the on-line connection of the data from the telephone companies with the police terminals, with the activation of the system being under judicial order.

With the difficulties already found by the Brazilian police and prosecuting attorneys in the instruction of criminal investigations using telephone interception, it is evident that room listening devices or hidden microphones would be very valuable to combat transnational organized crime. Under the Brazilian Constitution this is considered illegal at present.

C. Undercover Operations

Operations of infiltration of police in criminal organizations in Brazil are not possible yet because there is no exception to the rules of the Brazilian Penal Code which establishes: "whoever may contribute to a crime is subject to the sanctions established". Brazilian law lists as basic principles of the role of the police the prevention of crime before the repression of crime.

Therefore participation of the police in any stage of the crime, whether it is in the preparation or execution, makes it impossible to commit the crime, and the author will be exempt of sanction. Certainly the solution for this problem would be the reformulation of our sixty-year-old Penal Code. There is already a Committee which has been working for some years to present a bill to this effect.

D. Best Practice in and Weak Points of Conventional Investigative Techniques

In the investigation of transnational organized crime in Brazil traditional techniques are extensively used and

constitute proof in the criminal process (with equal value, depending on the context). The gathering of material proof in a search and seizure which occurred during police investigation (by judicial order), with indications of authorship, combined with declarations from witnesses and police reports from surveillance/observations, are the best points of conventional investigation. The questioning of suspects will either confirm all the proof already evident, or will lead to formal contradiction in the process.

In the questioning of suspects and interviews with witnesses, there is difficulty as to the hearing, because in Brazil the statements of these people must be formal (at a predetermined place and time), by delivery of written information or notification at least two days before. Suspects also have the right to appear with their lawyers. As a result, these hearings generally take a long time to occur, as these suspects and witnesses must receive the document personally by going to police headquarters. Sometimes it takes long time for the police to find their addresses. Additionally, there is the fact that only after the third legal notice or invitation, formally delivered and not attended, can the suspect or witness be taken as soon as he/she is found to the police station to provide information about the case under investigation.

Regarding search and seizure, problems originate in obtaining orders and in the delay (on the part of the judges) in issuing the judicial order. The judges always send a requisition for an order of search and seizure, to be done by the police, to verify the position of the Department of Justice. Another problem occurs at the moment of search in the houses, companies, etc. of the suspect, when it is necessary (due to an act of law) to have the presence of two witnesses that are preferably not

police officers. People refuse to collaborate under several pretexts, above all, due to fear of reprisal in the future, as they have no guarantee that the police will provide effective and lasting security.

In shadowing and observations, the most common problems are generated by the lack of integration and trust between the different police groups in Brazil - Federal Police, Federal Highways Police, Military Police and Civil Police. Due to the fact that there is no hierarchy and because of problems of internal corruption, they do not receive communications from each other about ongoing work.

Thus, in the development of surveillance operations, the population always denounces the presence of suspicious people to the Military Police, which approach the suspect, i.e. the police at work in the area, as if they were criminals. This is commonplace due to the high rate of urban violence that exists in the country, and many times they compromise the secrecy of the operation.

III. METHODS FOR OBTAINING COOPERATION WITH WITNESSES TO PUNISH ORGANIZED CRIMINALS

A. Immunity

According to Brazilian law for combating organized crime, there is only the potential that the penalty will be reduced to one or two thirds, when the spontaneous collaboration of the author will lead to clarifying the penal infractions and their authorship. There is not any precept of immunity.

In relation to this spontaneous collaboration, it can be said that it does not have practical effect in Brazil, as this benefit was created ten years ago in the Law of Violent Crimes and, up to the

moment, in practice has had no effect, rarely being applied. Delinquents know that when they betray their accomplices they will not have a long life in jail. And the Brazilian State is in such a bad financial situation that it will not build special prisons for criminals who collaborate with justice officials. The horizon is not a very promising one, unless the State can search for more encompassing solutions for the problem than the simple legislative insertion of such measures.

The Programme for the Protection of Victims and Witnesses constitutes the only existing method in Brazil to obtain the cooperation of people, aimed at the punishment of individuals connected to organized crime. Nevertheless, it is impossible to assure the security of people in Brazil.

B. Witness and Victim Protection Programmes

The national programme for the protection of victims and witnesses who have been threatened, was created by Federal law in July 1999. The programme came into effect in August of that year, and the people who are entitled to the protection programme are those without decreed imprisonment and their relatives who have lived with them habitually. The protection can be requested by the witness him/herself, or by the victim, the Department of Justice, the police, the judge who is responsible for the criminal process, or by public agencies and entities for the defense of the human rights.

The programs are funded with money from the State and Federal governments and executed by non-governmental organizations (NGOs). They have the following measures:

- (i) Transference of residence;
- (ii) Monthly financial aid per person;

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- (iii) The supply of food and clothing;
- (iv) Safety when they go from one place to another;
- (v) Help to find a job in the work market;
- (vi) Removal of public employees without any loss of remuneration;
- (vii) Social, psychological and medical assistance;
- (viii) Change of identity.

IV. COMPONENTS AND LEGAL FRAMEWORKS FOR COMBATING TRANSNATIONAL ORGANIZED CRIME

A. Criminalization of Participation in an Organized Criminal Group

According to the Brazilian legislation, the punishment of criminals from groups of organized crime is done according to the sanctions foreseen for each crime. No special circumstance exists due to the fact that the offender has committed a crime or crimes when he/she was participating in a organized crime group.

The criterion for the punishment of those participating in groups of organized crime, according to what is established in the Brazilian Penal Code, are the examples below:

- (i) when the accusation is for only one crime, the suspect will be condemned to the sanctions of that penal type;
- (ii) when the charge is for two or more crimes, by means of more than one action, that is, more than one act or omission, the sanction will be applied in a cumulative way, that is, they are arithmetically added; and
- (iii) when the accusation is for committing two or more crimes by means of only one action, then there is the application of the most severe sanction that is applicable, but increased from one sixth to one half.

B. Anti- Money Laundering Systems

According to what is demonstrated by international experience, one of the most important aspects for the prevention of the offense of money laundering is perfection of the administrative system and financial controls.

As a result, the law for the prevention and combat of money laundering in Brazil was created in 1998, along with a criminal policy aimed at this objective. This gave rise to a system against money laundering which initially appears in the law itself, with the criminalization of the behavior of money laundering. From then on we had a special law considering the laundering of money as a crime, beyond our old Penal Code. Also came the creation of the Council of Financial Activities (COAF), which aimed at discipline, applying administrative sanctions, receiving, examining and identifying suspect occurrences of illicit activities related to the laundering of money. It's aim was also to coordinate and propose mechanisms for the cooperation and exchange of information that could provide quick and efficient actions in the combat, cover-up or dissimulation of goods, rights and values. The COAF is comprised of public employees from several federal agencies, such as the police, auditors, etc. We also created, at the Central Bank of Brazil, the Department for the Combat of Financial and Exchange Illicit Acts. This department was designated to be in charge of the general monitoring of the financial market, and is the main agency to receive allegations made by the COAF in relation to the financial system.

At the Federal Police Department was created the Division for the Repression of International Organized Crime, with headquarters in the capital of the country, but with police trained for investigations throughout Brazil. This department is in

charge of the ascertaining information on transnational organized crime activities.

to let them go free (after they receive some bribe).

C. Asset Forfeiture System (for Assets Derived from Organized Crimes)

For goods and merchandise or real property acquired as product of crime, even if these have already been registered in the name of person or persons without any connection with the crime, the Brazilian procedural law has only one institute available, which is for the seizure of goods. For seizure it is necessary that there are strong indications of the illicit origin of the goods. Brazil does not have an asset forfeiture system that is specifically applied in cases of organized crime.

In our country, in order to perform the extradition correctly, after the identification and confirmation of the place where the person, who is searched for is staying, and after the extradition by the Central National Office of the Interpol and the issuing of a Warrant of Arrest by the highest court of Brazil, the Federal Supreme Court, the person who is searched is generally arrested by the Brazilian Federal Police. The Supreme Court of Brazil has determined that people arrested for extradition remain under custody in the jail of the Federal Police Department, in order to avoid escape, as this always occurs when these people remain in common prisons.

V. BEST PRACTICE IN EXERCISING INTERNATIONAL COOPERATION IN CRIMINAL MATTERS (EXTRADITION AND MUTUAL LEGAL ASSISTANCE) TO TACKLE TRANSNATIONAL ORGANIZED CRIME

In the case of existing treaties or the formalization of reciprocity agreements for extradition, the best way to practice international cooperation in relation to transnational organized crime is the guarantee of the imprisonment and hand-over of the person to be extradicted to the country that is making the request, after the adoption of the appropriate legal orders.

Due to its large extension, Brazil has always received a large number of members from international organized crime groups, which have remained in the country by using several tactics which include the corruption of public authorities and police for safe and incognito permanence. Regularly these criminals use their financial powers to convince some poorly paid civil, military and state police

EFFECTIVE METHODS TO COMBAT TRANSNATIONAL ORGANIZED CRIME IN CRIMINAL JUSTICE PROCESSES: THE NIGERIAN PERSPECTIVE

*Awunah Donald NgorNgor **

I. PREAMBLE

At the dawn of the 20th century, crime and criminality have metamorphosed from international to transnational. This globalization of crime has necessitated nations to seek and explore the effective ways and means to curb transnational crime through the vehicle of criminal justice processes. The technological advancements witnessed in the preceding millennium in all facets of human endeavor have inadvertently, or simply put, aided and created a seemingly enabling global environment for transnational crime to thrive.

The world is becoming smaller and interrelated every day. The advances made in technology have facilitated trade, travel, movement of persons and services. In the same vein international criminal activity has tremendously benefited from these advances. The complicity and extent of transnational organized crime, and the negative influence these criminals exert through the stupendous wealth that they acquire make it imperative for the cooperation of all nations and regions of the world to effectively combat this menace. The stakes are enormous, as international criminal organized groups jeopardise the global trend toward peace and freedom, sap

the strength from developing countries and threatened all efforts to build a safe, more prosperous worlds.

The political, economic, social and security frameworks of many nations have been gravely weakened, undermined and corrupted by the unwholesome activities of organized criminal groups operating in a sophisticated impregnable network.

In this presentation, however, attempts will be made to critically analyse the Nigerian model in tackling, controlling and managing transnational organized crime within the ambit of the Nigerian Criminal Justice System and International Justice System and International Cooperation.

II. AN OVERVIEW OF TRANSNATIONAL CRIME

Transnational organized crime suggests in simple terms the movement of persons, goods and services across sovereign national jurisdiction in a manner devoid of acceptable norms and standards. The increasing trend of transnational crime could be best appreciated against the backdrop of internationalization of crime. These phenomena of globalization of crime could be traceable to some contending reasons:

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- (i) Emergence of Regional Cooperation and removal of trade barriers;
- (ii) Huge profit can be made by meeting demand in one country for an illegal product which is only available from elsewhere, e.g. cocaine, heroine or prostitution;
- (iii) Criminals are making increasing use of the international system and are particularly attracted to jurisdictions which help to disguise their activities, such as countries which entrench banking and corporate security;
- (iv) Criminals exploit weakness in the provision of products or services in another country, for instance, the roving international banking frauds, which have emerged in recent years.
- (v) The forging of international letters of credit or bearer bonds, which can be presented at a series of financial institutions around the world in an effort to exploit the tax internal checking procedure.
- (v) The increased volume complexity of international transactions which help to disguise criminal activity; and
- (vi) The depressed economy of most developing countries which creates the conducive fertile ground for the gestation of crime networks and operation.

Transnational organized crime is a highly sophisticated and syndicated criminal activity which surpass the primary concern of a particular single nation. It demands a conceptual international cooperation to tackle. Some of these crimes that have transnational characteristics are:

- (i) illicit drug trafficking
- (ii) illegal firearms trafficking
- (iii) human (women and children) trafficking
- (iv) trafficking stolen vehicles
- (v) card fraud
- (vi) money laundering
- (vii) smuggling
- (viii) trafficking in stolen work of arts
- (ix) Advance fee fraud (a.k.a. 419) amongst others.

There are major factors largely responsible for the preponderance of transnational crime, namely:

- (i) The development of global markets;
- (ii) Advancement in technology, efficient communication and transport which have accelerated the movement of people, products, money and of course criminals;
- (iii) The deregulation of the financial systems of many developed economies whereby many bottlenecks in international trade and commerce are removed;
- (iv) Political developments, especially the demise of old totalitarian regimes of East and Central Europe and the emergence of new markets oriented democracies, causing existing international criminal organisations to seek new frontiers;

III. THE NIGERIAN SITUATION

It has been argued that organized crime weakens the very foundation of democracy, as there can be no-good governance without rule of law. This observation is quite apt for the situation in Nigeria! As the nation faces the challenges of nurturing a stable democracy, after many years of military dictatorship, organized crime poses a great threat to the survival of the country.

It is a truism that for every six black men in the world, four are Nigerians. Therefore, Nigeria has a dominant role to play in the international effort to curtail transnational organized crime. The participation of

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Nigerians in organized crime whether as passive members of the group or active main stream members must be seen within the context of Nigeria as the most populous black nation in the world. At the local level, the sophistry of organized groups can be best described as rudimentary. However, with international linkages, the operational base of organized crime in Nigeria has widened beyond immediate frontiers which is a source of great concern to government. The Nigerian government has mapped out policies and strategies to deal decisively with crimes that are transnational in nature and scope.

A. Illicit Drug Trafficking

Drug trafficking undoubtedly features prominently among international crimes that respect no national boundaries. Nigeria is neither a producer nor consumer nation in the illicit drug trade. It serves as a transit route. Most persons with Nigerian International Passport that are arrested, prosecuted and convicted in connection with drug trafficking are couriers working for drug barons in other countries.

Of all transnational criminal activities prevalent in Nigeria, the drug trade has brought the country much more woes and international pariah status than any other has. Drug trafficking came to official prominence between 1983 - 1984 in Nigeria following public execution of some convicted drug traffickers.

The violence associated with illicit drug trade in some parts of the world is yet to be witnessed in Nigeria due to the fact that Nigeria is a stop over routes between the producers on one hand and consumers on the other. The couriers are mostly youths within the age bracket of 18 - 40 years. The methods of peddling in drugs varied from simple concealment in personal effects, lining of clothing, animals (pets),

concealment in women's reproductive organ (vagina), disguised as talcum powder, packaged in small molded balls and swallowed, engraved in cultural artifacts to many ingenious unimaginable methods. The drugs are transported across the globe by land, air and sea.

However, be that as it may, since the establishment of National Drug Law Enforcement Agency (NDLEA) by the Nigerian government in 1989, the hitherto upsurge in drug trafficking has reduced considerably. Added to this, is the promulgation of National Drug Law Enforcement Agency Act. The Act seeks to enforce laws against the cultivation, processing, sale, trafficking and use of hard drugs and to empower the Agency to investigate persons suspected to have dealings in drugs and other related matters. The NDLEA with the cooperation of other international agencies has relatively fought the war against drug trafficking to a reasonable level.

B. Illegal Firearms Trafficking

Proliferation of firearms is a threat to international security. Illegal firearms trafficking constituted a major component of transnational organized crime. The ever increasing armed conflicts in many regions of the world account for huge trafficking in firearms. Similarly, constant political instability and internal power tussle amongst third world countries precipitate arms trafficking.

The Nigerian fratricidal civil war between 1967 - 1970 exposed the country to influx of firearms. Also, the participation of Nigeria in Peace Keeping Operations all over the world and particularly Nigeria's dominant role in Economic Commission of West African States Monitoring Group (ECOMOG) Operations in the sub-region serves as a likely source of illegal firearms into the country. Apparently, the major

route of illegal firearms being brought into Nigeria is through the seemingly porous borders of neighbouring countries in the sub-region.

Illegal firearms trafficking have undisputedly fueled ethnic/religious armed conflicts and armed robbery in Nigeria which has resulted to monumental negative consequences. Armed robbery remains one of the major crimes in Nigeria which is perpetrated by holders of illicit arms.

Strategies for arms control have been put in place by Nigerian government. These include:

- (i) intensive international boundary control
- (ii) cancellation of Firearms (Dealers) Import Licence
- (iii) withdrawal of arms from individuals
- (iv) periodic check of arms on charge in a public armoury
- (v) Continuous recovery of arms and ammunition by the Police from armed robbers and other criminals.

On the international sphere, under the auspices of United Nations Regional Centre for Peace Disarmament in Africa and the programme of Coordination and Assistance for Security and Development (PCASED), Nigerian government organized a sub-regional workshop on the Importation, Exportation and Manufacture of Light Weapons in West Africa. The workshop was designed to enable the Chiefs of Police, Customs and Gendarmerie of ECOWAS member states initiate a process of establishing an information exchange network and strategy for the control of the proliferation of light weapons in the sub-region.

Under the relevant Nigerian laws, arms trade generally is under control by the Government of Nigeria. It is controlled by the issuance of relevant licenses which indicate the types and categories of arms and ammunition that can be traded upon by individuals and corporate organisations. The general control and acquisition of personal firearms in Nigeria is the prerogative of the Inspector-General of Police in the exercise of his function as the Chief Security Officer.

Any arms procured through any illegal way is a crime. The illicit trade in arms is being carried out nefariously by dubious businessmen whose identities remained masked. It is extremely difficult to determine the quantity of arms and ammunition illegally possessed in Nigeria. This poses a great danger to internal security.

It is however pertinent to assert that the Nigeria Police Force and other security agencies as well as the government are doing everything possible to check the activities of these unpatriotic Nigerians and their foreign collaborators engaged in such criminal activities, which from all indication constitute serious threat to the security of Nigeria in particular and the international community at large.

C. Human (Woman and Child) Trafficking

In the recent past, the trafficking in humans, particularly women and children has assumed an alarming proportion globally. Trafficking in persons has become a big menace internationally because of its attendant illegality and evil. Victims of human trafficking are often recruited into prostitution or child-labour or outright slavery. The traffickers and victims are seduced into the illicit trade by the apparent economic benefits and sermons of success stories by those who are engaged

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in the illicit trade.

Nigeria is a leading nation in human trafficking in Africa. Young Nigerian girls of the average age of 14 years are lured into this illegal business by syndicates operating within and outside Nigeria. The entire business is shrouded in secrecy and some of the victims are transported outside Nigeria in the guise to pursue education and gainful employment. The traffickers employ subtle force, coercion, fraud and outright deceit to accomplish their objectives.

Generally, the trafficking gravitates towards Central Europe especially Italy through various detected and undetected routes. Despite existing laws against trafficking in human beings and related crimes, the illegal business has continued unabated and the government of Nigeria is making tremendous effort to stem the tide. Recently, there has been intensive enlightenment and educational programmes on the dangers of human trafficking which is linked to prostitution, child labour and slavery. To this end, deported Nigerians from Europe are rehabilitated and offered alternative employment by government.

In the same direction, the Nigeria Police Force will be hosting international workshop on trafficking in human beings in November, 2000. In an effort to have a national focus on the issue, the Inspector-General of Police set up a National Committee on Human Trafficking in 1995. Similarly, a National Working Committee on Human Trafficking was inaugurated in December, 1999. The Head of Force Criminal Investigation Department (FCID) Mrs. A. J. Ojomo, fwc, Assistant Inspector-General of Police, as the coordinator of the National Working Committee is piloting the crusade against trafficking in human beings.

An NGO, Women Trafficking Child Labour Eradication Foundation (WOTCLEF) pioneered by the wife of the Vice President of Nigeria is sponsoring a private Bill to the National Assembly on the issue of women trafficking. WOTCLEF is fighting the scourge from a moralistic point of view. The Police is engaged in preventive surveillance patrol, information gathering and sporadic raids on syndicated traffickers.

Prostitution is said to be the world's oldest profession. It is a global phenomena and a complex worldwide web. Essentially, trafficking in humans, particularly in women and children, is to serve the international prostitution ring. The world community therefore, must amend respective existing laws against trafficking in human beings and adopt measures to curtail human trafficking.

D. Advance Fee Fraud : A.k.a 419

The concept of Advance Fee Fraud is predicated on payment of some sort of fees, tax, kick-back or brokerage on the pretence that such is required as part of official transaction in existing business deals. The Nigerian Criminal Code section 419 describes it as obtaining by false pretences. It is an organized syndicated criminal venture between dubious, unscrupulous Nigerians on one hand and unsuspecting foreigners to illegally transfer abroad non existing funds belonging to the government of Nigeria or a corporate organisation in Nigeria to an account of such gullible/greedy foreign collaborator. Scam letters and forged documents are mostly used in perpetuating this crime. Its most common form is a letter to an identified foreign businessman who is told enticing stories about huge profits to be made in Nigeria's oil, defence, banking or solid mineral sector by the provision of an account where some money from a deal would be paid. The letter is written in such a way as to attract

an equally dubious foreign businessman who usually buys the scam. He is duped after paying a certain amount of money demanded for bribing officials responsible for releasing the huge sum of money.

The trans-global dimension this crime has assumed is a source of concern to Nigeria because of its negative consequences on the country's economy, credibility, and image. The Nigerian international image has so much being battered that most business proposals from Nigeria are seen as deceptive and fraudulent. Between 1998 - July 2000, the following nationals were complainants in Advance Fee Fraud related cases in Nigeria:

- | | |
|-------------------------------|------------------|
| * Germany 24 | * Italy 5 |
| * United States of America 16 | |
| | * Canada 5 |
| * India 5 | * South Africa 2 |
| * Japan 6 | * Iran 5 |
| * Australia 2 | * Egypt 2 |
| * New Zealand 2 | * Syria 1 |
| * Philippines 1 | * Portugal 1 |
| * Saudi Arabia 1 | * Israel 1 |
| * Korea 1 | * Taiwan 1 |
| * Nigeria 113. | |

(Source: Special Fraud Unit Section, Nigeria Police Force)

This clearly shows the international dimension of the crime. The above quoted figures represent recorded reported cases to the Force Criminal Investigation Department of Nigeria Police Force. Obviously, similar cases might have been reported to other security agencies. Besides, most victims of Advance Fee Fraud in Nigeria are reluctant to report the matter officially to security agencies because the victim(s) and suspect(s) are mostly engaged in illegal processes.

Conversely, the Nigerian government through security agencies especially the Police, have waged unending war against this crime. In this sense, the government

in 1995 promulgated Advance Fee Fraud and other fraud related offences Decree. Similarly, the Nigeria Police established a Special Fraud Unit (SFU) principally to take charge of heinous crimes of this nature. The Nigerian law enforcement agencies work hand-in-hand with other international agencies in joint operation and investigation of the various crimes especially the Advance Fee Fraud. The best way of preventing advance fee fraud is public enlightenment on the crime.

E. Trafficking in Artifacts

Works of Arts are rare and expensive commodities in the international market. Trafficking in stolen works of arts constitute one of the major illicit trades that has international connections. International syndicates in collaboration with their local counterparts gradually plunder the nation's cultural heritage. Nigerian cherished works of arts are found in international art galleries through illegal routes which remain shrouded in secrecy. This unwholesome act of international pillage denies Nigeria the expected foreign earnings. The Nigerian government views this illicit trade with a lot of concerns. It needs some combined efforts of Nigeria and international security agencies to effectively control trafficking in works of arts.

F. Trafficking in Stolen Vehicles

In Nigeria, like most West African countries, sales of second-hand cars is a lucrative business. Due to general global economic recession and harsh economic conditions prevalent in Nigeria, hardly could individuals afford brand new vehicles because of the prohibitive cost. Hence, fairly used vehicles are smuggled into the country from the western world. Businessmen involved in this trafficking employ all forms of intrigues to circumvent payment of customs duties and tariffs. In fact, most of the cars are stolen from US

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and other European countries. These cars find their ways to Nigeria through the international borders of neighbouring West African countries with the connivance and conspiracy of international con businessmen. In most cases, accompanying documents to the vehicles are expertly forged. This transnational organized trafficking is a disturbing trend not only to Nigeria but most countries of the world. International initiative must be put in place to track stolen vehicles all over the world and punish perpetrators accordingly.

G. Money Laundering

Money laundering has a linkage to attempts by organized and unorganised criminal syndicates to legitimise the proceeds of their criminal activities by concealing their true origin and ownership in order to enable them employ such fund for further activities.

These organized criminal groups, for example, drug trafficking, repatriate money from abroad by direct purchase and re-sale of luxury items like cars and jewelry. Similarly, dirty monies are equally passed through complex international system of legitimate business. Professional launderers employ various methods and techniques to accomplish their unwholesome activity. These include over invoicing of goods, usage of high value and using laundered money to capitalize a public quoted company.

The Nigerian government is deeply concern about the distablizing impact of the numerous financial crimes on the nation and have articulated bold measures to fight the menace. Prominent among these measures are setting up of :

- (i) Money Laundering Surveillance Unit in Central Bank of Nigeria
- (ii) The promulgation of the Money Laundering Decree 1995

- (iii) Public awareness campaigns against drug trafficking, money laundering and advance fee fraud locally and internationally.

H. Credit Card Fraud

The use of Credit Card is not well pronounced in Nigeria. However, dubious Nigerian nationals home and abroad are involved in counterfeiting and theft of Credit Cards. The government in collaboration with other international agencies are tackling the menace posed by the activities of international fraudsters. However, international remedy must be found urgently to curb this disturbing trend.

IV. LEGISLATION AGAINST TRANSNATIONAL ORGANIZED CRIME

The Nigeria government has over the years enacted far-reaching laws aimed at checkmating transnational organized crime and punishing the perpetrators of these crimes. These laws include among others:

- (i) Penal Code and Criminal Code Acts. The substantive criminal codes that cover criminal offences in the Northern and Southern Nigeria respectively. In relation to prostitution and trafficking in women, the Penal Code, codified laws of Northern Nigeria provides:
 - (a) Procuration of Minor Girls (section 275)
“whoever, by any means whatsoever, induces any girl under the age of eighteen years to go from place or to do any act with infant that such girls may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punished with imprisonment which may extend

to ten years and shall also be liable to fine”.

(b) Importation of Girls from Foreign Country (section 276)

“whoever imports into Northern Nigeria any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be forced or seduced to illicit intercourse with another person shall be punished with imprisonment which may extend to ten years and shall also be liable to fine”.

(c) Traffick in Women (section 281)

whoever, in order to gratify the passions of another person, procures, entices or leads away, even with her consent, a woman or girl for immoral purpose shall be punished with imprisonment which may extend to seven years and shall also be liable to fine”.

The Criminal Code, the codified laws for Southern Nigeria, provides in section 419, regarding Advance Fee Fraud thus:

“Any person who by any false pretence and with intent to defraud, obtains from any other person anything capable of being, or induces any other person to deliver to any person anything capable of being stolen is guilty of a felony, and is liable to imprisonment for three years”. If the thing is of the value of one thousand naira upwards, he is liable to imprisonment for seven years.”

(ii) National Drug Law Enforcement Agency - established to enforce laws against drug trafficking.

As a deterrent to drug trafficking, NDLEA Act in Part II, Section 10 stipulates:

“Any person who without lawful authority -

(a) Imports, manufactures, produces, processes, plants or grows the drugs popularly known as cocaine, LSD, heroine or any other similar drug shall be guilty of an offence and liable on conviction to be sentenced to imprisonment for life; or

(b) Exports, transports or otherwise traffics in the drugs popularly known as cocaine, LSD, heroine or any other similar drugs shall be guilty of an offence and liable on conviction to be sentenced to imprisonment for life; or

(c) Sells, buys, exposes or offers for sale or otherwise deals in or with the drugs popularly known as cocaine, LSD, heroine or any other similar drugs shall be guilty of an offence and liable on conviction to be sentenced to imprisonment for life; or

(d) Knowingly possesses or use the drugs popularly known as cocaine, LSD, heroine or any other similar drugs by smoking, inhaling or injecting the said drugs shall be guilty of an offence and liable on conviction to imprisonment for a term not less than fifteen years but not exceeding twenty-five years:

(iii) Advance Fee Fraud and other related offences Decree 1999 - Law promulgated to check sharp practices of unscrupulous local and international businessmen:

“Besides, penalties under this Decree, section 11 of the Decree moreover, provides for restitution for the victims of false pretence. Section 11(I) provides, in addition to any other penalty prescribed under this Decree, the Tribunal shall order a person convicted of an

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- offence under this Decree to make restitution to the victim of the false pretence or fraud by directing that person to do the following*
- a. *Where the property involved is money, to pay to the victim, an amount equivalent to the loss sustained by the victim, and*
 - b. *In any other case;*
 - i. *To return the property to the victim or to a person designated by him or*
 - ii. *To pay an amount equal to the value of the property, where the return of the property is impossible or impracticable.*
- (iv) Money Laundering Decree 1995 - Law enacted for prevention of Money Laundering.
"Section 14 of the Decree stipulates what constituted offences under the Decree. It provides thus: a person who:
- a. *Converts or transfers resources or property derived directly or indirectly from illicit traffic in narcotic drugs or psychotropic substances, with the aim of either concealing or disguising the illicit origin of the resources or property, or aiding any person involved in the illicit traffic of narcotic drugs or psychotropic substances to evade the legal consequences of his action or*
 - b. *Collaborates in concealing or disguising the genuine nature, origin, location, disposition, movement or ownership of the resources, property or rights thereto derived directly or indirectly from illicit traffic in narcotic drugs or psychotropic substances*
 - c. *Is guilty of an offence under the section and liable on conviction to imprisonment for a term of not less than 15 years or not more than 25 years."*
- (v) Special Tribunal (Miscellaneous Offences) Act - An Act in respect of miscellaneous offences with stiff penalties and to establish a Special Tribunal for the trial of such offender.
- (vi) Firearms Act 1959 - An Act to make provision for regulating the possession of and dealing in firearms and ammunition including muzzle loading in firearms, and for matters ancillary thereto
- (vii) Anti Corruption Act 2000 - A law enacted to fight corruption in all its ramifications.
- (viii) Mutual Assistance in Criminal Matters within the Commonwealth Enactment and Enforcement Act - An Act to make legislative provision to give the Force of law to the scheme for mutual assistance in criminal matters within the Commonwealth.
- (ix) Extradition Act - A law to enable extradition of fugitive offenders within the Commonwealth.

The aforementioned laws and many administrative instructions are bold and articulated legislative steps to make the commission of transnational and related crimes unattractive.

V. PROBLEMS

Combating transnational crime is fraught with teething problems. The marvelous advancement in technology will definitely enhance the planning and execution of transnational crime. Criminals will advance from the rudimentary modes of communication like ordinary mail, telephone to more

sophisticated E-Mail and Internet satellite communication facilities, thereby creating identification and investigation problems.

Computer revolution has given birth to a new crime trend known as *cyber terrorism*. The detection of counterfeits and forged documents is made tedious by the introduction of hi-tech computer scam, forgeries and advanced colour processing techniques which render distinction between copied document and their originals difficult.

Internet technological knowledge has become a familiar and household commodity in almost all advanced and developed countries with the exception of African countries. Consequently, African law enforcement agencies do not possess the technological know how to burst cyber crimes.

The proliferation in the number and complexity of transnational crimes will make law enforcement capital intensive and cumbersome. Developing countries with their poor economic base and competitive development needs will hardly cope with the responsibilities of modern policing required in this regard. The Criminal Justice system can only respond to the extent that it has capability to respond. The amount of money being invested fighting crime is so small in developing countries in comparison to advanced nations.

Lack of political will on the part of some countries may pose obstacle to law enforcement cooperation in combating transnational crime. It is clear that for political, economic, religious and cultural reasons, some countries are unwilling to enter into bilateral or multilateral cooperation agreement on matters of crime control which they assumed as unwarranted interference with their legal

sovereignty. Complex and varied, the problems militating against the effective combating of transnational organized crime may be, they are certainly not insurmountable.

VI. PROSPECTS

The attendant negative impact of transnational organized crime on world economies can not be overemphasised. Therefore, to effectively combat transnational organized crime, its structural characteristics and operational methods should be taken into account in devising strategies, policies, legislation and other measures designated to combat it.

A critical analysis of transnational crime revealed an organisation which exists to commit crimes; has hierarchical links which enable its kingpins to control the organisation, use of violence, intimidation and corruption to acquire wealth and control territory and market, and launders the proceeds in furtherance of infiltration of legitimate economics. Organized crime groups have potential for territorial expansion beyond national borders and links with other criminal organisations. It is apparent therefore, that any stratagem aimed at combating organized crime must be the product of the knowledge of these organisations and their dynamics, statistics and information should, at every given opportunity, be collated, analysed and appropriately disseminated for use by law enforcement agencies.

On the domestic sphere, to effectively curb transnational organized crime, the following methods should be addressed among others in accordance with various UNO resolutions on the matter:

- (i) Legislation penalising participation in criminal associations or conspiracies, and imposing criminal liability on

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- corporate bodies is necessary as a means of strengthening preventive capabilities;
- (ii) Reliable evidence gathering techniques, such as electronic surveillance, undercover operations and controlled delivery should be considered in national law;
 - (iii) Encouraging the cooperation and testimony of members of organized criminal gangs by limiting the disclosure of the address and identity of witnesses, and protection programme of witnesses and their formation;
 - (iv) Defeating the economic power of criminal organisation through criminal law measures with appropriate sanctions and sentences and regulatory mechanisms. The laundering of criminal proceeds must be criminalised;
 - (v) Legislative and regulatory measure that limit financial security, ensure adequate record keeping and impose an obligation for the identification and reporting of suspicious financial transactions;
 - (vi) Strengthening of the supervision of passport issuance and the endorsement of protection of passports against tampering and counterfeiting; and
 - (vii) Promotion through mass media campaigns that stimulate public awareness of the evils of organized crime; the need for public participation in its prevention and the promotion of public security.

Added to the above, and most importantly on the domestic front, should be the establishment and management of courageous, incorruptible law enforcement agencies to arrest, investigate and

prosecute culprits of transnational organized crime to a logical conclusion. Currently in Nigeria, the government is re-organising, re-modernizing her security agencies especially the Police Force to squarely face the challenges of the new trends in the transnationalization of crime.

Transnational organized crime is an international activity that calls for nation states to pool their resources to collectively enhance peaceful, economic, social growth and development for the mutual benefit of all. Consequently, there should be in place workable global strategies to effectively combat transnational organized crime within the framework of criminal justice processes. To this end, special courts with general international application should be created to deal squarely with transnational organized crime.

Significantly, the United Nations has spearheaded counter-measures against transnational organized crime. The plan of action adopted during the 7th United Nation Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1988 and the adoption of Model Treaty on Extradition and Model Treaty on Mutual Assistance in Criminal Matters in 1990, in accordance with the 8th Congress held in Havana are pointers in this direction.

In order to eliminate the destructive aftermath of organized crime, international cooperation in criminal matters should be hinged on the following forms:

- (i) Extradition;
- (ii) Mutual Legal Assistance;
- (iii) Transfer of Criminal Proceedings;
- (iv) Regulations and enforcement of foreign criminal judgements and sentences which may include:
 - (a) Transfer of prisoners;
 - (b) Transfer of supervision of persons conditionally sentenced

- or released;
- (c) Enforcement of other sanctions:
- Search, seizure and confiscation of criminal proceeds of crime;
 - Special investigation techniques;
 - Exchange of information and training.

investment necessary for all-round development.

To ensure peace, tranquility and a globally secured life, the modern world must take the issue of transnational crime, and international cooperation in combating it, very seriously.

Furthermore, international organisations such as ICPO-INTERPOL, the World Customs Organisation, the United Nations Commission on Crime Prevention and Criminal Justice, the Universal Postal Union should be used to full advantage in global law enforcement. Transnational organized criminal organisations are not only sophisticated but also heavily financed, there is need for harmonization of relevant laws, equally nations should make adequate and sufficient budgetary allocation to crime prevention and detection.

The negative consequences of transnational organized crime transcend government, public and private sector. Therefore, the burden should not be left to government alone to bear. The public and private sector should be encouraged to fund law enforcement cooperation programmes aimed at eradicating organized crime. The civil groups have comprehensive reservoir of information and knowledge on these criminal syndicates.

V. CONCLUSION

Undoubtedly, no effort propelled to stem the tide of transnational crime with its monumental and disastrous consequences on the world order will be too great. The international community will to her peril neglect to face the challenges of modern crime and criminality. A political system that allows criminals free reign will not attract the much needed foreign

COUNTRY PAPER ON EFFECTIVE METHODS TO COMBAT TRANSNATIONAL ORGANIZED CRIME IN CRIMINAL JUSTICE PROCESSES (PHILIPPINES)

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I. FACTUAL SETTING

Transnational organized crime (TOC) is a serious global menace that has evolved into a sophisticated and even legitimate means of perpetuating criminal activities and dynasties. It continues to threaten the future, the very existence, of every man, woman, and child because of its innate voraciousness. No one is spared, not the Americas, not the European Community, especially not the developing countries and emerging democracies in Asia and Africa. It destabilizes economies and creates a façade of stability and progress to conceal the erosion of the moral fabric of modern society on which it feeds. Globalization and the growing popularity and application of the internet has made it possible for transnational organized crime groups (TOCGs) to expand their activities at an alarming rate under a cloak of legitimacy and to establish bases of operations beyond their normal and traditional confines. States with high poverty levels are particularly vulnerable to such incursions because of the staggering amounts these groups are willing to invest in employing offshore managers and in gaining the goodwill of local law enforcers and officials.

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The Philippines, which has not attained genuine economic growth in the past, certainly fits this profile. Additionally, its location and thousands of mostly unsecured islands, with rugged coastlines and friendly townfolk, facilitate infiltration and provide strategic and ideal drop-off and transshipment points for TOCGs.

II. TRANSNATIONAL ORGANIZED CRIME IN THE PHILIPPINES

A. The Current Situation

TOC has not been given much attention by past administrations due in large measure to preoccupation with domestic problems still evident to this day, among them, uneven distribution of wealth, trade imbalance, and the protracted though isolated insurgency in the south. This has been compounded by the traditional notion that crime prevention lies within the purview of domestic law enforcement. Thus, international covenants notwithstanding, TOCs have not been as seriously addressed in the Philippines as in other countries. As a member of the United Nations, the Philippines has participated in the various conventions of the UN Congress on the Prevention of Crime and the Treatment of Offenders, and has become party to such positive measures as the Milan Plan of Action, the Caracas Declaration, and the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order.

For some time, Philippine leaders have been aware of the guidelines and policies on the prevention and control of organized crime, judicial independence, extradition, mutual assistance, transfer of proceedings, and treatment of prisoners, among other matters. Unfortunately, there has been a dearth of relevant local legislation on these subjects, and the ones enacted have been fairly conservative.

Existing criminal laws, however, may be made applicable against TOCGs as long as the crime involved or any of its components falls within the definition of any criminal statute and meets the requirements of Philippine principles on territoriality. The Revised Penal Code (RPC), the main source of criminal law in the Philippines since 1 January 1932, enumerates specific felonies that may be committed by *any person*. Similarly, special laws on specific crimes not identified or defined in the RPC, such as laws on narcotics,¹ graft and corrupt practices,² illegal possession or manufacture of firearms and explosives,³ illegal gambling,⁴ illegal fishing,⁵ illegal logging,⁶ piracy and highway robbery,⁷ hijacking,⁸ car theft,⁹ and white slavery,¹⁰ may also be committed, directly or indirectly, by members of TOCGs. With

such wide coverage, they can accordingly be charged, tried and penalized under Philippine laws, as long as no question of territorial jurisdiction or diplomatic immunity is raised. Still, the Philippines is wanting in legislation on some forms of TOC like money laundering¹¹, human trafficking, environmental crimes,¹² card fraud, computer-related crimes,¹³ stolen auto and auto parts trafficking, maritime piracy, and violations of intellectual property rights. The latter, described in 1995 by the FBI as the “crime of the 21st Century,” is itself a tool for money laundering,¹⁴ but there is no existing local legal mechanism for making such determination or dealing with a given identified situation.

Without belaboring the obvious, the fact is, even the terms “transnational organized crime” and “transnational organized crime groups” have no exact definition under existing Philippine laws. The only known definition of TOC is found in a paper by a police senior superintendent who declared that “there is an emerging consensus defining transnational crime as *an offense that has an international dimension and involves (the) crossing of at least one border before, during and after the fact*. Therefore,

¹ Republic Act No. 6425. (Henceforth, any reference to Republic Acts shall be indicated as “R.A.”).

² R.A. No. 3019.

³ Presidential Decree No. 1866. (Henceforth, any reference to Presidential Decrees shall be indicated as “P.D.”).

⁴ R.A. No. 3063 (on horse racing); P.D. No. 449 (on cockfighting); P.D. No. 483 (on game fixing); P.D. No. 510 (on slot machines); and P.D. No. 1306 (on jai alai).

⁵ P.D. No. 704.

⁶ P.D. No. 330.

⁷ P.D. No. 532.

⁸ R.A. No. 6235

⁹ R.A. No. 6538.

¹⁰ Batas Pambansa Blg. 186.

¹¹ Although the Philippines is not a member of the Financial Action Task Force (FATF) on Money Laundering, it is enjoined to adopt the “Forty Recommendations” of the FATF drawn up on 1990 and revised in 1996.

¹² For instance, in the case of the Philippines, how to protect biodiversity, how to deal with the unauthorized dumping of toxic wastes, how to ensure the safe use of chemicals on food products and raw materials, or how to police marine sanctuaries within Philippine waters.

¹³ The efficacy of the recently enacted *E-Commerce Law* (R.A. No. 8792) is yet to be determined.

¹⁴ *Organized Crime and Product Counterfeiting*, <<http://www.ari.net/iacc/economic.html>> 20 May 2000.

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it is a mutual concern of at least two affected countries that they must jointly address.”¹⁵ This definition begs the question, to say the least. To fully understand the nature of TOC and TOCGs, a resort to other sources is inevitable. The INTERPOL defines TOCG as: “Any enterprise or group of persons engaged in a continuing illegal activity which has as its primary purpose the generation of profits, irrespective of national boundaries.”¹⁶ This definition, criticized by Italy, Spain, and Germany for leaving out the requirement of an organized command structure, and by the U.S. and Canada for omitting the requirement of using violence to attain the group’s goals, was later altered to read, “Any group having a corporate structure whose primary objective is to obtain money through illegal activities, often surviving on fear and corruption.”¹⁷

B. Legal Frameworks for Combating Transnational Organized Crime¹⁸

1. The Early Experiments

Early attempts to combat TOC were mostly of local application and, in more ways than one, required further legislation to be effective. In 1979, at the height of martial law, former President Ferdinand E. Marcos established a National Committee on Anti-Organized Crime (NACAC) to formulate government plans, implement actions, and control all activities “relative to the five pillar approach to the National Criminal Justice System, particularly on organized

crimes.”¹⁹ Two years later, Marcos created the Peace and Order Council (POC),²⁰ whose functions and responsibilities duplicated those of the NACAC. Because of this, E.O. No. 829 was passed on 11 September 1982, abolishing the NACAC with the POC absorbing its functions, duties, and responsibilities. The National Law Enforcement Coordinating Committee (NALECC) was also constituted to coordinate the activities of various law enforcement agencies. In such seminal form, however, the POC and the NALECC were nothing more than toothless organizations that posed no significant threat to the scattered TOCGs operating in the country.

From that time until the ascent to the presidency by Fidel V. Ramos, Marcos’ cousin and former police chief, there was absolutely no forward movement in the battle against TOC. Within his first year in office, Ramos reorganized the NALECC twice. In 1999, the NALECC would undergo yet another organizational shift as the government intensified its TOC programme. Meanwhile, Ramos issued E.O. No. 246 on 18 May 1995, reconstituting the National Action Committee on Anti-Hijacking as the National Committee on Anti-Hijacking and Anti-Terrorism (NACAHT).

Realizing that the task of preventing or eradicating TOC on its own was going to be very difficult, the Philippines sought to fight this war in alliance with its neighbors. In a grand show of regional solidarity, nine Ministers of Interior/Home Affairs and Representatives of ASEAN Member Countries²¹ converged in Manila, on 20 December 1997 for the 1st ASEAN Conference on Transnational Crime and signed the ASEAN Declaration on

¹⁵ Lucas V. Cauton, Jr., *Transnational Crime: The New Challenge to Law Enforcement*, Transnational Crime Bulletin, Vol. 1, No. 1, 2000, p. 86.

¹⁶ First International Symposium on Organized Crime, St. Cloud, France, May 1988.

¹⁷ *Transnational Organized Crime*, <<http://www.alternatives.com/crime/define.html>> 20 May 2000.

¹⁸ See Appendix A for the Timeline of the Philippines’ Battle Against Transnational Organized Crime.

¹⁹ Letter of Instruction No. 824 s-79.

²⁰ E.O. No. 727 s-81.

Transnational Crime. The conference marked the culmination of a series of activities beginning with the adoption of the Naples Political Declaration and Global Plan of Action of 23 November 1994. The Baguio Communiqué, reached during the 1st International Conference on Terrorism held at Baguio City, Philippines, from 18-21 February 1996, led to the 29th ASEAN Ministerial Meeting (AMM) and the 1st Informal ASEAN Summit, both held at Jakarta, in July and November 1996. The following year, the 30th AMM and the 2nd Informal ASEAN Summit were held at Kuala Lumpur, in July and December, respectively. The signatories to the ASEAN Declaration resolved to confront transnational crime by, among other measures, strengthening each nation's commitment to cooperate in combating TOC, encouraging them to assign police attachés and/or liaison officers in each other's capitals to facilitate cooperation, urging the networking of relevant law enforcement agencies in the member countries, and expanding the scope of efforts against TOC.

2. The Creation of the Philippine Center on Transnational Crime

To this end, President Joseph E. Estrada signed E.O. No. 62 on 15 January 1999, creating the Philippine Center on Transnational Crime (PCTC). Estrada, who as Vice-President headed the defunct Presidential Anti-Crime Commission (PACC)²², considered the establishment of the PCTC necessary after determining, among other things, that (a) TOC has

adversely affected the political, economic, and socio-cultural stability and security of the Philippines; (b) the functions and responsibilities of various law enforcement and related agencies need to be linked, coordinated, and complemented to effectively combat TOC; and (c) the growing sophistication of TOC demands a concerted, synchronized, and focused effort from these agencies.

As so created, the PCTC has the following powers and functions:

- (i) To establish, through the use of modern information and telecommunications technology, a shared central database among government agencies for information on criminals, methodologies, arrests and convictions on the following transnational crime:
 - (a) illicit trafficking of narcotic drugs and psychotropic substances;
 - (b) money laundering;
 - (c) terrorism;
 - (d) arms smuggling;
 - (e) trafficking in persons;
 - (f) piracy; and
 - (g) other crimes that have an impact on the stability and security of the country;
- (ii) To supervise and control (the) conduct of anti-transnational crime operations of all government agencies and instrumentalities;
- (iii) To establish a central database on national as well as international legislation and jurisprudence on transnational crime, with the end in view of recommending measures to strengthen responses and provide immediate intervention for the prevention, detection and apprehension of criminals operating in the country;
- (iv) To establish a center for strategic

²¹ Brunei Darussalam, Republic of Indonesia, Lao People's Democratic Republic, Malaysia, Union of Myanmar, Republic of the Philippines, Republic of Singapore, Kingdom of Thailand, and the Socialist Republic of Vietnam.

²² The PACC's successor was the Presidential Anti-Organized Crime Task Force (PAOCTF).

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- research on the structure and dynamics of transnational organized crime in all its forms, predict trends and analyze relationships of given factors for the formulation of individual and collective strategies for the prevention and detection of transnational organized crime and for the apprehension of criminal elements involved;
- (v) To design programmes and projects aimed at enhancing national capacity-building in combating transnational crime, as well as supporting the related programmes and projects of other ASEAN and international centers;
 - (vi) To explore and coordinate information exchanges and training with other government agencies, foreign countries and international organizations involved in the combat against transnational crime;
 - (vii) To select personnel from within the NAPOLCOM, PNP and other government agencies for detail with the PCTC;
 - (viii) To enlist the assistance of any department, bureau, office, agency or instrumentality of the government, including government-owned or controlled corporations, to carry out its functions, including the use of their respective personnel, facilities and resources; and
 - (ix) To perform such functions and carry out such activities as may be directed by the President.²³
- following government agencies and instrumentalities:
- (i) Philippine National Police (PNP);
 - (ii) National Bureau of Investigation (NBI);
 - (iii) National Action Committee on Anti-Hijacking and Anti-Terrorism (NACAHT);
 - (iv) Presidential Anti-Organized Crime Task Force (PAOCTF);
 - (v) Presidential Anti-Smuggling Task Force (PASTF);
 - (vi) National Police Commission (NAPOLCOM);
 - (vii) Department of the Interior and Local Government (DILG);
 - (viii) Department of Justice (DOJ)
 - (ix) Department of Finance (DOF);
 - (x) Department of Transportation and Communication (DOTC);
 - (xi) Dangerous Drugs Board (DDB);
 - (xii) National Prosecution Service (NPS);
 - (xiii) Bureau of Immigration and Deportation (BID);
 - (xiv) Bureau of Internal Revenue (BIR);
 - (xv) Economic Intelligence and Investigation Bureau (EIIB);
 - (xvi) Bureau of Customs (BOC);
 - (xvii) National Intelligence Coordinating Agency (NICA);
 - (xviii) Armed Forces of the Philippines (AFP);
 - (xix) Land Transportation Office (LTO);
 - (xx) National Telecommunications Commission (NTC);
 - (xxi) National Statistics and Census Office (NSCO); and
 - (xxii) Other government agencies which the PCTC may find necessary to implement its mandate.

E.O. No. 62 also mandates²⁴ that the PCTC shall be supported and assisted in the performance of its tasks by the

²³ E.O. No. 62, § 3.

²⁴ *Ibid.*, § 5.

Although the PCTC is under the Office of the President, general supervision and control are exercised by the NAPOLCOM. The Executive Director of the PCTC, who reports to the President through the

Secretary of Interior and Local Government or Chairman of the NAPOLCOM, has immediate supervision and control over all PCTC units, with the power to assign the respective duties and responsibilities of all officers and personnel of the PCTC. In this effort, he is assisted by a Deputy Executive Director and Chief Directorial Staff. The latter, in turn, oversees the seven directorates comprising the PCTC offices, namely, Administration and Finance, Research, Operations, Technology Management, Plans and Programs, Legal Affairs, and Detection and Investigation.²⁵

From the time it was established in 1999, the PCTC has evolved into the operational contact agency of the United Nations Office for Drug Control and Crime Prevention (UNODCCP), the Asia-Pacific Group (APG) on money laundering, the ASEAN on the proposed ASEAN Center for Combating Transnational Crime; the US Counter-Narcotics and Crime Center (USCCC); the National Crime Authority (NCA) of Australia; and Japan's National Police Agency (NPA) and JICA. In this regard, the PCTC has gone beyond its stated mission, that is, "To formulate and implement a concerted programme of action (for) all law enforcement, intelligence and other agencies for the prevention and control of transnational crime," but held fast to its belief "in a united and coordinated approach, both domestic and international, to safeguard national security and interest against the menace of transnational crime."²⁶

Sensing the growing importance of the PCTC, former PNP Chief Roberto C. Lastimoso issued Resolution 99-03 dated 30 April 1999, assimilating the National Drug Law Enforcement and Prevention

Coordinating Center (NDLEPCC) and the PCTC as regular members of the NALECC. A week later, in further affirmation of this move, Estrada issued E.O. No. 100, strengthening the operational, administrative and information support system of the PCTC by placing under its general supervision and control the Loop Center of the NACAHT, the INTERPOL National Central Bureau for the Philippines, the police attachés of the PNP, as well as the DILG's political attachés/counselors for security matters.

Current PCTC efforts are concentrating on human trafficking. According to Police Chief Inspector Camilo PP Cascolan, Chief of the Special Research Division of the PCTC Directorate for Research, the upward trend in the trafficking of persons, most of whom are women and children, is alarming not only because it reduces human beings into mere commodities, but also because it breeds such other crimes as those involving drugs, firearms, smuggling, illegal recruitment, and corruption of public officials.²⁷ In white slavery cases, for example, methods of procuring women range from harmless and seemingly unrelated activities (like foreign training or internship, adoption, family tours, religious pilgrimage, cultural exchange/promotion, sports events, and escort service), to cultural (marriage matchmaking or selling of a woman by her family), economic (job promises by illegal recruiters), and even criminal (abduction).²⁸

²⁷ Interview, 29 June 2000.

²⁸ *RP-Europe Concerns on Trafficking in Persons, The Philippine Experience*, Directorate for Research, PCTC, 2000, pp. 6-7. See also Youngik Yoon's *International Sexual Slavery*, <<http://www.alternatives.com/crime/PART7.HTML>> 20 May 2000.

²⁵ *Id.*, § 6.

²⁶ *PCTC Briefing Manuscript*, July 2000, p. 6.

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In spite of the tremendous support of the Chief Executive for the PCTC, E.O. No. 62 has been criticized in some quarters for its overly restrictive enumeration of TOCs falling within the jurisdiction of the PCTC. What, for instance, should be done about the smuggling of cultural artifacts? In a paper by a researcher from the Institute of International Legal Studies of the University of the Philippines Law Center, the writer lamented that "the amount of money that changes hands worldwide in respect of illegal trade in cultural property comes third after those of prohibited drugs and armaments. Unlike the latter two objects of commerce, whose destruction is sought by many because of their pernicious implications for the safety and, oftentimes, the lives of the people, the preservation of cultural artifacts, especially *in situ*, is sought as their removal from their original site, and possible damage thereto, and even eventual loss, can produce untold harm for mankind in general, and for a culture, in particular."²⁹

III. BATTLING TOC IN THE PHILIPPINES

A. Problems

1. In General

There is no doubt that the fight against TOC in the Philippines cannot be waged by a single entity. All components of the Philippine Criminal Justice System - law enforcement, prosecution, judicial process, correction, and the community - must act together in pursuit of the common goal of eradicating or at least emasculating TOC. The paper has shown that existing mechanisms for battling TOC primarily consist of legislation creating coordinate bodies that are mandated to channel the efforts of a slew of law enforcement and related agencies. Hence, the first real

obstacle in the Philippines' struggle to liberate itself from the stranglehold of TOCGs is the lack of a *bona fide* government agency *exclusively* assigned to tackle cases involving TOCs and TOCGs.

Penal statutes that may be used in the prosecution of individual members of TOCGs are abundant, but their enforcement remains lax due to a host of factors. There is also great difficulty in prosecuting criminals, a problem that has as much to do with deficiencies on the part of law enforcers who either lack investigative skills or do not wish to be burdened with complex legal procedures, as with the people's penchant for soliciting or offering political patronage.

Of course, lack of funds is a nagging issue. Every department of government is haunted by this problem. Even if meaningful and viable projects were devised, if they are not backed by sufficient funding, the rate of failure would remain high. To cite an example, the judiciary's budget has steadily declined in the last two years. In 1999, it was allotted a 1.20% share of the national budget, which was cut by .13% this year. A further 2-billion peso reduction is being contemplated by the legislature for fiscal year 2001. The Supreme Court recently submitted a Medium-Term Public Investment Programme (MTPIP) to the National Economic Development Authority, enumerating the projects it intends to pursue in the next three years. With a shrinking budget, the judiciary is experiencing difficulty in raising the salaries of judges and other court employees - a measure designed to reduce graft and corruption in the institution. It would, however, require great political will, sacrifice, and a unified judiciary to implement the identified projects.

²⁹ Joseph Sedfrey S. Santiago, *Smuggling of Cultural Artifacts*, TCB, Vol. 1, No. 1, 2000, p. 43.

Another factor to be considered is the inability of each administration to fill the needs of certain sectors of society. The soaring cost of auto parts, for instance, has greatly contributed to the continuous smuggling of this commodity. “New business” for crime is created when any human desire is stifled by the State.³⁰ In the given example, the human desire satisfied by the entry of smuggled, yet cheaper, auto parts is the desire to maximize or stretch the purchasing power of the local currency.

One area of concern, which has been overlooked by and is receiving meager attention from government, is how to control or minimize health and safety risks associated with seemingly innocuous TOCs like counterfeiting of such mass-based products as baby formulas, foodstuff, drugs, cosmetics, toys, apparels, and auto and aviation parts.³¹ The pernicious effects of passing off substandard imitations as genuine articles cannot simply be ignored by the State in this era of mass consumption.

2. In Detection and Investigation

As intimated earlier, one major problem area in the detection and investigation of TOCs in the Philippines is the lack of funds to meet the demands of modern law enforcement. The compensation of regular members of the police force and other related agencies is simply not commensurate with the perils of their job. TOCGs, on the other hand, with their vast financial resources, can hire the best team of consultants and lawyers, eventually employing corporate management skills in their global operations, thus, making the

fight even more lopsided in their favor. And while their army of followers, their “families,” grow and flourish, young and impressionable Filipinos tend to eschew a career in law enforcement for reasons ranging from low wages vis-à-vis work hazards, to negative public image and exposure to corruption. The resultant manpower shortage is more than enough to embolden even the lowliest lackey in the TOC hierarchy.

The dubious distinction of law enforcement is imputable not only to the popular notion that corruption permeates its ranks, but also to the emerging opinion that agents of the law do not possess the necessary skills to properly perform their duties and functions. The lack of modern and appropriate forensic tools, another offshoot of fund scarcity, is compounded by the impression that local forensics practitioners are not endowed with the ability necessary to fully utilize available technology. And to human rights advocates, documented cases of violation by the police of basic individual liberties, especially during arrests, searches and seizures, and custodial interrogation, constitute a virtual abandonment by the latter of their sworn obligation to uphold the law. Ironically, this situation sometimes arises out of the very desire of law enforcers, their eagerness, to send to jail in earnest a known criminal instead of going through the tedious process of obtaining warrants and supporting an indictment in court where there is a possibility that the accused may be acquitted.

Aside from a negative image, a recent study on the Philippine criminal justice system has revealed other problems involving the police which are connected with the administration of justice, to name a few inadequate investigation training, lack of coordination among police officers

³⁰ *Why be Concerned Now?* <<http://www.alternatives.com/crime/crime6.html>> 20 May 2000.

³¹ *Health and Safety Risks*, <<http://www.ari.net/iacc/health.safety.html>> 20 May 2000.

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and agencies, and failure of law enforcers to effect arrests by non-service of warrants.³²

3. In Prosecution

Every criminal charge is filed in and admitted by Philippine trial courts on the basis of evidence submitted by the police and those discovered by the prosecutors. During the trial, the case continues to be considered on the basis of physical, testimonial, and documentary proof. As in any jurisdiction, it is clear that evidence plays a crucial role in every successful conviction. In this regard, success is equated with confirmation of the judgment on appeal. This is one area of concern, for many crimes go unpunished because of mishandling of evidence - from the moment the crime scene is secured to the time the pieces of evidence gathered are actually placed under the care and custody of the police. The prosecutor is placed in a dilemma: Should the case be filed even if it is weak due to lack of evidence or inadmissibility of those actually found? Or should it be dismissed at the risk of letting loose into society someone who might commit more crimes? Law enforcers sometimes conduct arrests, searches and seizures, and custodial investigation without following procedure expressly stated in the Constitution, as well as in the Rules of Court. This gives rise to a situation where a case that is otherwise strong suddenly becomes infirm because of matters beyond the prosecutor's control.

Another scourge in the prosecutorial service is the reluctance or unwillingness of witnesses to testify, usually for fear of reprisal and not so unusually for pecuniary gain. Members of TOCGs who are on the brink of being placed within the Philippine

judicial process may find an ally in a witness whose silence can be bought or coerced. The lure of money is sometimes combined with subtle threats to produce the desired results.

As with law enforcers, many prosecutors lack basic and advanced advocacy skills due in large measure to inadequate continuing legal education.³³ The good lawyers are usually found in private practice, either alone, with others, or with a firm, preferring the trappings of wealth and power that come with a successful practice over the selfless notion of serving the public or defending a common criminal. Because of this reality, or as a result of it, critics of government have accused justice, particularly the legal profession, of being pro-rich or anti-poor. While this allegation is not totally accurate, it is not entirely false either. No statistical data is necessary to conclude that there are more people in the lower bracket of society who are in need of professional legal assistance, the kind of aid that most times can be availed of only by the moneyed class. Unfortunately, TOCGs belong to the latter class.

4. In Punishment

Criminal law in the Philippines is one of the legacies of Spain, a vestige of its colonial past. For three hundred years, Roman law principles on crime and punishment were applied in writing laws and deciding cases. A century after the Spaniards were ousted from the country, the Philippines continues to use these legal precepts, even enhancing them to suit present situations. But the race against the evolving face of crime, including the relatively new genre of TOC, seems to be a futile effort. Crime, as in other parts of the world, is always one or two steps ahead. To cite an example, in the Philippines, the prohibited stimulant drug known locally as

³² Myrna S. Feliciano and Alberto T. Muyot, *The Philippine Criminal Justice System*, 17 July 2000, p. 49.

³³ *Ibid.*, p. 57.

“Ecstasy” had been widely and indiscriminately sold to mostly young users for years before somebody even filed a bill in Congress to bring the distribution and sale of that drug within the purview of the Dangerous Drugs Act. Laws on environmental crimes and product counterfeiting are also archaic, making them top areas of concern for international organizations willing to extend financial or technical assistance to the country.

Another major obstacle to punishing TOC in the Philippines is judicial restraint. For TOCGs, the physical boundaries of nations do not exist. In dealing with them, there is bound to be a conflict between national or municipal laws and international laws governing controversies between or among states. The other factor to be considered is the effectiveness of international conventions vis-à-vis domestic laws. “In view of the jurisdictional and political weaknesses of international tribunals, are national courts the more promising avenue in certain fields for the growth of a body of law regulating state conduct?”³⁴ Two principles of judicial restraint must first be considered. Even if the doctrine of sovereign immunity and the act of state doctrine are similar in that they prevent “courts from becoming involved in disputes which might lead to friction between a foreign nation and their own . . . sovereign immunity applies only where a foreign state or its instrumentality is sought to be made a *party* to litigation or where its property is involved. On the other hand, the act of state doctrine focuses entirely on the *action* taken by that state, and may be applicable to litigation between two private parties to which that action is relevant. It determines not whether a court

can assert (or must relinquish) *jurisdiction* over a party but whether it can fully examine and decide certain claims *on the merits*, even when such claims rest on the asserted illegality of foreign governmental conduct.”³⁵ Without clear rules on conflicts of laws, problems may arise in executing judgments of conviction against foreign nationals.

If no such conflict exists, or if they are resolved without raising any diplomatic question, the next crimp to be ironed out are prison concerns. As in other countries, the Philippine correctional system suffers from such common problems as overcrowding, understaffing, dismal prison conditions, poor security, staff unrest or stress, and low budgetary allocation.³⁶ Crowded and substandard prison facilities breed diseases and discontent among inmates.³⁷ This is a direct consequence of the low budget allocation for the corrections system, a situation that practically forestalls the government from taking or continuing contingency measures aimed at decongesting prison facilities.³⁸ Budget, of course, includes salaries, which, in the case of law enforcement, is dismally low, hence, resulting in vacancies. Prison officials and employees are also members of the Philippine National Police so they suffer the same problems being experienced by law enforcers. As a result, penitentiaries are understaffed and security is lax. Prison breaks, especially in the provinces, are not uncommon.

But no issue has received as much attention from the three branches of government, the clergy, and mass media as

³⁴ Henry J. Steiner and Detlev F. Vagts, *Transnational Legal Problems (Materials and Text)*, New York: The Foundation Press, Inc., 1976, p. 637.

³⁵ *Ibid.*, pp. 672-673.

³⁶ Michael Cavadino and James Dignan, *The Penal System, An Introduction*, 2d, SAGE Publications, London: 1997, p. 10.

³⁷ Feliciano and Muyot, p. 86.

³⁸ *Philippine Corrections Today*, 28 Philippine Panorama (no. 41, 24 October 1999), 13-17.

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the death penalty. Suspended under the 1987 Constitution, the death penalty was revived on 1 January 1994 via Republic Act No. 7659. Despite its resurgence, there is no sign that the death penalty has effectively deterred people from committing crimes. It is just a matter of time before an innocent person is executed. A life sentence without parole could become a strong incapacitative, retributive punishment. "But the death penalty will remain and perhaps even flourish because it represents the supreme quick fix for the violent crime rate."³⁹ Critics would continue to question the efficacy of the death penalty as the ultimate form of social retribution, but its deterrent power would still be another issue.

B. Possible Solutions

With such a diverse set of obstacles confronting the Philippines in its battle against TOC, no single solution is in the horizon. Varying responses to each problem, given on a case-to-case basis, may be the only way to beat the growing threat of TOC.

Old laws must be updated so that they would be more responsive to present and emerging crisis situations involving TOC and TOCGs. To complement this, new forensic investigation techniques must be explored, like DNA testing. In the Philippines, the admissibility of DNA evidence is quite novel. It would have been tested during the trial of a celebrated rape-murder case,⁴⁰ but the defense, perhaps realizing that the results would be incriminating, challenged the admissibility of any evidence that would be obtained

therefrom. In any event, the trial court convicted the accused and the case is currently being reviewed by the Supreme Court. This turn of events prompted a law professor at the University of the Philippines to say that, "The novelty of the scientific method for DNA testing should not be a ground for exclusion of evidence under (Philippine) rules. Neither should degradation of the specimen be invoked against admission, since this goes merely into the weight, rather than admissibility, of the evidence."⁴¹

The development of pilot programs to enhance inter-institutional coordination can be initiated by agencies such as the PCTC. This can be supplemented by training modules on skills enhancement for enforcers (especially in handling evidence and securing crime scenes), prosecutors, and judges. In the case of judges, the programme has begun with the creation of the Philippine Judicial Academy, the training arm of the Supreme Court, and the launching of the Pre-Judicature Programme for future and present magistrates.

In the prosecutorial services, the incumbent Justice Secretary, Artemio G. Tuquero, has proposed some reforms such as, but not limited to, the following: strengthening of the support staff and upgrading of equipment; providing a more competitive compensation package to attract better and morally upright lawyers to join the service; setting up a national prosecution academy to undertake a comprehensive professional and career development programme for prosecutors; stricter enforcement of disciplinary measures against errant prosecutors; and

³⁹ John Klofas and Stan Stojkovic, editors, *Crime and Justice in the Year 2010*, USA: Wadsworth Publishing Company, 1995, pp. 263-264.

⁴⁰ The case of *People of the Philippines v. Hubert Webb, et al.*, dubbed by the local media as the *Visconde Massacre*.

⁴¹ Pacifico Agabin, "Admissibility of DNA Evidence in Philippine Courts," lecture given at the 7th National Convention-Seminar and General Meeting of the Philippine Women Judges Association.

close coordination with law enforcement agencies and the community in evidence-gathering.⁴²

Similarly, the correctional system is far from being perfect, but things could be better if only there would be a shift in government policy, from stressing imprisonment and punishment to encouraging rehabilitation and correction. This would not only decongest the penitentiaries but would also give prisoners a more positive goal, a human purpose that would nourish any potential for improvement.

There is also a need to strengthen the country's witness protection programme. Witnesses in TOCs would be motivated to come out in the open and give unadulterated statements if their safety against possible retribution from TOCGs could be assured. As an additional incentive, they could be given rewards for their efforts. At the moment, there are laws specifically allowing the release of funds as reward to state witnesses⁴³ and informers.⁴⁴ A former public official at the Department of Justice even opined that he "cannot discount altogether the usefulness of the reward system in the campaign against organized crimes."⁴⁵

In cases where extradition is proper, calling for mutual legal assistance in connection with a criminal investigation or execution of a prison sentence, extradition treaties may be resorted to, in accordance

with the Philippine Extradition Law.⁴⁶

For its part, the Supreme Court has embarked on a Judicial Reform Programme (SC-JRP)⁴⁷ designed to enhance the skills of judges and court employees, as well as improve court facilities and services all over the country. An integral component of the SC-JRP is to address all issues relevant to the administration and dispensation of justice. The MTPIP mentioned in **III-A(1)** on page 13 is a product of consultations with the various stakeholders in the justice system. It enumerates the projects identified by the Court itself based on studies commissioned for that purpose on the following areas of substance: past judicial reform efforts, the criminal justice system, strengthening of the communication system of the Supreme Court, a review of the *barangay* justice system to de-clog court dockets, alternative dispute resolution, formulation of administrative reforms, case decongestion, and impact of judicial education.

IV. CONCLUSION AND RECOMMENDATIONS

The TOC menace is precisely that - a menace. In a country like the Philippines, where all forms of wealth are in the hands of a handful of people - the same people who control government, directly or otherwise - TOCGs can wreak havoc in every Filipino's life by providing a placebo for society's ills. Using illegally generated money, TOCGs are able to set up bases of operation wherever they are welcome. Like legitimate corporations, they "invest" heavily in foreign shores, and local officials are all too willing to embrace their presence because of necessity. It is this necessity on which TOCGs feast. How can anyone avert the spread of a disease such as TOC?

⁴² Feliciano and Muyot, pp. 59-60.

⁴³ P.D. Nos. 1731 and 1732.

⁴⁴ P.D. No. 749, in relation to Articles 210, 211, and 212 of the Revised Penal Code; R.A. No. 3019; § 345 of the National Internal Revenue Code; and § 3604 of the Tariff and Customs Code.

⁴⁵ Catalino Macaraig, *in* DOJ Opinion No. 157, s. 1978, 2nd Indorsement, 6 October 1978.

⁴⁶ P.D. No. 1069.

⁴⁷ The author is a member of the Programme Management Office of the SC-JRP.

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The answer lies in community vigilance. Community participation in law enforcement, in the prosecution of TOCs, in court proceedings, and in the rehabilitation of members of TOCGs cannot simply be ignored. This is the reason why the community is at the heart of the criminal justice system. After all, defeating TOC would ultimately redound to the benefit of every member of the community. Their alertness and active participation, therefore, are not only desirable but even necessary. The smallest political unit in the Philippines, the *barangay*, is composed of members living within a specified zone or geographical area. Tribal in origin and clannish in nature, the *barangay* perfectly demonstrates how an indigenous entity could aid the CJS by the simple expedient of maintaining an active community-watch programme. As former President Ramos declared while calling attention to the incursion of drug syndicates in the country, “(The government) will never be able to root out the drug menace unless the citizenry lend a strong hand, especially the media, the church, the schools, the civic groups, the business sector and the local community leaders.”⁴⁸

Positive steps have already been made in this direction. In 1997, the PNP mobilized anti-crime civic organizations as a pipeline between kidnap victims and their relatives. “This was formulated to address the particular dilemma concerning the people’s fear and distrust of the police which often results in very few reports of crime incidents being brought before the law enforcement offices.”⁴⁹ In the later part of 1999, the PNP also launched a programme involving *barangay* officials. Patterned after the Hong Kong police, the “buddy system” sought to pair off police

officers with members of the *barangay* in responding to crimes committed in the *barangay*. “The programme relies heavily on the *barangay* officials having expert knowledge of the situation and physical layout of their respective jurisdictions. More significantly, those who conceptualized this programme were counting on the high degree of trust that the *barangay* officials command of their constituents that the information and manpower support that the latter would ordinarily withhold from the police would now be more freely extended by virtue of the presence of their *barangay* officials.”⁵⁰

Anywhere around the world, if members of the same community would only watch after the welfare of their neighbors, both materially and emotionally, there would be no opportunity for TOCGs to penetrate their closed group and perpetrate venalities. And is this not the way it should be?

⁴⁸ Ramos Urges People: Join Fight versus Crime, Philippine Daily Inquirer (12 August 1997), 2.

⁴⁹ Feliciano and Muyot, p. 90.

⁵⁰ Ibid.

APPENDIX A

**TIMELINE OF THE PHILIPPINES' BATTLE AGAINST
TRANSNATIONAL ORGANIZED CRIME**

WHAT	WHEN
LOI No. 824 s-79, establishment the National Committee on Anti-Organized Crime (NACAC)	1979
E.O. No. 727 s-81, creating the Peace and Order Council (POC)	1981
E.O. No. 829, creating the National Law Enforcement Coordinating Committee (NALECC), abolishing the NACAC, transferring its functions, duties, and responsibilities to the POC	11 September 1982
E.O. No. 41, amending E.O. No. 829	9 December 1992
E.O. No. 41-A, amending E.O. No. 41	1 February 1993
Adoption of the Naples Political Declaration and Global Plan of Action	23 November 1994
E.O. No. 246, reconstituting the National Action Committee on Anti-Hijacking as the National Committee on Anti-Hijacking and Anti-Terrorism (NACAHT)	18 May 1995
1 st International Conference on Terrorism (Baguio City)	18-21 February 1996
29 th ASEAN Ministerial Meeting (Jakarta)	July 1996
1 st Informal ASEAN Summit (Jakarta)	November 1996
30 th ASEAN Ministerial Meeting (Kuala Lumpur)	July 1997
2 nd Informal ASEAN Summit (Kuala Lumpur)	December 1997
Signing of the ASEAN Declaration on Transnational Crime during the 1 st ASEAN Conference on Transnational Crime (Manila)	20 December 1997
E.O. No. 62, creating the Philippine Center on Transnational Crime (PCTC)	15 January 1999
E.O. No. 100, strengthening the operational, administrative, and information support system of the PCTC	7 May 1999
Res. No. 99-03, assimilating the National Drug Law Enforcement and Prevention Coordinating Center and the PCTC as regular members of the NALECC.	30 April 1999

CRIME IN INDIA

*Sanjiv Kumar Upadhyay **

I. CRIME IN INDIA

A. General

There were 61.8 million criminal cases reported in 1998 with a rate of 6366 per million population. 77.8% of cases investigated were chargesheeted in a court of law. There were 5.7 million cases pending in courts of which trail was completed in 15.8% of cases and of these, 37.4% cases ended in conviction. There are 41.6 police personnel per sq. kilometers and 1360 per million population. 634 police personnel were killed on duty during 1998.

B. Organized Crime

In India, organized crime is at its worst in the commercial capital of India, the city of Mumbai. The first well-known organized gang to emerge was that of Varadharaj Mudaliar in the early sixties. His illegal activities included illicit liquor, gold smuggling, gambling, extortion and contract murders. Three other gangs emerged shortly thereafter namely, Haji Mastan, Yusuf Patel and Karim Lala. Haji Mastan and Yusuf Patel resorted to gold smuggling whereas Karim Lala operated in drugs. During Emergency in 1975 when there was crackdown on the Mafia, new gangs emerged. Dawood Ibrahim, the most successful, came in conflict with the Pathan gangs of Alamzeb and Amirzada which led to bitter internecine gang warfare. The Pathan gangs were liquidated to leave the field free for Dawood Ibrahim. In 1985, there was increased police pressure which made Dawood Ibrahim to flee. In March 1993, Dawood Ibrahim was behind the

serial bomb blasts in Mumbai in which 257 persons died and 713 were maimed. Public and private property worth several millions of rupees was destroyed. Investigation revealed transnational character of the conspiracy the objective of which was to cripple the economy, create communal divide and spread terror in the commercial capital of India. Dawood Ibrahim, Tiger Memon and Mohammed Dosa are operating from Dubai. Their field of activity is to extort money from builders and film producers, mediate in monetary disputes, and undertake contract (Supari) killings. There have been instances of investment of the dirty money in business with the result that unsuspecting businessmen have fallen prey to the Mafia warfare. The killings of Thaquiuddin Wahid of East West Airlines in 1996, Sunil Khatau of Khatau Mills in 1994, Om Prakash Kukreja of Kukreja Builders in 1995 and Ramnath Payyade, a prominent hotelier in 1995 are grim reminders of Mafia in Mumbai.

The other gangs of Mumbai indulging in organized crime are those of Chhota Rajan (Drug Trafficking and Contract Killings), Arun Gawli (Contract Killings and Protection Money), Late Amar Naik (Protection Money) and Chhota Shakeel. State of Maharashtra has enacted Maharashtra Control of Organized Crime Act, 1999. Other forms of organized crime in India are kidnappings for ransom, gun-running, illicit trafficking in women and children, money laundering etc.

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Organized crime exists in other cities too, though not to the same extent as in Mumbai. Ahmedabad city has been the hotbed of liquor mafia because of Prohibition policy (Banning of liquor). The Mafia became synonymous with the name of Latif who started in mid seventies as a small time bootlegger and grew up to set up a 200 strong gang after eliminating rivals with intimidation, extortion, kidnappings and murders. He won municipal elections from five different constituencies with strong political patronage. He was killed by police in an encounter in 1997.

There are several gangs operating in Delhi from neighbouring State of Uttar Pradesh indulging in kidnapping for ransom. The going rate was around Rupees 10-50 millions. Land Mafia has political connections and indulges in land grabbing, intimidation, forcible vacation etc. Of late, the ganglords of Mumbai have started using Delhi as a place for hiding and transit. Chhota Rajan group is strengthening its base in Delhi.

Boom in construction activities in Bangalore city has provided fertile breeding for the underworld. Builders are used for laundering black money. Forcible vacation of old disputed buildings is a popular side business for the underworld. The local gangsters in the State of Karnataka have connections with the underworld of Mumbai. One of the Mumbai gang operating here is the Chhota Rajan gang.

II. ILLICIT DRUG TRAFFICKING

India is geographically situated between the countries of Golden Triangle and Golden Crescent and is a transit point for narcotic drugs produced in these regions to the West. In India opium is grown under official control of Narcotics Commissioner

in three states namely Uttar Pradesh, Rajasthan and Madhya Pradesh. It is exported to foreign countries for medicinal purposes. Indian opium is considered best in world. Turkey & Australia are the other licit opium growing countries in the world. A part of the licit opium enters the illicit market in different forms. Besides, there is illicit cultivation of opium in the hill tracks of some states. There is a moderately sized chemical industry producing precursor materials for lawful purposes. The illicit cultivation of opium as well as the precursor chemicals can be used for manufacture of heroin. However, there is a great price differential between India and the West. A Kilogram of Heroin that goes for a hundred thousand Rupees in India may fetch Rupees ten million in the international market. Illicit drug trade in India has centered around five major substances, namely heroin, hashish, opium, herbal cannabis and methaqualone. The Indo-Pak border has traditionally been most vulnerable to drug trafficking. Drugs trafficking through India consists of Hashish and Heroin from Pakistan, Hashish from Nepal, White Heroin from Myanmar and Heroin from Bangladesh. In the early eighties, the Border State of Punjab became affected with narcoterrorism with the smuggling of narcotic drugs and arms from across the border. This was also the time when drug Mafia emerged in Golden Crescent countries. There were a number of seizures of a mixed consignment of narcotic drugs and arms in Punjab. In 1996, 64 % of the heroin seized was from the Golden Crescent. Although opium production is strictly under Government control in India, illicit poppy plantations have been reported in some places.

Drug addiction in India has not assumed such a serious magnitude as in some of the western countries, but there are no grounds for complacency. There have been reports

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of drug use among the students of universities in Delhi, Mumbai, Calcutta and Chandigarh. The society does not agitate too much with consumption of Bhang, crushed leaves of the cannabis plant. It is customary in some places to consume Bhang on the popular festival of Holi. There is no such tolerance for charas or ganja which are derived from the same cannabis plant.

The Narcotic Drugs and Psychotropic Substances Act, 1985 deals with the offences of Drug trafficking. Section 21 is the penal provision which stipulates that whoever manufactures, possesses, sells, purchases, transports, imports inter-state, exports inter-state or uses any manufactured drug shall be punishable with Rigorous Imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine. In repeat offences, there is provision for death penalty too.

The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 provides for detention of persons connected with illicit drug trafficking upto two years. An officer of the rank of Joint Secretary to the Government, specially empowered under the Act, can issue orders for detention of the any person (including a foreigner) with a view to preventing him from engaging in illicit traffic of narcotic drugs and psychotropic substances. On an average about 50 persons are detained under the Act every year.

There were 18273 cases registered under the NDPS Act in 1998 which was an increase of 31.8 % over 1988, but a decrease of 4.2 % over the quinquennial average of 1993-1997. 21386 persons were arrested under the NDPS Act of which major work was done by Narcotics Control Bureau, a

central agency for dealing with cases of drug trafficking. It has registered 11330 cases in 1998 of which 5809 cases were for Ganja, 2713 were for Heroin and 1771 cases were for Hashish. 62591 kgs of Ganja, 8478 kgs of Hashish and 597 kgs of Heroin were seized. During 1998, 12601 persons were arrested by Narcotics Control Bureau, which included 95 foreigners. 11612 persons were prosecuted in a court of law, 2782 persons were convicted and 5712 persons were acquitted. 16.9 % of drug cases pending in trial were disposed by the courts during 1998. Property worth Rupees 23.85 million was forfeited and worth Rupees 30.64 million was frozen. In a recent case, the Government of Orissa (State Government) confiscated property worth over Rupees thirty million of drug lord Mohammed Azad Parvez of Balasore, Orissa which included an ice factory, a saw mill, a market complex, a cloth store, three residential buildings and three acres of land. The accused was apprehended by Narcotics Control Bureau in 1998 on charge of heroin trafficking alongwith his wife and associates. Financial investigation was conducted by the agency into the movable and immovable properties under Chapter V-A of the NDPS Act, which led to confiscation.

India is signatory to three UN Conventions on Narcotics Drugs and Psychotropic Substances held in 1961, 1971 and 1988. India is a party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. Government of India has entered into bilateral agreement and Memorandum of Understanding with a number of countries. The countries with which India has signed bilateral agreement for drug control are USA, UK, Afghanistan, Mauritius, Russian Federation, Myanmar, Zambia, UAE, Iran, Egypt, Bulgaria, Romania, Mauritius. India has also signed a special bilateral agreement with

Pakistan in this regard.

III. ILLEGAL FIREARMS TRAFFICKING

Small arms used in guerilla warfare in some parts of the world are now available at cheap cost in other parts of the world. According to an estimate, there could be 750 million small weapons for such arms trafficking. India has a long coastline of about 7500 kms. and a long border with Pakistan, Nepal, Bhutan, China, Myanmar and Bangladesh. Border Security Force guards the borders, but it is not possible to have presence across each and every inch of the border. Customs Department has also seized illicit arms in significant quantities.

In India, states of Punjab and Jammu & Kashmir have been particularly vulnerable to arms trafficking across the border. More than 7500 pistols and revolvers, 2500 magazines and 28000 rounds of ammunition have been seized from the state of Jammu and Kashmir. During 1997, the Border Security Force seized several AK series rifles, 7 heavy machine guns, 204 pistols/revolvers, 18 rocket launchers, 54 other type of rifles and ammunition from Punjab and Jammu & Kashmir.

On 17th February 1996, Delhi police recovered 361 pistols of 0.30 caliber with the inscription "Made in China by Norinco", 728 magazines and 3738 live rounds in a cavity in the undercarriage of a caravan bus. A Swiss national and an Iranian living in Pakistan since 1981 were detained. Investigation disclosed that this infact was the second consignment, the first one having been successfully transported in 1995. 22 persons including five foreign nationals have been prosecuted in the court of law in this case.

Delhi Police caught five fugitive members of the Chhota Rajan gang including an Assam Rifles jawan and two Nepali nationals who were planning to set up a major arms and money distribution base in Delhi.

In 1993, a consignment of AK-56 rifles, magazines, live rounds and hand grenades were sent from a Gulf country to land at the coast of Dighi Jetti in the State of Gujarat. Subsequently huge quantity of arms, ammunition and explosives (RDX) were smuggled by sea route at Shekhadi in District Raigad. These were used for Bomb blasts in Mumbai on 12th March 1993, which caused terror, widespread damage, and loss of 257 lives and maiming of 713 persons. During investigation, some of the arms recovered included 62 AK-56 rifles with 280 magazines and 38,888 rounds, 479 hand grenades, 12 pistols of 9 mm make with ammunition, 1100 electric detonators, 2313 kgs. of RDX and many other weapons. In the state of Madhya Pradesh in central India, 24 AK-56 rifles, 5250 cartridges, 81 magazines and 27 hand grenades were recovered by police on 4th November 1995.

Hijacking of an Indian Airlines flight on the 24th December 1999 in Kandahar was the latest incident of the use of illegal weapons in the hands of terrorists. After investigation, the CBI filed a chargesheet in the court of law against five hijackers and their accomplices.

A sensational case called Purulia arms drop case was an example of illicit arms trafficking by air. On 17th December 1996, an Antonov 26 aircraft dropped over 300 AK 47/56 rifles and 20,545 rounds of ammunition, dragnov sniper weapons, rocket launchers and night vision devices in Purulia village in West Bengal. The aircraft was bought from Latvia for US\$2 million and chartered by a Hong Kong

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registered company Carol Airlines. Payments were made mostly from foreign bank accounts. The aircraft picked up consignment of arms from Bulgaria using end-users certificate issued by a neighbouring country. The arms were airdropped over Purulia in the state of West Bengal.

This case was investigated by the Central Bureau of Investigation and chargesheeted in the City Sessions Court, Calcutta. After trial, the court found the accused persons guilty of offences under Indian Penal Code, Explosive Substances Act, Arms Act, Explosives Act, and the Aircraft Act and sentenced Mr. Peter James Gifran Van Kalkstein Bleach (British National), Mr. Alexander Klichine, Mr. Igor Moskvitine, Oleg Gaidash, Evgueni Antimenko, Mr. Igor Timmerman (all Latvian nationals) and Vinay Kumar Singh (Indian national) to various terms of rigorous imprisonment on 2nd February 2000. The five Latvians were released on 22nd July 2000 when their sentences were commuted by the President of India.

Illicit trafficking in arms is punishable under Arms Act, 1959. The incidence of the Arms Act cases showed an increase of 20.8 % over the decade 1988-1998. In 1998, 63518 cases were reported which showed a decrease of 4.2% over the quinquennial average of 1993-1997 and 14.3 % over 1997. 66868 persons were arrested for violation of the Arms Act. 19.3 % of cases pending trial were disposed by the courts in 1998.

IV. HUMAN (WOMEN AND CHILDREN TRAFFICKING)

Commercial sex in India is a 400000 million Rupees annual business. Thirty percent of the sex workers are children who earn about Rupees 110000 million every year. There could be about 0.3 million child sex workers in India of which 0.1 million

could be less than 18 years of age. 15% of the sex workers are in the six metropolitan cities of Mumbai, Calcutta, Delhi, Chennai, Bangalore and Hyderabad. Delhi receives sex workers from 70 districts, Mumbai from 40, Bangalore from 10 and Calcutta from 11 districts. Some sex workers have also come from Nepal and Bangladesh. Mumbai and Goa have had incidence of paedophilic offences too. These places draw a number of foreign tourists. Fear of AIDS has contributed to the involvement of minor girls in the business because demand for virgins has increased exponentially with the fear of infection. There is also a myth that young girls in their pre-puberty can not be infested with AIDS. A number of young girls from southern India have been sent to the Arab countries. There have also been reports that India has served as a transit point for trafficking of young virgins from Nepal, Myanmar and Bangladesh to the Middle East, mostly Dubai.

Suppression of Immoral Traffic in Women and Girls Act, 1956 was the main Act to deal with these offences. This Act was amended in 1978 and was reenacted under the name of 'Immoral Traffic (Prevention) Act in 1986' to rectify some lacunae in the older Act. Punishment could be imprisonment for a period of 7-10 years or for life. Indian Penal Code stipulates that sexual intercourse with or without her consent with a girl less than 16 years of age amounts to rape punishable with imprisonment for life.

National Commission for Women is a body that reviews laws, conducts inquiries for redressal of complaints, undertakes promotional research for policies, advises the Government and ensures custodial justice for women. Section 10 (4) of National Commission for Women Act, 1992 gives the Commission powers of a Civil Court. The National Commission for

Women has formed an Expert Committee and has formulated a ten year National Plan of Action (1997-2006) to co-ordinate with the ninth and tenth Indian Five Year Plans. There were 8695 cases reported under the Immoral Traffic (Prevention) Act in 1998.

The number of cases showed a steadily declining trend upto 1996 but increased by 4.5 % over 1997. 15363 cases of kidnapping of women and girls were reported in 1998, which were up by 4.8 % over the previous year. 146 cases of importation of girls were

reported in 1998 compared to 78 cases in the previous year showing an increase of 87.2 %. 171 cases of procurement of minor girls were reported in 1998 as against 87 in 1997 but 206 in 1994. 11 cases of selling of minor girls for prostitution, 13 cases of buying minor girls for prostitution and 699 cases of kidnapping of minor girls were reported. 17247 male and 1217 female offenders were arrested for kidnapping and abduction of women and girls. 12879 persons (11617 males and 1262 females) were arrested under the Immoral Traffic (Prevention) Act.

V. CARD FRAUD

Some of the popular credit cards in India are as given below:

Card name	Type	Annual Fee	Interest Rate	Max.Credit
American Express Gold	International	Rs. 2400	2.50 %	51 days
Bank of Baroda	Domestic	100	3.00 %	51 days
Citibank Silver/ Classic	International	750	2.50 %	45 days
Stanchart/ Gold	International	2000	2.50 %	52 days
HSBC Gold	Domestic	1500	2.50 %	48 days
Stan Chart/ Executive	International	1200	2.50 %	50 days
ANZ Grindlays / Gold	International	2000	2.9 %	45 days
SBI Card	Domestic	500	2.50 %	50 days

There are 8000 million Rupees worth of Master Cards, 7000 million Rupees worth of VISA cards in circulation. Merchant/ service establishments are about 95000. In India, credit card fraud losses have occurred as per the following categories:

- (i) Counterfeit 32%
- (ii) Lost cards 30%
- (iii) Stolen cards 20%
- (iv) Multiple imprint 5%
- (v) Mail/Tele orders 4%
- (vi) Others 9%

VI. MONEY LAUNDERING

In India, money laundering is indulged in mainly by corporate houses to evade taxes unlike in some other countries where

it is mostly related to illicit drug trafficking. Non-resident Indians have been given some special banking facilities. These facilities are misused to bring back the money as white money. For example, a portfolio account is opened in a foreign country and the money is laundered back to be invested in the stock markets. Another *modus operandi* is to launder the money through bogus exports. The conversion of black money is done by over-invoicing of the products to countries like Russia and the former Soviet Republic countries. Some shell companies are set up to issue bill or invoices accompanied by bogus transport receipts in order to obtain funds against these documents from bank/ financial institutions and then divert major

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part of such proceeds by issue of cheques in the names of non-existent front companies of cheque discounters. The cheque discounters then handover cash immediately to the party after deduction of their commission. The cheque discounters are generally associated with commodities market where fake transactions in commodities can largely go unnoticed. The cheque discounters also issue fake Letters of Credit and false bills. The cheque discounters file income tax returns in which the commission is shown as taxable income.

In India, tackling problem of laundered money is correlated with the problem of tackling black money. There is a wide gap between the number of persons with taxable income and the numbers who actually pay income tax. This is despite the requirement of compulsory filing of income tax returns by any one having taxable income. Benami Transactions (Prohibition) Act makes the pseudo owner the real owner of the benami property. Tax raids and seizures, penalties and prosecution have been some of the measures to check black money. However, success has not been satisfactory. Certain special measures such as Voluntary Disclosure Scheme under which the evader discloses income on promise of concessional rates and immunity from penalties and prosecution. There have been other schemes like issue of Special Bearer Bonds, Special Levy on deposits in the National Housing Bank, waiver of penalty and interest, Foreign Remittance Scheme in 1991-92, India Development Bonds, and Gold Bond Scheme of 1992.

Money laundering had so far been dealt with under the Foreign Exchange Regulation Act, 1973, but with effect from June, 2000, FERA has been replaced by Foreign Exchange Maintenance Act and a Bill to enact money laundering law to be

named The Prevention of Money Laundering Bill has been introduced in the Parliament by the Government of India. Money laundering has been proposed to be a cognizable crime punishable with rigorous imprisonment of 3-7 years which could be extended to 10 years and a fine upto Rupees 0.5 million. The acquisition, possession or owning of money, movable and immovable assets, from crime, especially drugs and narcotics crimes, would tantamount to money laundering. Concealment of information on proceeds or gains from crime made within India or abroad is an offence too. An adjudicating authority is proposed which would have powers to confiscate properties of money launderers. An administrator may be appointed to manage the confiscated assets. An appellate tribunal is proposed to be set up with three members to hear appeals from the orders of the adjudicating authority. The rulings of the adjudicating authority are thus not contestable in the local courts. Financial institutions are expected to maintain transaction records and furnish these to the adjudicating authority. Failure to do so is punishable too.

The alternative remittance system through non-banking channels is called Hawala in India. It is based on trust in which the remitter pays the Hawala dealer in foreign country and the associate of the Hawala dealer pays the receiver in the home country. Since Hawala dealings are illegal, the transactions take place through word of mouth or other non-conventional means of communication. Since there is no audit, no control and no check, anonymity of the customers is maintained. There are hawala dealers in India and wherever people from Indian sub-continent are settled. Hawala routes are used both by ordinary people as well as drug traffickers, terrorists and unscrupulous businessmen.

In one of the cases of money laundering dealt with by the Central Bureau of Investigation, an organized group of the Hawala dealers operating from London and Dubai used to receive remittances from foreign banks for transferring to India. A telephonic message in coded words would be passed to agents in India to pay money in Indian rupees. The remittances so received by the above mentioned persons in dollars or Pound Sterling at London and Dubai were used for purchase of gold, drugs, arms, ammunitions and explosives through the underworld. The arms, ammunitions and explosives were used to be smuggled into India and sold to various criminal/terrorist groups while the drug used to be distributed to the traffickers.

Electronic Payment Technologies are coming to India and these are going to pose new challenges to Law Enforcement Agencies. The anonymity in transactions is bound to promote money laundering and other offences. The money launderer finds the electronic money easy to convert and transfer, and safe to store. The format of legal framework, code of conduct of business and self-regulation regarding e-commerce is under examination.

VII. MAJOR TRANSNATIONAL ORGANIZED CRIMINAL GROUPS

A. Dawood Ibrahim Gang

Dawood Ibrahim group is the most dreaded mafia gang with countrywide network and foreign connections. He has stationed himself in Dubai since 1985 and has indulged in drug and arms trafficking, smuggling, extortion and contract killings. His brother Anees Ibrahim looks after smuggling, drugs and contract killings; Noora looks after film financing and extortion; and Iqbal is incharge of the legitimate business which includes stock broking in Hong Kong. Anees is in legitimate business too managing Mohd.

Anees Trading Company in Dubai. His business interests in India are shopping centres, hotels, airlines and travel agencies in Mumbai with an annual turnover of about Rupees 20000 million. Extradition of offenders from Dubai has not been possible since there is no extradition treaty with Dubai. Moreover, some of these offenders have strong social links with politicians and other top personalities in Dubai.

B. Chhota Rajan Gang

Chhota Rajan was a member of Dawood gang but parted company after the 1993 serial bomb blasts in Mumbai. He raised his own gang in 1994-95 which is reported to have a membership of 800 persons today. Chhota Rajan himself is in a foreign country to avoid elimination from Dawood gang. His gang indulges in drug trafficking and contract killings. In collaboration with another local gang, he organized killing of a trusted leader of Dawood Ibrahim gang, Mr. Sunil Samant, in Dubai in 1995.

C. Babloo Shrivastava Gang

“Om Prakash Shrivastava @ Babloo Shrivastava” is facing 41 cases of murder, kidnappings for ransom etc. He was arrested in Singapore in April 1995 on the basis of a Red Corner Notice issued by INTERPOL and extradited to India in August 1995. He has since been in jail but his gang has continued to indulge in organized kidnappings and killings. The ransom amount is received by them in foreign countries through hawala (alternative non-banking remittance channel). The power of this gang has dwindled after his arrest.

VIII. ELECTRONIC SURVEILLANCE

The Government of India has made a legal provision in the licensing conditions formulated alongwith the cellular

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operators to make it mandatory on the part of the cellular companies to provide parallel monitoring facilities for all communications being received and emanating from a particular mobile set. Cellular operators operating in four metropolitan cities of Mumbai, Calcutta, Delhi and Chennai have made this facility available whereas others are bound to provide this facility within three years of the initiation of the mobile network.

Interception of messages, transmitted or received by any telegraph is covered under sub-section 2 of section 5 of the Indian Telegraphic Act - 1885 (13/85) which states:

"On occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States of public order or for preventing incitement to commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order."

The issue of the constitutional validity of this section came under scrutiny of the Supreme Court of India in a writ petition filed by the People's Union for Civil Liberties. The Supreme Court passed a judgement on 18th December, 1996, upholding the constitutional validity of the

Act but laid down certain guidelines prescribing that the order will be issued by the Home Secretaries at the Centre and in the States. A copy of the order should be sent to the Review Committee within a week. The order will cease to have an effect after two months unless renewed. The Review Committee will review the order passed by the authority concerned within two months of the passing of the order. The total period shall not exceed six months.

IX. IMMUNITY

There is provision in Section 306 of the Criminal Procedure Code to obtain evidence of an accomplice by tender of pardon subject to his making full and true disclosure of facts and circumstances concerning an offence. This provision is applicable in offences punishable with imprisonment of seven years or more.

X. WITNESS AND VICTIM PROTECTION PROGRAMME

There is no legislation at present for protection of witnesses and the members of their families. Section 171 of the Criminal Procedure Code prohibits the police officers to carry the complainant or witness to court. The intention of such legislation appears to be to ensure independence of evidence given by the witnesses without any influence of police.

In cases where it is important to keep the trial proceedings away from public gaze, resort could be made to the provisions of in-camera trial at the desire of the parties concerned or the court itself. In-camera trial is permitted under section 237(2) of Criminal Procedure Code. Its validity has been upheld by the Supreme Court of India in the so-called Kartar Singh case.

XII. ASSET FORFEITURE SYSTEM

The following provisions for forfeiture of proceeds of crime exist:

- (i) Criminal Law Amendment Ordinance (1944)
- (ii) Sections 111 and 112 of Customs Act (1964)
- (iii) Foreign Exchange Maintenance Act
- (iv) Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act (1976): *“This Act applies to persons convicted under the Sea Customs Act 1878, Custom Act 1962 or detained under Conservation of Foreign Exchange and Prevention of Smuggling Act. The main purpose of the Act is to forfeit the illegally acquired properties of such smugglers and foreign exchange manipulators in whosever’s name these may have been kept. It shall not be lawful for any person to whom the Act applies to hold any illegally acquired property either by himself or through any other person on his behalf. Any property so held is liable to be forfeited to the Central Government. Section 6 provides for issuance of show cause notice of forfeiture and section 7 provides for passing of final orders of forfeiture. Under section 8, burden of proving that any property specified in the notice is not illegally acquired property shall be on the person affected and under section 11, transfer of properties specified in the notice can be declared null and void.”*
- (v) Section 68 of Narcotic Drugs and Psychotropic Substances Act (1985)
- (vi) Sections 102 and 452 of Criminal Procedure Code

XIII. INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

India has entered into Mutual Legal Assistance Agreements / Treaties in criminal matters with United Kingdom (1992) (Agreement concerning the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds and instrument of crime, including currency transfers and terrorist funds), Canada (1994), France (1998), Russia (1993), Kyrgyzstan, Kazakhstan (all Mutual Legal Assistance Agreements in Criminal Matters), Egypt, China, Romania, Bulgaria and Oman. Mutual Legal Assistance Treaty has been negotiated with United Arab Emirates but is yet to be ratified. Negotiations are going on for signing of treaty on Mutual Legal Assistance in Criminal Matters with countries such as Australia, Norway, Mongolia, Turkmenistan, Bulgaria, Hong Ling, Ukraine, Uzbekistan and Azerbaijan.

India has extradition treaty with Nepal, Belgium, Canada, Netherlands, United Kingdom, United States of America, Switzerland, Bhutan and Hong Kong. Extradition Treaty is in various stages with Russia, Germany, UAE, Bulgaria, Thailand, France, Ukraine, Romania, Oman, Spain, Kazhakastan, Greece, Egypt, Malaysia and Mauritius. India has extradition arrangements with Sweden, Tanzania, Australia, Singapore, Sri Lanka, Papua New Guinea, Fiji and Thailand.

Section 166 Criminal Procedure Code deals with reciprocal arrangements regarding processes. A court in India can send summons or warrants in duplicate to a court in a foreign country for service or execution and the said foreign court will cause the service or execution. Section 166-A of Criminal Procedure Code deals with letter of request to the competent authority

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for investigation in foreign country. A criminal court in India may issue a letter of request to a court or a competent authority to examine orally any person supposed to be acquainted with facts and circumstances of the case, to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing. Section 166-B deals with letter of request from a country or place outside India to a court or an authority for investigation in India. Under its provision, the Central Government may forward a letter of request received from a foreign country to a magistrate who may summon such person and record his statement. The Central Government can also send the letter to a police officer who will investigate into the offence.

indiscriminate violence involving death or serious injury, or serious damage to property.

Extradition Act, 1962 deals with extradition of fugitive criminals. Extradition can be made if the offence is an extradition offence i.e. an offence provided for in the extradition treaty with a State which is a treaty state and for other countries, an offence which is specified under the Second Schedule. Under this schedule, there are 18 types of offences.

India is a signatory to the South Asia Association for Regional Cooperation (SAARC) Convention for Suppression of Terrorism. SAARC countries consist of India, Pakistan, Bangladesh, Nepal, Sri Lanka, Maldives and Bhutan. Pursuant to the SAARC Convention, India enacted the SAARC Convention (Suppression of Terrorism) Act. Extraditable crimes include unlawful seizure of aircraft; unlawful acts against the safety of civil aviation; crimes against internationally protected persons; common law offences like murder, kidnapping, hostage taking; and offences relating to firearms, weapons, explosives and dangerous substances etc. when used as a means to perpetrate

REPORTS OF THE COURSE

GROUP 1 PHASE 1

ANALYSIS OF CURRENT SITUATION ON ILLICIT DRUG TRAFFICKING

Chairperson	Mr. Mustafa Abdullah	(Malaysia)
Co-Chairperson	Mr. Ruy Gomes Silva	(Brazil)
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I. INTRODUCTION

Crime is increasing in scope, intensity and sophistication. It threatens the safety of citizens around the world and hampers countries in their social, economic and cultural development. Globalization has provided the environment for a growing internationalization of criminal activities. Multinational organized criminal syndicates have significantly broadened the range of their illegal operations and illicit drug trafficking in particular, figures very prominently in transnational organized crime (TOC). In most countries, despite years of drug suppression and prevention efforts, the cycle of the drug trafficking and drug abuse continues. If allowed to remain unabated, the drug menace will considerably destroy the quality of life of the people. The cost to the world community due to this menace includes not only lost billions of dollars, lost of life and physical injuries, but also entails substantial public corruption. The combined effect of these adverse consequences tends to undermine the

security and stability of governments themselves.

Drug trafficking and abuse are serious issues confronting both developing and developed nations. The large consumption and demand for drugs worldwide has given a wide opportunity for traffickers to carry out their illegal activities which give them a lucrative returns. According to 1994 report of United Nation International Drug Control Programme (UNDCP), it is estimated that out of one trillion dollars worldwide profits of organized crime annually, US\$500 billion comes from drug trade. In USA alone, in 1995, the Americans spent approximately US\$57 billion on drugs including US\$38 billion to purchase cocaine and US\$10 billion on heroin from overseas sources. Meanwhile in Pakistan where average per capita income is only about US\$500 annually, the amount of consumer expenditure on heroin alone is estimated US\$1.2 billion per year. This scenario points towards the heinousness of the situation, which is

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becoming worst with everyday passing.

This paper attempts to analyze the general trend of the drug trafficking worldwide which includes production, trade and consumption of illicit drugs. It will also address related issues such as modus operandi, seizures and organized mafia drug trafficking groups.

II. TYPES OF DRUG AND SOURCE COUNTRIES

Though there are several types of drugs produced all over the world each type of drugs has the prominent producing areas. Such source countries are those which have either weak political systems or unstable governments. Recently, the production levels of particular types of drugs show fluctuation, whereas others remain constant. According to the "Global Illicit Drug Trend 2000 (DRAFT)" edited by UNDCP, the situations of each type of drugs are as follows:

A. Opiates (Opium, Morphine and Heroin)

The well known opium poppy producing areas are the "Golden Triangle (Myanmar, Laos and Thailand), the "Golden Crescent" (stretching from the Pakistan Afghanistan boarder to northern part of Iran), Central and South America such as Mexico and Colombia. However, Myanmar and Afghanistan are by far the largest countries of those.

Myanmar which used to be top ranking country in the cultivation of opium poppy has declined since 1999. The cultivation went down from 130,300 kilograms in 1998 to 89,500 kilograms in 1999. On the contrary, the production in Afghanistan has increased considerably by about 41%, from 63,674 kilograms in 1998 to 90,983 kilograms in 1999. There was also a considerable shift of opium production from

South East to South West Asia in 1999. In Laos, Pakistan and Thailand, the cultivation of poppy has declined. However, globally opium production has increased by one-third in 1999 although opium poppy cultivation on the whole decreased by 20,000 hectares.

B. Cocaine

The South American region especially Colombia, Peru and Bolivia are the leading cocaine producing countries in the world. However, Columbia is still leading among the three. In 1999 there was reported decline in coca bush cultivation in Bolivia (43%) and Peru (24%) respectively, resulting in lower coca leaf and potential cocaine production. On the other hand, 20% increase in coca bush cultivation in Colombia had been reported by the USA Government.

Although the total world output of cocaine declined in 1999 as a result of the above, the UNDCP still contends that there is no significant effect because cocaine consumption had an overall increase during the last few years.

C. Cannabis

There are 120 countries having reported illicit cultivation of cannabis all over the world. The INTERPOL has listed Morocco, South Africa, Nigeria, Afghanistan, Pakistan, Mexico. Colombia and Jamaica as the "primary" source countries for cannabis in its "Cannabis World Report 1999".

D. Amphetamine-Type Stimulants (ATS) such as Methamphetamine, Ecstasy, LSD etc

Generally the main ATS manufacture areas are also the main ATS consumption areas such as East and South-East Asia, North America and Western Europe, reflecting the fact that transit trade is less important for ATS than for other drugs

such as heroin or cocaine. As for Asia, Thailand emerged as the country of largest seizures of ATS worldwide, reflecting its role as a major center of illicit production of ATS in South-East Asia. In the areas of the "Golden Triangle" where at one time was exclusively being used for the refining of heroin are now being used for manufacturing of methamphetamine as well. Myanmar has emerged as another important location for illicit methamphetamine manufacture in the region.

III. CONSUMPTION

The consumption of drug worldwide has reached alarming level that if allowed to continue unabated, the consequences to the world community can be more severe. In the US for example about 13 million people (6.1% of the total population) used drug on a casual or a monthly basis in the year 1996. In 1995, there were approximately 3.3 million chronic users of cocaine and 0.5 million people addicted to heroin. Estimate indicates that 5 million Americans have tried methamphetamine in their life time, an illicit drug associated with particularly violent behavior. This therefore indicates that the USA has suffered a serious problem of drug use.

Disturbing enough is the fact that other countries are also experiencing an increase in the drug abuse. In Pakistan for example, the number of people addicted to heroin is estimated to be 1.52 million people in 1995. It is estimated that 20% of total European population is affected by drugs in one way or another. Cocaine consumption is most widespread in Spain, UK, Netherlands and Germany. Switzerland and Italy also seem to have rather high level of cocaine consumption. One recent survey in Switzerland revealed that 2-3% of the 15-45 years age-group had consumed cocaine in 1998. Abuse of cocaine is also reported

to spread more widely in Australia, Western and Southern Africa.

In South East Asia, the abuse of drug like cannabis and heroin still remains high. In Malaysia for example, the number of drug addicts recorded in 1999 is 191,097 (0.9% of the total population of 22 million), out of which 64% are heroin addicts. Of late the use of ATS like ecstasy and shabu has gain much ground in this region.

These three types of drugs are also widely used in Thailand Indonesia the Philippines and Laos. Other countries like China, India, Pakistan and Japan are also abused such drugs. Out of the total drug users, heroin users in China recorded 60%, India 53.5% and Pakistan 99.7%. While in Brazil and Nigeria, Cocaine is more popular.

According to UNDCP report in 1998, Laos has the highest or second highest rate of opium abuse world wide among the people of 15 years of age and above. Besides consuming, countries such as China, Thailand, Malaysia, Singapore, Pakistan, Laos, India, Indonesia and Brazil are also known to be major transit countries used by the drug traffickers. This is because those countries are closer to the main drug resource regions. It is disturbing to note that some other drug transiting countries have also been turning into consuming ones.

IV. MODUS OPERANDI AND ROUTES

Illicit drug trafficking has been the most profitable illegal activity in the world. According to 1999 report of the Financial Action Task Force (FATF), between US\$40 -100 billion is earned from illegal drug per year in the USA alone. The drug traffickers have also spread their activities throughout the world and they resort to use all sort of

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modus operandi to evade detection by the authorities. Though modus operandi used by drug traffickers differs from country to country, internationally detected modes of concealment employed are generally as follows:

- (i) Ingestion, leg casts and body wrap;
- (ii) Use of false bottoms of luggage, concealment in imported packages such as electronic equipment, foods, false cavities of furniture etc...
- (iii) Concealment in special compartments in vehicles and ships, containers and air freights.
- (iv) Delivery by courier services;

In Japan, apart from the above modus operandi, the drug traffickers also used methods such as soaking cloth in drug solution and melting drugs in whisky. Cargo container equipped with Global Positioning System (GPS) also being used to ferry in large amount of methamphetamine. The routes are often by air, sea and land, depending on geographical location of the country concerned.

In Brazil, several routes are used to both import and export drugs but usually large amounts are carrying by sea through some of the five Brazilian ports and by air through international airports placed in Sao Paulo, Rio de Janeiro, Salvador, Recife, Fortaleza and Manaus to USA/Europe. In Japan, due to its long seacoast, it is facing the problem of trafficking of drug in and out of the country by sea and air. While, in Laos, China, Pakistan, India, land and air routes are usually the choice by the drug traffickers because of the geographical vicinity to the Golden Triangle and the Golden Crescent.

The drug rings who are engaged in illicit smuggling of heroin from the Golden Triangle to USA, Australia and Europe

more often are using the Philippines, Malaysia and Singapore as their transshipment points.

V. DRUG TRAFFICKING MAFIA

Due to the large profits gained from trafficking, big criminal organizations are deeply involved in drug trafficking in the world, from smuggling to illegal sales up to end user. Japanese criminal organization called "Boryokudan" continue to be deeply involved in illicit drug trafficking, especially methamphetamines/amphetamine-type stimulants. The Boryokudan groups have conspired with foreign Mafia such as Chinese Mafia, Russian Mafia, Taiwan Mafia, Cocaine Cartel and so forth. Over 500 kg methamphetamines were confiscated in October 1999 along shoreline of Japan and 9 Chinese/Taiwanese and a Japanese were arrested. In this particular case, the Boryokudan groups were involved in plotting drug trafficking from the Korean Peninsular into Japan with the conspiracy of a known criminal organization based in Hong Kong. In recent year, drug-related offences in Japan involving Iranian organized drug trafficking groups are rising sharply. Arrests have been made on charges of possessing illicit drugs for commercial purposes and/or transiting them. The Boryokudan groups are reported to have connection with them behind the scenes.

The Hong Kong-based Triad is a criminal group which has come into being as an offshoot of China's traditional secret society. Triad activities are carried out mainly within its territory and/or Triad control loose organization in Mainland China to operate drug trafficking. However, Triads have become a matter of concern not only in Hong Kong, but also in other places where there is a sizable Chinese community all over the world.

Dawood Ibrahim group is the most dreaded mafia in India with countrywide networks and foreign connections. Dawood Ibrahim has stationed himself in Dubai since 1995 and has indulged in drug trafficking in conspiracy with his family who are pretending to be transacting legitimate business.

The Colombian Cocaine Cartels are still the main drug trafficking mafia in South American States. However, Nigerian and Italian groups began to rise in the field of drug trafficking in Brazil.

Myanmar's ethnic militia organization such as Kachin Independent Army (KIA), New Democratic Army (NDA), Wa Army (WA) and Shan Independent Army (SIA) are carrying out drug trafficking in the Golden Triangle where it extends over Myanmar, Laos Thailand and China. In Colombia, it is widely known that the Force Armed Revolution Columbia (FARC) is controlling territorial position and using it for drug related activities.

VI. DRUG SEIZURES

The data on seizure of illicit drugs is an available indicator for underlying production, trafficking and consumption trends. The United Nations have compiled a comparative list of countries regarding seizure figures along with the several top ranking countries in respect of different drugs. (See Appendix D). As for opium, among 18 countries in 1998, 7 were located in Asia region. As for heroin, 6 countries were located in Asia region. Almost 18 countries reported high seizure of cocaine were located in the American region. This data shows that some countries in and around illicit production areas known as the Golden Triangle and the Golden Crescent and cocaine production area are exposed to the menace of drug trafficking. Furthermore, transit countries have

developed into consumption countries.

In view of the global situation, it is pointed out that ATS has the potential to become a major drug problem of the twenty-first century. In fact, the most striking feature in Asia region was the increasing level of trafficking in countries of East and South Asia. While this area accounted for just 22% of global seizure of ATS in 1990, its share in global seizure almost doubled to reach 41% in 1998, reflecting increasing levels of production, trafficking and consumption in the region. The other region with similar growth rates was Western Europe. ATS seizure in Western Europe rose from 20% of global seizure in 1990 to 38% in 1998. ATS seizure in North America accounted for 18% of global ATS seizure in 1998, up from 14% in 1990. Among the 30 countries that reported the highest seizure, 11 were located in South-East Asia, 11 in Western Europe and 3 in North America. The seven countries i.e. United Kingdom, Thailand, USA, China, Netherlands, the Philippines and Japan, accounted for more than 80% of global ATS seizure. Thailand emerged as the country reporting the largest ATS seizure worldwide, reflecting its role as a major center of illicit production in South-East Asia. From 1997 to 1998 ATS seizure rose in Thailand by 30%, in China by 20% and tripled in Japan. Furthermore, in 1999, 1.9 tons of methamphetamine was seized in Japan, which was the highest amount in the past year. Seizure in Myanmar tripled, also exceeding those of the Philippines, and indirectly reflecting the increasing role of Myanmar as another important location for illicit methamphetamine manufacture in the region.

Several factors contributed to the surge in ATS abuse. On the supply side, economic incentive were powerful. In some countries, clandestine manufacture of

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methamphetamine could lead to profit of nearly 3,000 percent of the cost of raw materials. Such profitability derived from the following: the accessibility and abundance of precursors, which suggested that clandestine manufacture could be carried out by non-specialist and close to the point of final consumption: fewer stages in the chain of distribution with the involvement of fewer individual; and shorter distances from production area to consumption area, reducing the scope for effective interdiction. In addition, detailed information on the manufacture of ATS were widely available to the public at large through the Internet and other such network.

menace if we are to have a safer world community.

VII. CONCLUSION

There is no doubt that the foregoing analysis indicates a very big threat that drug pose to the world economies and countries. The problem is even more compounded by the existence of strong organized criminal groups and mafia that engaged in this trade, scattered around the world and earning big amount of money that makes their financial position stronger than economies of some independent states, yet their trade negatively affect world economies and destroys right of individual.

The analysis further shows that formerly transit countries are progressively graduating into consuming countries. The modus operandi of transporting these drug is changing day after day both in scope and complexity that it often requires devising new method of detection. The figures of seized drugs are so overwhelming that indicates that much more drug may be produced, trafficked and abused without he detection of law enforcement, agencies. It is therefore prudent that an international consorted effort is required to fight this

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Appendix A

DRUG SEIZURES

Opium

(Kg)

	1993	1994	1995	1996	1997	1998
China	3,354	1,178	1,110	1,745	1,880	1,215
India	2,908	2,256	1,349	2,876	3,316	2,031
Indonesia	-	2.6	0.03	0.03	-	-
Japan	12.8	33.7	32.8	31.1	39.0	19.8
Laos	369	293	695	199	200	No Report
Malaysia	11.5	69.0	155.1	2.6	150	32.7
Pakistan	4,500	14,663	109,420	7,423	7,300	5,202
Tanzania	7u	0.15	0.13	No Report	-	-
Thailand	2,530	606	927	381	1,150	1,631

Heroin

(Kg)

	1993	1994	1995	1996	1997	1998
Brazil	No Report	12.8	0.006	-	-	0.95
China	4,459	4,086	2,375	4,347	5,477	7,358
India	1,071	1,011	1,681	1,257	1,332	655
Indonesia	41.2	42.8	1.7	1.7	20.4	27.8
Japan	15.2	10.2	7.7	3.9	5.9	3.9
Laos	6.0	44.9	49.7	16.2	72.3	No Report
Malaysia	216	212	119	241	276	289
Nigeria	288	91.6	30.3	19.4	10.5	5.8
Pakistan	4,000	6,444	10,760	5,872	6,156	3,363
Philippine	17.4	23.0	-	1.5	30.0	1.7
Tanzania	1.9	1.3	2.8	No Report	4.8	2.7
Thailand	2,537	1,295	518	598	323	508
Uganda	1.3	2.8	1.5	2.7	No Report	1.3

Cocaine

(Kg)

	1993	1994	1995	1996	1997	1998
Brazil	6,608	12,028	5,815	4,070	4,309	6,560
India	-	1.6	40.0	3.0	24.0	1.0
Indonesia	-	4.4	0.1	0.4	3.3	4.7
Japan	25.9	19.9	36.6	37.1	25.5	20.8
Nigeria	1,309	90.8	15.2	6.2	31.9	9.3
Philippine	8.1	9.4	1.4	1.6	1.0	1.1
Tanzania	2.2	-	-	No Report	0.2	-
Thailand	3.2	No Report	No Report	No Report	2.4	3.6

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Cannabis Herb

(Kg)

	1993	1994	1995	1996	1997	1998
Brazil	No Report	18,836	11,731	22,430	31,828	28,982
China	No Report	No Report	466	4,876	2,408	5,079
Fiji	No Report	5.0	16.9	6.9	No Report	No Report
India	94,964	187,896	12,873	62,992	80,866	68,221
Indonesia	5,785	1,331	444	444	716	1,071
Japan	612	665	208	173	155	120
Laos	3,217	115	5,197	1,896	7,026	No Report
Malasia	962	717	15.9	1,425	3,889	1,781
Nigeria	7,461	19,732	15,258	18,600	15,905	16,170
Pakistan	No Report	20,087	No Report	No Report	No Report	No Report
Philippine	4,638	10,844	2,213	2,045	2,227	No Report
Tanzania	-	-	4,012	No Report	82,539	4,618
Thailand	31,484	8,890	19,880	16,720	9,142	5,582
Uganda	No Report	7,910	No Report	259	No Report	5,530

Papua New Guinea has only a few drug cases.

Cannabis Resin

(Kg)

	1993	1994	1995	1996	1997	1998
Brazil	No Report	1.4	6.3	8.5	12.1	-
India	7,979	-	3,629	6,520	3,281	10, 106
Indonesia	-	-	0.5	2.1	-	0.7
Japan	29.7	96.9	130.7	145.1	197.4	214.6
Malasia	No Report	No Report	965	No Report	-	-
Pakistan	189,000	189,252	357,690	192,837	107,000	69,909
Philippine	3.8	126.0	5.8	0.03	0.28	No Report
Tanzania	-	-	-	-	42.2	
Thailand	No Report	6,925	No Report	No report	45.2	20.6
Uganda	No Report	25				

Stimulants

(Kg)

	1993	1994	1995	1996	1997	1998
Indonesia	-	25u	-	0.33	5.6	-
Japan	96.9	315	89.2	652.2	173	549.7
Malaysia	No Report	71,841u	-	No Report	2.0	-
Nigeria	1.8	94.3	45.0	10.6	309.5	No Report
Philippine	160.7	114.6	207.6	767.5	694.5	77.8
Thailand	1,289.7	812	561	442	2,135.9	2,827.9

GROUP 2
PHASE 1

**CURRENT SITUATION OF ILLEGAL FIREARMS
TRAFFICKING AND HUMAN (WOMEN, CHILDREN, AND
MIGRANTS) TRAFFICKING**

Chairperson	Mr. Ramend Hem Raj	(Fiji)
Co-Chairperson	Mr. Toshihiro Fukushi	(Japan)
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I. INTRODUCTION

The presence of transnational organized criminal groups in almost all corners of the world seems to signify that every State is fighting a losing battle against this scourge of the modern world. Problems arising from the activities of these syndicates in the commission of so-called “hard crimes” such as the trafficking of narcotics and psychotropic substances, firearms, and humans, as well as the newly-emerging “high-tech crimes” of money laundering, product counterfeiting, card fraud, and computer-related offenses, are shared by most countries. This report will attempt to show the current situation of the illegal trafficking of firearms and humans from a global perspective, with the end in view of arriving at a solution founded not only on individual but also, and more importantly, on international multilateral efforts.

**II. ILLEGAL FIREARMS
TRAFFICKING**

Guns are manufactured and distributed to serve the various needs of different groups of people. On the supply end, firearms are generally trafficked for profit: since their underground sale is unregulated, the suppliers have absolute control over their prices. There are times, however, when they are used as currency to purchase narcotics. Brazilian drug traffickers trade firearms for cocaine with terrorist groups from neighboring countries. Some guns in Papua New Guinea are also exchanged for drugs, and this is where transnational organized criminal groups make their presence felt.

Civil strife and a strong military presence likewise greatly contribute to the accumulation of firearms and ammunition in certain places. The proliferation of firearms in Nigeria is due largely to armed conflicts in that region. The first wave

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occurred in the wake of the civil war of 1967-1970, while the second wave came during the Peacekeeping Operations, particularly in the Economic Commission of West African States Monitoring Group Operations (ECOMOG). And while Nigeria used to be merely a transit nation, it has since been transformed into a primary user. There is, however, no relevant data linking illicit firearms to any particular transnational organized crime group.

In similar fashion, gun trafficking is very rampant in Tanzania due to civil wars in the neighboring states of Rwanda, Burundi, Uganda, the Democratic Republic of Congo, Mozambique, and Somalia, through Kenya. Between 1997 and 1999, some 1,716 people have been arrested in relation to firearms, 1,313 guns and 7,113 ammunition were seized, leading to the filing of 1,223 cases of firearms trafficking involving sub-machine guns, semiautomatic rifles, pistols, shotguns, AK-47s, and muzzle loading guns.

At other times, soldiers in countries that have experienced much internal conflict or wars find themselves with no meaningful employment and no use for guns at the cessation of hostilities Cambodia and Vietnam had a surplus of guns after the war in that region. The military had guns, but they needed money, so they sold their guns at the Thai border, thus, creating problems for the Thai authorities. Only strict border checks controlled its spread, thereby drastically reducing Thailand's firearms problem.

From the demand end, guns support the illegal activities of organized criminal groups in countries like Brazil, Japan, Papua New Guinea, Tanzania, and Uganda. They are also used in terrorist or guerilla warfare, as what is happening in the Indian states of Punjab, Jammu, and Kashmir, and in Muslim Mindanao in the

Philippines. In fact, even Nomadic tribes in Karimojong, Uganda, have 200,000 guns, mostly from Somalia and Sudan. Two organized crime groups, the Allied Democratic Force and the Lords Resistance Army, also possess a large number of firearms. And if money is not enough, there are times when kidnapped children are traded for guns.

How, then, are firearms being trafficked around the globe? In Brazil, this is the main activity of frontier smugglers, mostly at the Brazil-Paraguay area, where firearms enter the black market. The Russian mafia, on the other hand, sponsors the importation of illicit arms to Brazil through the ports of Rio de Janeiro and Santos in São Paulo. In Papua New Guinea, firearms enter the community from Australia, Indonesia, and the Solomon Islands in container cargo vessels, light aircraft, fishing trawlers, and by individual couriers or through parcel ports. As an importer, the Philippines gets its guns mainly from the United States, and as a manufacturer, moves imported as well as locally crafted handguns to Taiwan, Japan Malaysia, and other Asian countries. This is done either by misdeclaring the contents of cargo containers and sending them to a fictitious consignee, or by smuggling the firearms into non-commercial ports.

In regional trafficking of firearms, transnational organized criminal groups make full use of the unguarded borders of such countries as India, Malaysia, Nigeria, and Pakistan. India's long and porous border poses a major problem in monitoring and controlling movement of illegal firearms. And yet, firearms are transported not only by land but also by sea and air. Gun trafficking in India continues despite the existence of the Arms Act of 1959.

As in India, it is through penetrable borders where firearms find their way into Malaysia. The problem, though not serious, is compounded by the lack of control at the borders, making it ideal for arms smugglers. Because of the proximity of Muslim Mindanao in the Philippines, it is believed that illegal firearms are trafficked between these two countries by sea. Statistics show that in 1999, 247 pistols, revolvers, and shotguns were seized, with 250 people arrested. In 1999, Sabah police arrested 116 people and shot 15 others. The involvement of transnational organized criminals, however, has not been established. Some countries, like Laos and Nigeria, are merely transit points for the trafficking of firearms so that the long hand of transnational organized crime never actuary touches them.

The Japanese public is fortunate enough to be shielded from the influx of firearms, illegal or otherwise, by its firearms control system, as well as by the non-necessity of procuring firearms because of the lack of internal conflicts. Arid while guns were previously used only against criminal elements, in recent times, even ordinary and innocent citizens have been victimized. The boryokudan however, has no monopoly of firearms. Even the notorious Aum Shinri Cult, which was responsible for the fatal sarin gas incident in 1994, is involved in the illicit manufacture of firearms, such as AK-47s. Some of their firearms are reportedly smuggled from the Philippines.

III. HUMAN TRAFFICKING

Human trafficking, especially the trafficking of women and children, has lately been receiving much attention because of its human rights implications. But trafficking in humans is of two types: the first is initiated by the victim and is, therefore, voluntary, while the second is

totally involuntary.

The Chinese experience explains it best. Because of economic hardships or, perhaps, due to government policy, many Chinese want to leave the country in search of a better life. Some of them are able to gain lawful employment overseas. The problem begins when the authorized period of stay or employment expires and they opt to stay on as illegal migrants. The second situation, though rarer, involves, to a large extent, human smuggling. This occurs when prospective migrants who try but fail to obtain legitimate travel documents seek the help of triad societies and organized crime syndicates or "snakeheads" who are willing to provide them with forged travel documents for a very high fee. To pay these fees, they sometimes resort to drug trafficking, weapons smuggling, kidnapping, murder, robbery, blackmail or extortion, and even terrorism: They normally travel on long and unusual routes, under inhuman conditions, just to reach their destination, which is usually a progressive country like the U.S., France, U.K., Italy, Australia, or Japan. China, being a developed nation in its own right, also attracts illegal migrants. At present, however, China has no specific law on illegal migration or human smuggling.

Similarly, the problem of Japan is more on illegal immigration rather than human trafficking. There are instances when people seeking gainful employment in Japan but cannot do so legally solicit the help of transnational organized criminal groups to secure forged travel documents, find work, and enter Japan. In 1992, for example, among the persons deported by the Immigration Bureau, the number of persons who entered Japan illegally, that is, without a valid passport, was 3,459. Thereafter, the annual figure remained fairly constant until 1996, when illegal immigrants started to enter the country by

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sea. Thus, by 1999, the number of illegal immigrants has swelled to 9,337, with 6,281 individuals entering Japan by air the rest by sea. This shifting trend may be due to the difficulty in getting into the country through regular landing procedures. Among those who opt to enter Japan by sea, more ingenious methods have recently been uncovered, such as transferring from Chinese to Korean fishing vessels, traveling with forged documents aboard vessels of legal registry, hiding in the ship's secret compartments, and disembarking at non-commercial ports along the Japanese coast. Illegal immigration, particularly by Chinese nationals, is usually carried out with the assistance of the triad or "snake heads" in cooperation with the boryokudan.

In the past few years, there has also been a marked increase in the number of illegal migrants to Fiji, mostly women and young girls of Chinese origin. Investigations reveal that criminal organizations are responsible for transporting these illegal migrants to Fiji, with assistance from their Fijian counterparts and some corrupt Fijian authorities. Many of them initially enter Fiji on fishing vessels, jump into the water, before being picked up and transferred to smaller boats, as pre-arranged.

Personal economic gain also appears to be the common reason behind the trafficking of women from Brazil, Nigeria, the Philippines, Thailand, and Uganda. Trafficking of women in Brazil has intensified in the past few years, spurred by the socio-economic difficulties in the country. The high rate of unemployment is actually forcing women and adolescents into prostitution. Criminal organizations in Brazil take women to Europe and Asia, usually under the guise of giving them good jobs in a regular company, or in a dance group or show house, and/or in a prostitution house or striptease show.

Organized crime syndicates in Nigeria employ various tactics in human trafficking. They use education, gainful employment, or success stories to attract victims. At other times, they employ force, coercion, fraud, or deceit. In the end, the hapless victim is forced into prostitution, child labor, or even slavery. The average age of women trafficked into prostitution or slavery is 14 years.

Following global trends, there is a steady increase in the rate of trafficking of persons in the Philippines. The usual methods employed by transnational organized criminal groups are illegal recruitment and mail-order bride scheme, including cyber matchmaking (e.g., advertisements seeking marriage proposals from foreign males). These could only be perpetrated by local syndicates working with the help of foreign organized crime groups.

Women and children are the usual victims of human trafficking in Uganda. There is evidence that Ugandan children are abducted by Sudanese rebels, brought to Sudan and used not only in combat but are also sold into slavery to Sudanese Arabs or exchanged for guns. Through the years, over 10,000 children have been abducted and even as some of them have reportedly been released, around 6,000 are still missing. On the other hand, many women who leave Uganda for promised jobs in Europe or the Middle East end up being sold into sex slavery. To this day, some of these women attempt to return home but are unable to do so because they have no money and, therefore, cannot procure proper travel documents.

On a slightly different mode, India, Pakistan, and Thailand are similarly situated in that the main thrust of human traffickers in these countries is on sexual trafficking. The commercial sex trade in India is undoubtedly profitable. Fear of

AIDS is forcing syndicates to look for younger girls, with demands for virgins rising exponentially in the last few years. Thus, incidents of kidnapping of women and children in India as well as in other countries have steadily increased in recent times. The victims end up working as prostitutes, either in India or in other countries, notably in Arab countries.

Trafficking in women into and from Pakistan is now more prevalent and is actually getting worse. It used to involve mostly foreigners, but the internal trafficking of Pakistani women is on the rise, although there is insufficient proof of this. The prostitution of poor young girls has always been around, with very few being able to escape their fate even if they want to.

On the other hand, Thailand's problems in human trafficking take on many forms. Legal as well as economic reasons contribute to the problem. In desperate search of jobs abroad, young Thai women resort to small groups of illegal human traffickers with international connections. The high demand for prostitutes accounts for the continued profitability of the business. Some countries, like Laos and Malaysia, serve only as transit points for trafficking women en route to a third country for prostitution or forced labor.

IV. ANALYSIS

A perusal of the foregoing facts instantly reveals a uniformity in the reasons or causes surrounding the illicit trafficking of firearms and humans, as well as in the *modus operandi* employed by transnational organized criminal groups to consummate their acts. For some countries, such as India, Nigeria, Pakistan, Tanzania, and Uganda, and to some extent, Papua New Guinea and the Philippines, the use of firearms is integral to armed struggle,

thereby feeding the fire of internal strife or regional conflict. Transnational criminal organizations engaged in the distribution of firearms benefit the most from situations like these because of the ensuing breakdown of the social order. Less government restrictions mean more freedom for them to operate with impunity.

In Brazil and Papua New Guinea, firearms are also exchanged for illegal drugs. The symbiotic relationship between arms and narcotics dealers is all too evident that their activities often overlap, thus, creating a very deadly combination. Firearms are also the weapons of choice of terrorists. In India and the Philippines, terrorists are getting bolder as their firearms become more sophisticated than standard government-issued firearms.

As regards human trafficking, the most common reason for voluntarily venturing to a foreign land is the desire to simply earn a living. It must be noted that the favorite destinations of illegal migrants are the developed or highly industrialized nations like the U.S., Japan, Canada, Germany, France, and the U.K. Most women originating from Brazil, India, Nigeria, Pakistan, the Philippines, Thailand, and Uganda usually wind up as sex workers, servants, or abused homemakers.

Criminal elements prowling the globe for likely victims are becoming more and more creative, making it more difficult for the proper authorities, and the public at large, to detect their true intentions. They devise sterling success stories that would convince even the most skeptical foreign employment aspirant.

Others make use of a mail-order bride scheme to lure young women who wish to fast-track their dream of living in another country. Many young and educated Filipino women have fallen prey to this

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system. And if subtle persuasion fails, they can always resort to deception, coercion, and abduction.

IV. CONCLUSION

Illegal firearms trafficking and the trafficking of humans continue to be carried out in spite of intensified efforts by individual States to eradicate them. The methods utilized by transnational organized criminal groups to carry out such illicit activities are still evolving both in sophistication and in virulence. One of the best solutions in sight is the relentless development of equally innovative if not outright crafty countermeasures enforceable at the domestic as well as at the global level. The unwavering commitment of all members of the international community to assist and cooperate with each other will not only prove to be ideal but also indispensable.

The United Nations has been endeavoring to fight and eradicate transnational organized crime and, in fact, has been campaigning for the adoption of the three related Protocols on firearms, smuggling of migrants, and trafficking in persons for the establishment of an effective legal framework against transnational organized crime. A UN Global Programme Against Trafficking in Human Beings is also being launched worldwide. The target year of the *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century* "for achieving a significant decrease in the incidence of illegal firearms and human trafficking is 2005. None of us is bound by this period. If the balance between crime and law enforcement at the transnational level could tilt in favor of the law much sooner, then, for once, we would be one step ahead of organized crime.

GROUP 3
PHASE 1

**CURRENT SITUATION OF ORGANIZED CRIMES IN
TRAFFICKING STOLEN VEHICLES, CARD FRAUD, MONEY
LAUNDERING AND MAJOR TRANSNATIONAL ORGANIZED
CRIMINAL GROUPS**

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I. INTRODUCTION

In furtherance to the realisation of the central objective of 116th International Training Course with the main theme 'Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes', our Group was assigned to analyse the current situation of the following topics:

- (i) Trafficking in Stolen Vehicles
- (ii) Card Fraud
- (iii) Money Laundering
- (iv) Major Transnational Organized Groups

In the Course of our discussion, we relied extensively on the country reports of the participants, course reference material, and facts emanating from our group discussions. The scope of our deliberation was centred on general overview of our subject matter with particular reference to the undermentioned countries:

- (i) Japan
- (ii) India
- (iii) Nigeria

- (iv) Pakistan
- (v) Tanzania

The Transnational Organized Crime has assumed serious dimensions to engage the collective attention of the international community at large. Various United Nations agencies and other world bodies have deliberated on the issue of tackling transnational Organized crime, and the Transnational Criminal Organisations and have come out with far reaching resolutions and recommendations.

**II. TRAFFICKING STOLEN
VEHICLES**

A. Current situation

Over the past decade the rate of vehicle ownership has risen considerably in all countries and the incidence of illicit trafficking of stolen vehicles has increased correspondingly. The transnational organized criminal groups are playing a major role in trafficking of vehicles. There is rapid growth and geographical expansion of this problem in Europe, America, Asia

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and Africa. The method of trafficking varies from country to country. Three methods have come to notice in the illicit trafficking of stolen vehicles, namely, stealing vehicles by duplicate keys, diverting rental cars to foreign countries and outright robbery of vehicles at gunpoint. The stolen vehicles recovered in African countries are of European, American or Japanese origin. The organized groups in the countries from where the vehicles are trafficked have links with the syndicates in the African countries. The vehicle trafficking is usually conducted using forged documents and shipping them as second hand vehicles, where they are disposed for profit. Similarly, illicit trafficking is also prevalent within the African countries where the vehicles are stolen in one country and driven across the border into another country. In West African sub-region, there is a protocol for free movement of persons and goods under the auspices of Economic Community of West African States (ECOWAS). Criminals take undue advantage of this policy to indulge in trafficking in stolen vehicles. On account of harsh economic conditions in the West African countries, most of the people can not afford brand new vehicles and therefore the sale of second-hand cars is a lucrative business. Hence, fairly used vehicles are smuggled into these countries from the western world. In Nigeria, these cars find their way into the country through the international borders of neighbouring West African States.

Trafficking in stolen vehicles is also a major problem in East African countries where the modus operandi is similar. Motor vehicles robbed from Tanzania and other countries of Great Lake Region and Southern African Region have been recovered in Uganda. In the same vein, vehicles robbed in Uganda have been recovered in other countries of the region.

In the year 1999, a total number of 32 vehicles robbed from neighboring countries were recovered from Uganda and 18 Ugandan registered vehicles were recovered from neighboring countries.

In India, there is incidence of trafficking of stolen vehicles to Nepal. However, there is no such trafficking across the Indo-Pak border, as the border control is strict. In Pakistan, theft of vehicle is on the rise but there is no significant problem of transnational trafficking of stolen vehicles.

In Japan, the Boryokudan groups, Myanmar nationals and Vietnamese are involved in trafficking of stolen vehicles. Boryokudans steal expensive vehicle and smuggle them to Russia by sea route. Myanmar nationals in Japan also adopt the same method for smuggling vehicles to Myanmar and Bangladesh. Besides, stolen vehicles are being trafficked by Myanmar group who also have a legitimate car export business. The Vietnamese group in Japan is engaged in stealing Honda two wheelers for trafficking to Vietnam.

III. CARD FRAUD

Credit cards have come a long way since inception in mid sixties, and so have the fraudulent activities in credit cards. The identifying features are laminated on a plastic material with logo and name of the issuing bank, identification number of the cardholder, dates of issue and expiry, of the cardholder and other essential features. The forgerers have not found it too daunting to counterfeit such a card nor have the hackers found it impossible to generate valid credit card account numbers. Multiple imprints of the credit cards have been made to commit frauds. Stolen or lost credit cards have been used to enter into a transaction. There have been reports of a high-tech crime ring that used a single computer chip to obtain credit

card numbers and personal information of cardholders in Taiwan. Losses of \$30.96 million in 1999 were 30% higher than in the previous year in Taiwan. The easy availability of the card-number generator software makes it a popular modus operandi for the hackers. With online business transactions on the rise, the law enforcement agencies have a daunting task on hand in all countries in the next few years. The credit card market has grown fast in Asian countries in recent years. In India where the average person is not credit card friendly, the annual card spending has grown to Rupees 70,000 million. With e-commerce set to gain increasing popularity, credit cards will become centerpiece of banking and personal financial relationship. The losses due to fraud in credit cards have occurred by the following categories:

(i) Counterfeit	32%
(ii) Lost cards	30%
(iii) Stolen cards	20%
(iv) Multiple imprint	5%
(v) Mail/Tele orders	4%
(vi) Others	9%

In Brazil, credit card fraud has become a major problem. The fraud is mainly perpetrated by cloning of credit cards. The cloning is mostly done abroad where equipment is freely available, whereas in Brazil the sale of such equipment is prohibited.

In Malaysia, the modus operandi used in credit card frauds is by using card number generators, skimming, mail/telephone order and using fictitious identity. Criminal groups have used Credit Master and Credit Wizard Software to obtain credit card numbers using computers and have produced forged credit cards with identical bank identification numbers. In the method of skimming, skimmer machine has been used to extract encoded data from a genuine card's

magnetic strip for making a counterfeit card. In commission of fraud through Mail/Telephone Order, counterfeit cards have been used for ordering goods/services via telephone or mail at boarding houses, vacant premises or motels. Sometimes, credit card is obtained by using fictitious identity and on receipt of the card, the fraudulent cardholders would embark on a shopping spree. In 1998, there were 104 cases of card fraud involving RM1.49 million while in 1999, there were 72 cases involving losses of RM624,480.

The use of Credit Card is not well pronounced in Nigeria, Tanzania and Uganda at present. However, some unscrupulous Nigerians, home and abroad, have been found to be involved in counterfeiting and theft of Credit Cards.

In the Philippines, there are Syndicates with intricate knowledge of computers and it is not much difficult for them to hack bank transactions, manufacture counterfeit credit cards or forge signatures. There have been reported cases of international gang operating in the field of credit card fraud. The Philippines PNP Intelligence Group was able to crack down on credit card scamsters in a well publicized case in 1997 with the cooperation of US Secret Service and INTBRPOL. The syndicate had successfully operated in the United States, United Kingdom, Hong Kong and Thailand earlier. The methods employed for card fraud apart from skimming are as given below:

- (i) Courier-Interception Method: The courier of the cards is bribed and the data is extracted for duplication of the cards.
- (ii) Cardholder access: The cardholder himself is bribed for permitting cloning of the cards.
- (iii) Merchant Access: The personnel of the business company are bribed

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to reveal information about the account numbers of the clients. The account numbers are cloned and operated by using fake identification documents.

In Japan, credit card fraud through counterfeiting, theft and misuse is becoming a serious problem. Organized criminal groups of Malaysian Chinese, Boryokudans and Hong Kong nationals have been found involved in credit card fraud. Hong Kong and Chinese groups possess a remarkable expertise in reading secret security numbers and counterfeiting cards within Japan. Besides, Iranians are reported to have indulged in Telephone card fraud.

Evidently, advent of e-commerce and online financial transactions has resulted in increased propensity on part of Organized criminal groups to commit credit card fraud as it provides anonymity and ease in operation.

IV. MONEY LAUNDERING

Money laundering is an integral part of Transnational Organized Crime. The Transnational Criminal Organisations have resorted to money laundering in different countries in an effort to legitimise the proceeds of crime. The extent of money laundering is difficult to estimate since it is an illegal trade for which no statistics is available. A rough estimate is that about 2-5% of the global GDP is the dirty money that enters the capital market every year. Experience in various countries shows that the general techniques to launder money are:

- (i) investing the dirty money in the legitimate business either through shell companies or through genuine companies in pseudo name;
- (ii) acquisition of assets by paying the

- requisite taxes;
- (iii) deposit of money in banks in non-cooperative countries and remittances through banking channels to the host country;
- (iv) use of non-banking channels in transfer of money;
- (v) over invoicing of goods in seemingly normal business transactions;
- (vi) routing of money through tax haven countries.

One of the popular methods of remittance among the Asian communities settled abroad who have to send money back home is hundi or hawala, an alternative non-banking remittance channel. The money is deposited with the local agent, who sends instructions to his counterpart in the native country to pay the money to the recipient. This is a fast and convenient method for transfer of money. This method is in vogue for a number of years. It has also been used by money launderers since there is no audit or accounting as the system works on trust. For example, in China, Triads have used this system and in India, Organized criminal gangs have used this system to launder their drug and illicit arms proceeds.

In Brazil, international Mafia have used ghosts beneficiaries, front and fictitious companies for money laundering. In India, money laundering is indulged in by corporate houses to evade taxes as well as by the Organized criminal groups to launder dirty money. Money laundering techniques include smurfing, establishment of front companies, acquisition of commercial and noncommercial properties, remittances through Hawala (Non-banking channel), over-invoicing and double invoicing, legitimate business and foreign remittances.

Furthermore, in Nigeria, money laundering has correlation with attempt to legitimise the proceeds of crime by concealing their true origin and ownership. The Organized criminal groups involved in drug trafficking repatriate money from abroad by direct purchase and re-sale of luxury items like cars and jewelry. The other methods include over invoicing of goods and trading in stocks and shares.

In Pakistan, money laundering has linkage with drug trafficking, smuggling, tax evasion and corruption. The methods adopted, amongst others, include hawala, investment in real estate, over invoicing of exports and under invoicing of imports.

There have been about ten cases of money laundering in Japan since 1992 when the law on money laundering was enacted. An Iranian group was reported to have remitted proceeds of drug trafficking to Middle East through banking channels. Boryokudans have also indulged in laundering of the proceeds of sale of stimulant drugs. Chinese 'Snakeheads' have used underground banks in their human trafficking activities in Japan for money laundering.

Undeniably, money laundering is an essential financial activity of Transnational Criminal Organisations to evade detection and enjoy the proceeds of their unwholesome activities. Therefore, the role of authorities in pursuing the money trail is becoming increasingly cumbersome.

V. MAJOR TRANSNATIONAL ORGANIZED CRIMINAL GROUPS

Transnational Organized crime has spread its tentacles world wide endangering the foundations of the international civilised society and corrupting the political, social and economic systems. With rise of a global

market for illicit drugs and firearms. Transnational Criminal Organisations have blossomed forming new alliances to thwart the efforts of the international community to mount a crackdown on them. Chinese Triads, Russian Mafia, Colombian cartels, Japanese Boryokudans, Sicilian Mafia, Nigerian Criminal Groups and Turkish drug traffickers have continued to remain out of reach of the law enforcement authorities in different countries.

There are a few groups of Organized criminals that indulge in illicit drug trafficking in Brazil. The Nigerian group has developed a wide network of drug traffickers who have operations in all parts of the world. They have close relationship with the Colombian cartels. The group gets cocaine from neighbouring countries using Nigerians as couriers. Italian Mafia too indulges in drug trafficking using Europeans as couriers.

Snakeheads are Chinese Mafia indulging in illicit trafficking of human beings. They are operating in countries wherever there are Chinese settlers. Some of the major transnational organized crime groups operating in India are Dawood Ibrahim Group, Chhota Rajan Group and Babloo Shrivastava Group. The most dreaded group is the Dawood Ibrahim group, which has countrywide network and foreign connections. The group has indulged in all types of Organized crime like drug trafficking, firearms trafficking, money laundering, contract killings, smuggling and extortion. The group has acquired legitimate business activities in India, Hong Kong, Dubai and a few other countries.

Another group is the Chhota Rajan, a renegade group of Dawood gang, which parted ways after the 1993 serial bomb blasts in Mumibai. The group is reported to have a membership of about 800 persons.

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The major source of income of the gang is from drug trafficking and contract killings.

The third prominent group is the Babloo Shrivastava gang, which indulges in kidnapping for ransom and contract killings. They receive the ransom amount in foreign countries through hawala channels. Although there may not be any Nigerian criminal groups operating within Nigeria, but the Nigerians are reported to be members of Organized crime groups abroad. The main activities are drug trafficking, human trafficking and money laundering. In Nigeria, the groups are loosely Organized syndicates but have cohesive characteristics.

There are a dozen of identified transnational crime groups in the Philippines namely, Alfred Trionko, Lawrence Wang, Relly Barbon Gang, Solido Group, Paracale gangs, Andres Manambit Group, Chen Ling Tun, Chen Chi Chuing, Wein Kuen Keung, Wong, Kuen Alan Tong, Choo Yeh Leong and Yan Po Weng. Their illegal activities include trafficking in women and firearms and they have connections with Japanese Yakuza.

In Tanzania, Uganda and neighbouring countries, criminals do not function in an Organized pattern at present and crime is mostly perpetrated on individual basis.

In Thailand, criminal networks are involved in trafficking in women. There are at least seven families in Bangkok who recruit, sell and smuggle Asian women for prostitution throughout the world. They use forged travel documents for such trafficking to U.S.A, Japan, Canada and Australia.

The main Organized criminal groups operating in Japan are Boryokudans, Chinese Triads and Chinese Snakeheads. Boryokudans have 2500 organisations with

about 83100 members. Their main activities are 'protection money', drug trafficking, gambling and book making. The Chinese Triads are indulging in drug trafficking, firearms trafficking, human trafficking and robbery. They have alliance with Boryokudans in carrying out some of their illegal activities. Chinese Snakeheads are engaged in human smuggling using forged documents.

Transnational criminal organisations are invariably the canopy that nurtures and provides protection for the perpetrators of crime that have transnational character and scope.

VI. CONCLUSION

In summation, the phenomenal upsurge in the international community of trafficking in stolen vehicle, card fraud, money laundering coupled with the emergence of transnational criminal organizations across the globe demands galvanized international effort to stem the trend.

GROUP 1
PHASE 2

**SPECIAL INVESTIGATIVE TOOLS TO COMBAT
TRANSNATIONAL ORGANIZED CRIME (TOC)**

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I. INTRODUCTION

Transnational Organized Crime (TOC) has become a great concern to the world community as it poses a threat to the safety and security of sovereign states. It has manifested itself in many ways, prominent amongst which are drug trafficking, money laundering, trafficking in women and children, illicit manufacturing of and trafficking of firearms, the smuggling of migrants etc. The result of the above is the emergence of serious problems in various countries of the world.

The use of traditional investigative methods to combat TOC has proved to be very difficult and ineffective. This state of affairs therefore calls for the use of special investigative tools such as controlled delivery, undercover operations and electronic surveillance (wiretapping, communications interception etc) by law enforcement agencies to effectively control TOC.

However, there is controversy surrounding the use of these techniques and thus, to a certain extent, discouraging the law enforcement agencies to utilize them. Their use potentially undermines the rule of law, may lead to infringement on human rights and involves government agencies in the use of deceitful means. There is a fear that governments may use them to oppress citizens under the guise of national interest. Their use therefore often spark off politically sensitive debates.

The biggest question therefore is how to use these techniques consistent with the rule of law and respect of human rights. The answer to this cannot be universally obtained and this will depend on the legal system, practice and culture of each country. There is a need therefore, to strike an agreement as to what extent the privacy rights of individuals can be respected at the same time keeping them (people) safe from the effects of TOC.

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In that vein, this paper seeks to analyze these tools with emphasis on the current situation, common issues and problems as well as proposed solutions. It will also analyze the legal framework existing in countries of focus and the trial admissibility of evidence obtained using the above-mentioned investigative tools.

II. CONTROLLED DELIVERY

A. Current Situation

Controlled delivery is recognized to be one of the most effective investigative tools in fighting TOC, particularly illicit drug trafficking. It is defined as the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.¹

Under the controlled delivery system, the shipments of such goods are monitored closely by law enforcement officers and may delay arrests in order to identify as many members of a trafficking network as possible and to arrest them at a point where legal proof is most readily available. This innovative technique of investigation can be very effective in trapping the managers of crime syndicates. However the methods employed may not be acceptable to many countries in view of considerations of their domestic laws, because it produces offences which could be otherwise prevented.

Since the endorsement of its application vide Article 11 of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (herein after

called the 1988 UN Convention), this investigative technique has been frequently utilized by law enforcement agencies in dealing with drug offences, both domestically and internationally. Obviously this tool has become one of the most effective weapons in combating illicit drug trafficking as it enables the law enforcement agencies to specifically identify, arrest and prosecute not only the carriers and couriers but also the principals, organizers and financiers of such illicit activities. Apart from drug trafficking, the usage of this technique has been extended to other type of organized crimes such as trafficking of firearms, trafficking of stolen vehicles etc...

In reality, almost all the participating countries have adopted the tactics of controlled delivery in tackling mainly drugs and firearms trafficking. Three of these i.e. Italy, Japan and Pakistan, have some special laws or regulations pertaining to conducting controlled delivery while others have conducted the operation based on discretion of the law enforcement agencies in accordance with the regulations or some departmental guidelines of relevant authorities such as police, prosecution, customs etc... In countries where this investigative tool has been utilized, evidence collected during investigations is admissible upon court decisions in accordance with the existing criminal laws of respective countries. However, in Brazil, despite of the technique being provided under the Organized Crime Law, the tool has not been utilized by the law enforcement agencies because the legal provisions are found to be insufficient. Efforts are underway to strengthen the law to this effect.

In Italy, the provisions of some laws allow controlled delivery operations in respect of illicit drug trafficking, money laundering and illicit trafficking of firearms

¹ Article 2 (i), The Draft UN Convention against Transnational Organized Crime (A/AC. 254/36).

and explosives. However, this technique is only to be applied when any other investigative methods are proven to be unsuccessful or insufficient. The same laws also call for delayed action by the enforcement officers in respect of arrests and seizures during such operations.²

In Japan, since the enactment of the Law on Special Provisions for Narcotics³ in 1992 until October 2000, about 160 operations of controlled delivery were conducted by the Japanese law enforcement agencies.⁴

B. Common Issues and Problems

The use of controlled delivery usually becomes a very pertinent issue especially when the laws of a particular country do not explicitly provide for its use. How then could an agency apply it? On this question, it was felt that the laws of most countries do not specifically designate the use of this technique as illegal. It is often just found out that such a method as a means of investigation and detection of criminal activity had not been considered when the laws were promulgated. It can therefore be presumed that while this methodology is not explicitly sanctioned by law, it cannot be said to be unlawful. Controlled delivery is often a mean to an end and a good method of catching the sender and receiver of illicit consignments. The question is however whether it is really effective? Whether it is worthwhile employing? What its merits and demerits are - Is it an effective tool from investigative point of view? Can it lead to arrests? What are

the legal provisions and what is the sentencing policy?

While discussing all these issues, it was found that controlled delivery has both advantages and disadvantages. On the positive side, it is the most effective method of arresting a whole network of a particular illicit trafficking syndicate, not just the sender and the receiver. On the negative side, it is very dangerous because if it fails, the illegal goods or substances enter the market.

In practice, the operation of controlled delivery is very difficult and complicated, particularly when it involves many countries. Worse still when there is a difference in legal systems and practices of the countries concerned, as well as the lack of cooperation and coordination among various law enforcement agencies.

In utilizing this tool, enforcement agencies are often haunted by fears that the illicit consignments may end up lost in the process. Even worse, is the case of firearms, their loss is directly linked with danger. In Japan therefore, the law accordingly provides that controlled delivery of firearms should be conducted only under clean controlled delivery (CCD) operations.

C. Proposed Solutions

In regard to the solutions for these problems, we can derive our lessons from successful precedents. One classic example was the case of successful CCD operation conducted jointly by 3 countries i.e. the US Republic of Korea - Japan in 1998 whereby 6 kg of "fake-cocaine" was ferried from the United States to Japan via Republic of Korea resulting in an arrest of a receiver in Japan.⁵ In this particular case, the Drug Enforcement Administration (DEA) had

² Article 97 & 98 of Republic President Decree (DPR) 309/90 and Article 12-4 DPR 306/92.

³ Law Concerning Special Provisions for the Narcotics and Psychotropics Control Law, etc, and other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances Through International Cooperation.

⁴ Isamu Ikenoue, UNAFEI lecture, 2 October 2000.

⁵ Mune Ohno, UNAFEI lecture, 2 October 2000.

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decided to change the real cocaine with fake one because of security reasons and the receiver was indicted in accordance with Japanese law. The success of this operation was as a result of proper planning, close cooperation and coordination between countries concerned.

We can draw several lessons from this particular experience:

- (i) The establishment of close contact and cooperation with countries in relation to controlled delivery operation leads to successful results. In this vein, law enforcement agencies in each country should establish and maintain intelligence and information exchange mechanisms and networks, so as to get timely and accurate information, both at the domestic and international level. Legislation or policy designed to promote international cooperation and harmonization in accordance with the 1988 UN Convention forms the basis of establishing smooth information exchange mechanisms. Needless to say, the success of controlled delivery hinges upon domestic cooperation and coordination among law enforcement agencies, as well as international coordination and cooperation. Each law enforcement agency in each country has to set up a system of exchanging intelligence and information and these intelligence and information units should be closely linked and cooperating with each other. Then, a multi-agency task force may be organized whenever deemed necessary. In case of practical law enforcement on international mutual assistance, these intelligence and information units shall fulfill the

function of acting as a contact point. This contact point should promote communication with the country concerned in accomplishing international controlled delivery.

- (ii) Controlled delivery carried out in conjunction with the undercover operation produces good results in that the fear of losing consignments and the escape of suspects will diminish with timely gathering of accurate information.
- (iii) It is necessary to develop new technologies to re-enforce the use of this tool, such as sophisticated monitoring devices (tracing transmitters, response senders and receivers, thermo imaging cameras etc).

It is expected that these countermeasures may lead to solving the problems mentioned above in the controlled delivery operations.

In order to overcome the fear that CCD may weaken the court case, we need a law or regulations to conduct CCD. In Japan, the Law on Special Provisions for Narcotics approves judicial authorities to punish violators who with intent to commit any offence, import, export, transfer, receive or possess any drug or other article as a controlled substance. Japanese law enforcement officers can invoke this law to engage in CCD.

In addition to these measures, effective application of the controlled delivery tool in any country requires policies and countermeasures that are fast, flexible, easy to adapt to new situations and both technically and conceptually commensurate with the ever-growing complexity of the evolving global TOC problems. There might also be a need for

interdisciplinary research and conceptualization, experimentation with entirely new concepts and approaches and increased international cooperation. In that context, the establishment of the information network system would also produce good results so that many countries could share among themselves their knowledge, expertise, and develop information on the various available approaches to solving the problems in controlled delivery operations. There is no doubt that an approach which is successful in one country may not always be successful in another, because the idea of the law and the criminal procedure depends upon the social, cultural and historical background of each country and their policies. Therefore, the measure should be suitable and in conformity with the situation in any country, and exact measures should be selected out of information available, with given regard to the fundamental idea that we have to combat TOC.

It is therefore clear that controlled delivery, though a simple concept, it demands a high level of skill and professionalism, teamwork and cooperation between agencies. How successful the operation of controlled delivery will thus depend on how close the cooperation, coordination and monitoring is between the involved agencies, both domestically and internationally. It is also expected that accomplishing the controlled delivery as part of the international cooperation against trafficking of illicit consignments other than drugs will have a great impact on combating TOC.

III. UNDERCOVER OPERATIONS

A. Current Situation.

Undercover operation is another effective investigate tool against TOC and in many cases, it is employed hand-in-hand

with controlled delivery. The law enforcement agencies in some countries employ undercover agents to gather information and collect evidence about criminal gangs, study their modus operandi and evaluate their future plans and strategies. This information is used both for preventive and investigative purposes. This technique inherently involves an element of deception and may require cooperation with persons whose motivation and conduct are open to question, and so should be carefully considered and monitored.

Undercover operation means an investigation involving a series of related undercover activities (investigative activities involving the use of an assumed name or cover identity) by an undercover employee (agent) over a period of time.⁶ It may be of very short duration, lasting only a few hours, or may be quite lengthy, lasting a few years. It may be directed at only a single crime incident, or a long term criminal enterprise. Through such undercover operations, law enforcement agents are able to infiltrate the highest levels of organized crime groups by posing as criminals when real criminals discuss their plans and seek assistance in committing crimes.⁷

Undercover operations are extremely sensitive and pose the danger of luring otherwise innocent people into criminal activity. Because this technique carries the potential for problems, it requires exceptional preparation. In most drug cases, the undercover agents are officers from law enforcement agencies where they act as buyers of drugs. This method of investigation is very dangerous as it puts the life of the law enforcement officer at

⁶ US Attorney General Guidelines on *FBI Undercover Operations* Revised 11/13/92

⁷ Bruce G. Ohr, UNAFEI lecture, 24 October 2000.

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risk if he is identified by the syndicates and as such it has' to be carefully planned, by using officers who have some experience in conducting such investigations.

All the participating countries except Brazil and India have employed the technique of undercover operation for investigating crimes which includes drug and firearms trafficking, money laundering, stolen properties trafficking, woman trafficking, etc, of which 6 countries; China, Germany, Italy, Japan (for narcotics and firearms trafficking only), Malaysia and, Pakistan have some special laws or regulations pertaining to conducting undercover operation while other countries have conducted the operation according to the guidelines formulated by the relevant authorities. In these countries, some sort of consent or permission to conduct the operation is required, for example, the consent of a prosecutor and judge in Germany, the consent of agency supervisor and prosecutor in the United States, authority of a prosecutor in Italy, and in case of Japan, and authority of the Minister of Health and Welfare for drug trafficking and by the Prefectural Public Safety Commission for firearms trafficking respectively.

The use of this investigative tool has proven to be very effective in combating TOC. It is evident in the undercover operations carried out in most countries which employed the tool. The classic examples are the Operation Dinero (1994) and Operation Green Ice II (1995) in the United States, whereby DEA undercover agents set up front business that offered money laundering services to drug traffickers. Both operations were hugely successful and disabled sophisticated drug trafficking organizations. Operation Dinero resulted in the seizure of three valuable paintings and US\$90 million and

the arrest of 116 suspects in the United States, Spain, Italy and Canada. Whereas Operation Green Ice II, which involved over 200 agents from 27 different law enforcement agencies, resulted in over 80 indictments. Another most successful undercover operation by DEA is Operations Pipeline and Convoy which were conducted since 1984 in New Mexico and New Jersey, resulting in seizures of Marijuana (1,199,855 kg), Cocaine (133,419 kg), Crack Cocaine (896 kg), Heroin (487 kg), Methamphetamine (4,617 kg) and currency US\$604 million between the period of L January 1986 to September 2000.⁸

In Thailand, recently the Thai police announced that they seized 2 million methamphetamine tablets in early October 2000 from a 28-year-old man trying to sell them to an undercover agent.⁹

B. Common Issues and Problems

The justification of an undercover operation demands establishment of criminal liability of the action of the accused person, failure of which often raises issues challenging the legality of the operation. In the USA for example, for the undercover operation not to give rise to successful claims of entrapment or related defenses, all law enforcement officers must consider the following three points before conducting undercover operation: First, while reasonable suspicion is not legally necessary to initiate an undercover operation, officers should nonetheless be prepared to articulate a legitimate law enforcement purpose for beginning such an investigation. Secondly, law enforcement officers should, to the extent possible, avoid using persistent or coercive techniques, and

⁸ US Department of Justice, Drug Enforcement Administration, Internet Site <www.usdoj.gov/dea/programs/money.htm&www.usdoj.gov/dea/programs/pipecon.htm as at 10/19/00>.

⁹ The Daily Yomiuri, 11 October 2000.

instead, merely create an opportunity or provide the facilities for the targeted criminal to commit the crime. Thirdly, officers should document and be prepared to articulate the factors demonstrating that a defendant was disposed to commit the criminal act prior to Government contact. Such factors also include a prior arrest record, evidence of prior criminal activity, a defendant's familiarity with the circumstances surrounding a particular criminal event, and a defendant's eagerness to engage in the criminal activity. The most convincing evidence of predisposition will typically occur during the initial Government contacts, which officers should carefully document to successfully defeat the entrapment defense. In Japan, some judicial precedents by courts¹⁰ point out the following as justification for carrying out the undercover operation:

- (i) Due to the complexity of cases involving drug trafficking and difficulty in their investigation, employment of the tool is legally acceptable.
- (ii) The general guiding principle to use this tool should be consonant with public interest, order and morals. A law enforcement officer should not induce a person who has no prior intention of commission of crime to commit an illegal act.

It is obvious that such a principle in Japan and the United States lies at the basis of the undercover operation so that the operation is not legally approved unless the principle is secured. It is accordingly essential to conduct a conclusive pre-investigation and keep a detailed record with regard to words spoken between the

¹⁰ Supreme Court, 1st Petty Bench, 5 March 1953, 7 Sai-han Keishu 3-482, Tokyo High Court, 3 April 1997, Koken Sokuho 3065-37 & Tokyo High Court, 16 March 1953, 3 To-ko-jihō 3-120.

official and the suspect, and to preserve them in good condition, for evidence. Meanwhile, in employing the undercover operation, there are a few underlying common problems:

- (i) The risk of disclosure of the true identity of an undercover agent puts his life at considerable danger. The physical safety of the agent must therefore be considered.
- (ii) At times new members of the groups have to undergo unlawful "tests of innocence" by being required to commit criminal acts such as abuse of illicit drugs, homicide, stealing, causing injury etc yet, as a matter of principle, the agents are not allowed to commit any criminal offences.
- (iii) The work of an undercover agent is stressful, demands a full-time pretence and often expose to temptation of committing crimes. Thus, it requires a close monitoring by controlling officers and back-up crews to support the operation.
- (iv) Sometimes countries refuse to cooperate in the use of this investigative tool. This prevents undercover agent from operating in more than one country, especially if a crime is of a transnational in nature.

C. Proposed Solutions

To prevent the disclosure of his/her identity, the undercover agent must:

- (a) Be provided with a fully substantiated past history, referred to as "backstopping" and careful briefing concerning the criminal targets.
- (b) Consider in advance every conceivable scenario that may induce suspicion of, or hostility towards the agents.
- (c) Undergo careful testing, often

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including psychological profiling, to ensure that he/she possesses the intangible qualities to ensure that he/she will “fit” comfortably into the new identity.

With respect of the use of undercover operation in a serious case, to balance Committee consisting of prosecutors and investigators exists in the United the merits and demerits to the agent and the public, The Undercover Review States. The committee is responsible for reviewing, approving, and controlling all sensitive undercover operations. To be approved, an undercover proposal must be in writing, containing a full factual description of the suspected criminal activity and the participants therein, set out, in detail, the proposed undercover scenario, the expertise of the undercover team, the duration of the project, the anticipated legal issues, and it must evaluate the risk to the agents and the public. Establishment of such a committee may be a useful measure.

In an event where undercover agents were required to commit any violent act, the operation may be stopped immediately. In the United States, whenever an undercover operation reveals that a crime of violence is about to take place, law enforcement authorities are required to take necessary steps to prevent the violence from occurring. This may include warning the potential victim, arresting the subjects who pose a threat, or ending the undercover operation altogether. There is also a need, for decriminalization of participation in the commission of crimes to a certain extent, by undercover agents. In considering this, the officer who has skills of dealing with any unexpected contingency should be selected and permitted to engage in the undercover operation. Acquiring training and experience is the first principle for undercover agents.

It is important that countries which have succeeded in using this tool should share their experiences and expertise with others in close international cooperation. Cooperation at the regional and sub-regional level is the most important because to be effective undercover operations must often involve more than one country in the region. Such cooperation is often hampered by a lack of understanding between countries.

IV. ELECTRONIC SURVEILLANCE

A. Current Situation

The use of electronic surveillance such as wiretapping, communications interception etc. is a very sensitive issue and the topic is commonly surrounded by controversies. Questions of the constitutionality and violation of human rights expressed by rights activists have in many jurisdictions restricted or aborted the use of this investigative tool because it is generally an illegal practice. However, the law often comes in to legalize its application under given circumstances so as to protect the rights of other people from being violated by criminals. In order to harmonize its application and respect the right to privacy, several conditions must be followed depending on the requirement of each country concerned. These always include obtaining permissions from competent authorities (judge, prosecutor, minister etc), making effort not to interfere with the private affairs/conversations, making progressive reports, close supervision of the tapping etc. However, this method should only be applied if other means have failed, are impracticable or insufficient.

Electronic surveillance represents the single most important law enforcement weapon against organized crime. There is nothing as effective as proving a crime through the defendant's own words. Its

evidence provides reliable, objective evidence of crimes through the statements of the participants themselves. Additionally, electronic surveillance enables law enforcement agencies to learn of conspirators' plans to commit crimes before they are carried out. This allows them to survey the criminal activities, such as delivery of contraband and conspiratorial meetings, or to disrupt and abort the criminal activities, where appropriate, making electronic surveillance particularly helpful in preventing the occurrence of violent crimes.¹¹

Telephone interception and monitoring of all electronic communications are the most controversial aspects of electronic surveillance, yet very useful in assisting law enforcement agencies in combating TOC. Wiretapping or telephone interception is defined simply as the interception of a telephone conversation between parties without their knowledge, using equipment that is inserted into the electronic circuit between the transmitter and receiver. It is meant for obtaining information and intelligence on various illegal activities, and only a handful of agencies are authorized to use this facility. A screening process is normally carried out before permission to intercept is granted. This means that the agency has to justify the action by placing for scrutiny before the competent authority the reasons why tapping of a particular number is required, and also the antecedents and activities of the suspect. It requires handling in a very professional manner.

Wiretapping can be effective against crimes such as drug trafficking, money laundering, prostitution, gambling, kidnapping etc committed by the organized criminal groups which frequently employ

the use of telephone to perpetrate the offence. For example, if an order of drugs is received from a buyer, whereby the parties designate a secret rendezvous for the transfer of drug to be carried out. Only the parties to the telephone conversation know the transfer point. Therefore, it is very difficult for investigating authorities to obtain pertinent information which will assist in their investigation and clarify the substance of the crime committed, except through tapping the communication.

Wiretapping has been used to locate or trace the movement of the drugs in order to arrest the trafficker whilst in possession of such drug's. By employing such a method, not only the carrier of the drugs can be apprehended but also most of the members of the syndicate, resulting in the extermination of the syndicate.

In an attempt to analyze the situation of electronic surveillance among the participating countries, two categories were identified: countries which have no legal provisions allowing the use of the technique and those which have. Among countries with no legislation are Fiji, Laos, Nigeria, Papua New Guinea, Tanzania and Thailand. It is, however, noted that some of these countries go ahead to employ the wiretapping technique under guidelines internally issued by the relevant authorities for purposes of intelligence gathering instead of court evidence.

On the other hand, Hong Kong, Indonesia, Pakistan and Uganda have legal provisions allowing the employment of the tool, and the power granting authority is the police head. In India, the Telegraph Act of 1885 permits communication interception in case of public emergency, and so Pakistan's Telecommunication (Re-organization) Ordinance of 1996 and the Wireless Telegraphy Act of 1933 under which the authorizing power belongs to the

¹¹ Bruce G. Ohr, UNAFEI lecture, 24 October 2000.

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Interior Minister. In Malaysia, the Dangerous Drug Act 1952, the Dangerous Drugs (Forfeiture of Properties) Act 1988, the Anti-Corruption Act 1997 and the Kidnapping Act 1951 all provide for the use of telecommunication interception under the authority of the public prosecutor.

There are countries, however, which have legal provisions for the employment of the technique, after obtaining a warrant from a court judge. These include Brazil, China, Germany, Italy, Japan, the Philippines and the US. In most of these countries, the offences, where the tool can be used is as prescribed by the law, must be serious in nature, and only if it can be shown that other investigative techniques are either impractical or insufficient. The proposal for interception in the US Passes through a stringent procedure before approval by the judge, via the public prosecutors office and after approval from the department of Justice in Washington. However, there is a provision that allows wiretapping without the judge's approval, in case of emergency, but approval must be sought within 48 hours of the tapping. Even after permission is granted, submission of periodic progress reports to the courts is required. In 1998, a total number of 1329 cases of wire, oral and electronic communications interception were authorized by the courts in the US¹².

In Japan, the law authorizing the use of the tool was enacted in 1999 and came into effect on August 15,2000, whereas in Germany, the 1968 Code of Criminal Procedure permits the use of wiretapping.

B. Common Issues and Problems

The main issues and problems in the use of this investigative tool are as follows:

- (i) The main problem hampering the

use of this technique is lack of legislation allowing it to apply in many countries. Even where legislation exists, it often imposes stringent conditions such as limited time of communication interception, time consuming approval procedures and sorting of private conversations from crime related ones. In cases where authority have been obtained to intercept communication related to a particular crime, it has often become an issue whether tapping should continue when the criminals are discussing a new crime that is not contained in the warrant. The question always is whether the tapping authority should go ahead and tap the circumstantial crime or stop the tapping until a new approval is granted. In Italy, basically all crimes which are punishable by minimum imprisonment of 4 years under Criminal Procedure Code, can be wiretapped after obtaining a warrant. However, in the case of serious crimes which include Mafia-related crimes, wiretapping can be continued even if such a crime is not listed in the original warrant. In Japan on the other hand, even though wiretapping is authorized for only 4 categories of crime (drug related cases, trafficking of firearms, illegal immigrants trafficking and organized homicide), the tapping can be allowed to continue if the information being discussed relates to a crime punishable by a minimum imprisonment of 1 year. Similarly in the US and Germany, the laws give some leeway in the continuation of wiretapping related to other crimes but authority should be sought

¹² Administrative Office of the U.S. Court, 1988 Wiretap Report.

- immediately after the tapping.
- (ii) Lack of funds to purchase the right equipment, which is often very expensive.
- (iii) The persistent public debates and controversies surrounding the people's right to privacy *vis-a-vis* telecommunications interception.
- (iv) Persistent lack of voice experts to prove in courts of law that the voices tapped are of the accused persons.
- (v) The emergence of new technologies e.g. mobile phones, pre-paid phones, internet communications, etc which are often difficult to intercept or to tie to a particular owner.
- (vi) There is often a problem of telephone companies/vendors refusing to cooperate with the investigating agencies in carrying out wiretapping, giving various reasons such as protection of confidentiality and privacy of their customers etc.
- (vii) It is noted that in some instances there are countries which refuse to cooperate in carrying out the use of this tool, especially during investigation of TOC.

C. Proposed Solutions

To overcome the above problems, there should be enabling laws that make the use of the tool practicable and useful. Such laws should provide ample time for carrying out the surveillance or applying the interception, reduce the time consuming procedure of obtaining permission to use the tool, cover a wide range of electronic surveillance methods such as telephone and oral communication interceptions etc so as to effectively fight TOC. In countries where it is not possible to enact an independent law on electronic surveillance, the provisions should be embedded in other laws that address TOC

related matters.

Secondly, the laws should compel the telephone vendor/companies to cooperate with investigating agencies in the use of this tool. Thirdly, there is a need for countries to strike a balance in the use of the tool so as to effectively overcome the differences existing in relation to which type of crimes the tool should be used. Lastly, there should be international cooperation in the use of this tool. This should be accompanied with exchange of expertise between countries that have succeeded in using the tool with those that have not.

V. CONCLUSION

In conclusion, employment of the new investigative tools is highly necessary to fight against the ever growing threat of TOC. Undercover operations, controlled delivery and electronic surveillance stand out as the most effective investigative tools against TOC given the fact that where they have been used, they have exhibited a high level of ability to deliver good results. However, like all new innovations, the use of these tools have to overcome a lot of problems, ranging from lack of or ineffective legislation, lack of trained manpower, challenges from civil society and admissibility of evidence obtained through their application.

The ultimate solution for the success of the use of these tools lies in avoiding the misuse of these tools. Governments and enforcement agencies therefore need to establish proper guidelines and controls on their application by agents to avoid abuse. International cooperation and recognition of the effects of TOC and the sharing of experience and support between nations in using the tools to fight TOC are equally important. Regional police bodies such as "ASEANAPOL" in ASEAN "EUROPOL" in

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Europe and “EAPCCO” in Eastern Africa to re-enforce ICPO/INTERPOL can contribute greatly to strengthening the necessary level of cooperation.

**GROUP 2
PHASE 2**

**METHODS FOR OBTAINING THE COOPERATION OF
WITNESSES TO PUNISH ORGANIZED CRIMINALS: THE
IMMUNITY SYSTEM AND WITNESS PROTECTION
PROGRAMMES**

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I. INTRODUCTION

In battling transnational organized crime (TOC), early detection and effective law enforcement must be complemented by successful prosecution. To prevent TOC or to convict members of criminal organizations who have committed them, the essential factor that must always be considered is evidence. Vital documents as well as the fruits of the crime, such as illicit drugs or firearms, constitute physical evidence. Still, it is often ideal to present the testimony of certain persons - like police officers, undercover agents, informants, civilian witness, the victims, and, if necessary, some of the defendants themselves - in order to link the physical evidence to the accused or suspect. In cases involving TOC, the personal safety of witness for the prosecution, as well as that of the members of their families, may be placed in jeopardy due to the ferociousness of criminal syndicates and the vast power and influence that they possess. Thus,

there is a need for all nations to consider a feasible immunity system, as well as a comprehensive witness and victim protection programme, or to strengthen those which are already in existence,

There are countries which already have both of these mechanisms in place. Some have one or the other, while others have neither. Some are equipped with highly advanced systems, even as others are still in the formative or experimental stage. Additionally, as a rule, these laws do not specifically apply to TOC, but they may, nevertheless, be effectively used in cases involving TOC. The aim of this paper is to present some of the existing legal structures on immunity system and on witness and victim protection in order to share the information with nations which have yet to integrate them into their respective bodies of laws.

II. IMMUNITY SYSTEM

A. Scope

Immunity generally refers to the process of exempting from prosecution a person accused of a crime. This is particularly encouraged under Article 26 of the Draft United Nations Convention on Transnational Organized Crime, which deals with measures to enhance cooperation with law enforcement authorities.¹ As used in this paper, however, and in order to maximize the potential of witness cooperation as a tool for combating TOC, immunity will also be considered, in a limited sense, as a mitigation of sentence for suspects or accused persons who cooperate in a criminal investigation.

B. Objectives

There are various reasons why immunity is sought or suggested. Principally, the testimony of a person who is party to a crime is very reliable because of his relationship with his co-accused. Any statement obtained from him, assuming it has passed the twin evidentiary tests of credibility and materiality, in can always strengthen a case or actually build one.

At the investigation stage, a State witness can reveal the identity of other suspects, eventually leading to further arrests. At times, his statements can also assist the police in locating the victim of a crime. Still, in other cases, he may point out the *corpus delicti* or the body of the crime. This is precisely the situation in Brazil, where, although no specific immunity system is in place, a criminal's sentence may be mitigated if his cooperation results in any of these three.

Granting immunity from prosecution has actually led to the solving of many

serious crimes, as in the Fiji Islands and Thailand. And as far as organized crimes are concerned, Italy with its age-old problem with the mafia, came up with a Witness Security and Benefit Programme in 1991, which provides immunity to people who are willing to testify against the mafia dons. Although this law is in the process of amendment, the use of an immunity system is perceived to be a very effective tool in prosecuting terrorists or members of the families in Italy. If ordinary witnesses are reluctant to come forward with information that may help in solving organized crimes, people who have actually participated in such crimes are even more hesitant of downright unwilling to implicate the mob, whose reputation for immediate retaliation has sown terror in towns controlled by the mafia.

Still, in other countries like India, Korea, Nigeria, Pakistan, and Uganda, immunity may be granted so that the prosecution of a certain case may find more success using the evidence that the State witness may provide. Stretching the definition of immunity further, the Philippines enacted a law² providing immunity to givers of bribes in graft and corruption cases, a piece of legislation intended to eliminate the reluctance of such bribe-givers from cooperating in the investigation for fear of prosecution.

C. Procedural Requirements

The most common requisite in availing of immunity from prosecution is that an accused-witness must cooperate with the government by voluntarily making a full disclosure of facts and circumstances relevant to an offense for which he and other persons are being charged or investigated.³ Some countries have more stringent requirements, including the absolute necessity of the testimony and the

¹ See Annex A for the full text of this article.

² Presidential Decree No. 749.

possibility of corroborating its material points using other evidence. In such case, the accused must not appear to be the most guilty among two or more accused persons, and he must never have been convicted of any crime where his integrity was placed in doubt.⁴

The grant of immunity is purely discretionary, so it can be withdrawn at anytime by the grantor if the grantee fails to fulfill his obligations under the terms and conditions of his immunity.⁵

At this point, it may be expedient to describe in more detail the immunity systems in two of the countries that have extensively dealt with organized crime and how they are utilizing this method in their fight against TOC.

In Italy, statements by a cooperating defendant have been used for 30 years, but, as stated earlier, it was only in 1991 that a witness security and benefit programme was formally adopted. There is now a bill pending in the Italian Parliament for the amendment of this law. The bill limits the scope of the cooperating defendant's testimony to cases involving terrorism or Mafia offenses and gives more emphasis to the quality of the cooperation than the original law. Furthermore, it prohibits such defendant from making statements relevant to the facts covered in the proceedings where he has cooperated, to bodies other than those who are involved in the immunity process, namely, the judicial authority, the police forces, and his

own defense counsel. Thus, while in detention, he is not allowed to engage in conversation with the police handling the investigation of the case, at least until the record of the cooperation is drawn up, in order to avoid any suspicion that his testimony was contrived by the investigators. Neither is he allowed to meet other cooperating defendants nor receive or send mail outside, save for purposes connected to protection needs. As a consequence of his collaboration, he may be spared from pre-trial detention or simply placed on house arrest after judgment if his contribution has been substantial or significant.⁶

But while the Italian government is eagerly awaiting the passage of this law which would, in effect, allow the prosecutorial service to take full advantage of the immunity system, the Americans have been successfully using it for decades. The United States of America used to have "transactional immunity," which gave total immunity to the witness from prosecution for an offense to which his testimony specifically related. By 1970, however, these had been replaced by "use immunity."⁷ In essence, "use immunity" only provides that a witness' testimony will not be used against him/her, but he/she may still be prosecuted using other evidence.⁸ The system ensures that the testimony will not lead to the infliction of criminal penalties on the witness.

To utilize "use immunity," the testimony or other information must be necessary to the public interest and the witness must have asserted or will likely assert his/her right against self-incrimination. The

³ #306 Criminal Procedure Code (India); Witness Security Benefit Act of 1991 (Italy); Witness and Victim Protection Law (Republic of Korea); #9 Rule 119, 1985 Rules of Criminal Procedure (Philippines). The same is true for Fiji, Nigeria, Pakistan, Thailand, Uganda, and the USA.

⁴ See note 3 (Philippines).

⁵ #337-339, Criminal Procedure Code (Pakistan).

⁶ Franco Roberti, UNAFEI lecture, 24 October 2000.

⁷ 18 U.S.C., #6001-6005.

⁸ The same system is being used by Tanzania under its Economic and Organized Crime Control Act of 1984, #53.

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United States Attorney, with the approval of the Attorney General or the designated Attorney General, is the one who shall apply with the court for an order granting use immunity.⁹

In addition to these codified immunity systems, there are two other types of immunity system which are not codified, namely, non-prosecution agreements and cooperation agreements. Non-prosecution agreements, which are mainly used where the involvement of a witness in a criminal act is minimal, grant immunity from prosecution in connection with that case in return for full and truthful cooperation, but these are rarely used.

Cooperation agreements, on the other hand, are utilized more frequently and are considered very valuable in the prosecution of organized crime groups. In a cooperation agreement, the government agrees to file a motion which would, in effect, give a judge the discretion to reduce the sentence in exchange for the defendant's complete and truthful cooperation. And upon receipt of such motion, the sentencing judge will usually reduce the penalty.¹⁰

D. Alternatives

Some countries have adopted systems which do not squarely fall within the concept of immunity discussed above. China, for example, grants immunity or mitigation of sentence to returning Chinese nationals who have committed a crime abroad for which they have already been punished.¹¹ Germany used to have a law on Principal Witness Regulations Against Organized Crime, but this ceased to be operative on 31 December 1999.¹² Section

31 of the Narcotics Act, however, which has been in force since 1981, has been unusually successful in the detection of organized narcotics crime.¹³

On the other hand, there is a way of getting the testimony of a person other than through immunity. Hong Kong's Organized and Serious Crimes Ordinance of 1994 allows the Attorney General to apply to the High Court for a "witness order", which compels a person to provide information to the police or other officers conducting an investigation of an organized crime. Defiance of such order is a punishable offense.

E. Assessment

There are many countries which have an immunity system, sophisticated or otherwise, because it is internationally recognized as an effective measure in combating TOC. This prerogative, however, must always be exercised with utmost caution. Others, like the US, have an advanced and evolving immunity system, a fact that may be attributable to their long experience with crime detection and prevention, their need to reconcile effective law enforcement and prosecution with the individual's right against self-incrimination, as well as on changes in the attitude of the general public toward crime and punishment. It must be noted that, in recent years, the trend in the USA has been toward granting less immunity to cooperating criminal, for basically the same arguments against immunity.

Some countries, however, do not have such a system. The reasons vary from one State to another, based on one or more of the following issues: (a) it violates the

⁹ In 1999, 1,444 out of 2,059 requests for immunity were granted by US courts.

¹⁰ Bruce G.Ohr, UNAFEI lecture, 24 October 2000, *citing* Federal Sentencing Guideline § 5K1.1.

¹¹ § 1, Article 10, Criminal Law.

¹² A summary of the pertinent law is provided in Annex B.

¹³ A summary of the provision is provided in Annex C.

principle of equality and rule of law; (b) it is incompatible with the principle of mandatory prosecution; (c) it is prone to abuse by authorities; (d) it is detrimental to the citizen's confidence in the judiciary and in the inviolability of the law; (e) it breeds a negative public perception that the State is dealing with criminals; (f) it makes the defense more difficult; (g) it makes the trial and prosecution depend on the dubious statement of a criminal who wishes to escape liability; (h) the danger of betrayal tends to unite rather than divide crime groups¹⁴; and (i) in some countries, there is a culture of justice where the people cannot accept the exoneration of a criminal by testifying against his co-accused.¹⁵

Therefore, the absence or existence of an immunity system depends as much on each nation's culture, history, and national sentiment, as on their body of laws. This difference, in turn, poses one of the main obstacles in enforcing the immunity system provision of the Draft UN Convention Against TOC, which would bind all States Parties to consider the adoption of such a system.

III. WITNESS AND VICTIM PROTECTION PROGRAMS

A. Scope Objectives

Keeping in mind the provisions of the Draft UN Convention Against TOC, specifically Articles 23-24,¹⁶ the passage of which before the end of 2000 is very likely, the nations of the world are thereby encouraged to adopt measures which will guarantee the protection of witnesses from threats, intimidation, corruption, or bodily injury in relation to testimony given in a

¹⁴ Issues (a) to (h) are actually the reasons that led to the collapse of the immunity system in Germany.

¹⁵ This seems to be the main reason why there is no immunity system in Japan.

¹⁶ See Annex A for the full text of these three articles.

case involving TOC.

In order to get the cooperation of people in the fight against TOC, they must be assured that in doing so, their life or property, or that of their family's, would be safe from the criminal organizations they are challenging. Depending on the degree of cooperation and the type of witness, this protection may be given before, during and/or after the judicial proceeding. A witness may either be the accused who is granted immunity, the victim, or a third party. Even as the inquiry is done before the police, the public prosecutor, or the court, protection must be considered as long as there is a possibility that the suspect/accused or other individual aims to prevent the witness from testifying against said suspect/accused or to force such witness to make a false testimony, by threatening or actually hurting the witness or any member of his/her family.

Some countries have specific witness protection programs, while others have incorporated witness protection provisions in their criminal or criminal procedure codes. Either way, if adequate protection can be given to witnesses, the law would have served its purpose.

B. Modes of Protection

1. Witness and Victim Protection in General

In Brazil, the national programme for the protection of victims and witnesses took effect in August 1999. The persons who may benefit from this programme are those without decreed imprisonment and their relatives who habitually live with them. The programme includes the following measures:

- (i) Transferring the residence of the witness;
- (ii) Monthly financial aid for each witness;
- (iii) Supply of food and clothing;

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- (iv) Police protection when traveling;
- (v) Helping the witness find a job in the work market;
- (vi) Retention of benefits by a public employee who is removed from the service;
- (vii) Social, psychological and medical assistance; and
- (viii) Change of identity.

Under the Criminal Procedure Law and Police Law of Germany, there are witness protection measures that can be taken in several steps depending on the gravity of the danger. The concurrent utilization of several means is possible. The simplest though no less effective measure, is by protecting the address of the witness. However, the best way to protect a witness is by totally concealing his/her identity and person.¹⁷

Hong Kong's Witness Protection Ordinance of 2000 assures the safety of witnesses, specifically accomplices, and their families by allowing them to live in safehouses, omitting their address from their statements, and giving them a new identity after the trial. In addition, the Hong Kong Police has set up a hotline which may be used by the public to report the activities of criminal organizations in the first instance. In such a case, the identity of the reporter shall also be protected.

The 1991 witness protection programme of Italy covers cooperating defendants as well as non-criminal witnesses.¹⁸ In implementing the programme, the following are observed:

- (a) the personal safety of the cooperating witness;
- (b) their psychological safety;
- (c) security of investigation; and

¹⁷ Johan peter Wilhelm Hilger, NAFEI lecture, 17 October 2000.

- (d) third-party position in the management of the collaboration, which is essential to prevent an instance where the police may suggest the answer to the suspect (otherwise known as the principle of separation between protection and investigation agencies).

Where the statement are indispensable for investigations on Mafia-type or terrorist-subversive criminal organizations, reinforced common measures - such as temporary police protection for the cooperating witness and his family members - may be applied to ensure the latter's safety. Financial support is usually given, although the amount is not substantial.

Moreover, the witness may be exempt from pre-trial custody if:

- (a) s/he has no current connections with the Mafia or terrorist organization;
- (b) s/he complies with the conditions of the programme; and
- (c) their cooperation is significant.

Witnesses who are, however, already in custody may be placed in appropriate and adequate correctional units. The law (Article 8, Law Decree No. 52 of 1991) also provides as incentive for the collaboration, a special extenuating circumstance, that is, the reduction of the penalty by one-third in case of conviction.

The Republic of Korea enacted its Witness and Victim protection Law on 31

¹⁸ The responsibility to protect a person and his family members, as long as it is necessary and possible, is vested by the law in a range of bodies and authorities, including the Chief Prosecutors or the Head of the Police, the National Commission of the Ministry of the Interior, and the National Protection Service.

August 1999, which came into effect on June 2000. The law covers not only the victim or the witness, but also extends protection to their families. If there is a possibility that a witness may be the target of retaliatory action, his name may be kept confidential and he may be given police protection. When the witness or victim sustains financial loss as a result of the crime or the investigation, he may be granted relief money for the loss suffered. And in the event there is a need for such witness to transfer his residence or secure new employment, he may be furnished some assistance at government expense.

In Laos, during investigation of a case, the police may provide protection to a witness whose personal safety is threatened. The investigation can be done in the office of the police investigator or the prosecutor, and the statement secured during the investigation can be presented and accepted as evidence at the court's discretion. The witness and victim protection programme of Nigeria, which is covered by regulations and not by any specific provision in the Criminal Code, is aimed at protecting witnesses who fear for their life or personal safety in the event they agree to testify against the accused. This programme includes keeping the name of the witness confidential.

In the Philippines, the Witness Protection, Security and Benefit Act¹⁹ was enacted on 21 April 1991, with the Department of Justice as the lead implementing agency. As a result of admission into the Witness Protection and Benefit Programme, which has a substantial budgetary allocation,²⁰ the witness shall enjoy the following benefits:

- (i) Secure housing facility until he has testified or until the threat, intimidation or harassment disappears or is reduced to a manageable or tolerable level;
- (ii) Relocation, if the circumstances so warrant;
- (iii) Financial and employment assistance;
- (iv) Retention of employment benefits;
- (v) Travel expenses and subsistence allowance during the inquiry;
- (vi) Medical treatment, hospitalization, and medication in case of injury;
- (vii) Burial benefits, in case of death due to his participation in the WPP; and
- (viii) Free education to children, from primary to college level in any State or private school, college or university, if the witness dies or becomes permanently incapacitated to work.

For its part, Section 52 of Tanzania's Economic and Organized Crime Control Act of 1984 allows the Inspector-General of Police, on his own motion or after consultation with the Director of Public Prosecutions, to arrange for the security of the witness or potential witness and, if necessary, his/her family, where there is danger or real possibility of threat or harm to such witness or potential witness.

In the USA, the federal witness security programme to aid the prosecution of organized crime groups was created by the Department of Justice in 1970. Because of security concerns regarding the witness and his/her family, the pending and actual participation of such witness in the programme shall not be disclosed except under the authorization of the Office of Enforcement Operation. This set-up gives the United States Marshal Service time to conduct preliminary interviews,

¹⁹ Republic Act No. 6981.

²⁰ The latest available figure is 35,000,000, Philippine currency, for the year 1996.

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psychological testing and appropriate review, thereby minimizing the disruption to both the witness and the concerned government agencies. Once admitted into the programme, the witness and his/her family are given new identities, relocated to another part of the US, and given financial assistance until the witness is able to secure employment. The witness security programme, although rarely used and very costly,²¹ has proven to be extremely beneficial and effective in the prosecution of organized crime groups.

2. Court Systems for Witness and Victim Protection

Japan has evolved a comprehensive witness protection programme under its Code of Criminal Procedure (CCP), which was amended on 18 August 1999 and 19 May 2000. For the purpose of this paper, the Japanese model will be utilized as a point reference for the following discussion on the various court systems adopted by different countries to ensure the protection of witness.

(i) Denial of Bail

Under Section 96.1 (4) in relation to Section 89 (5) of the CCP of Japan, an accused may be denied bail if there is reasonable ground to believe that he may threaten to or actually injure the body or damage the property of a witness, whether such witness be the victim or some other person who has knowledge of the case, or a relative of said witness. Likewise, in Papua New Guinea, when the suspect in a serious crime is in custody, the prosecution may file a motion in

court to deny bail to the accused if there is danger that he may go after the witness. It bail is granted, however, the judge may set as conditions that the accused must not leave his home nor talk to any of the prosecution witnesses. Moreover, he is placed under police surveillance and is required to report to court once a week. But during the trial, there is no legal mechanism for the protection of witnesses, except police escort during the hearings.

(ii) Attendants, Screen, and Video Link

With the recent amendment of Japan's CCP, an attendant of the witness may be allowed in the course of examination, and a screen may be set up between the witness and accused. One of the innovations introduced is the allowance of video link examination (to take effect in November 2001) where the witness, being out of the courtroom, answers the questions of the public prosecutor or the defense counsel who are in the courtroom.²²

Similarly, some countries have rules of procedure which allow psychologist, social worker, public prosecutor, or other person to accompany a child victim under eighteen years of age during the inquiry and trial of the case, or the use of audio-video equipment to record the victim's statement (as in the case of Thailand),²³ or allow

²¹ Since the beginning of the programme, over 6,800 witnesses have been admitted, along with some 9,000 family members. The average cost is \$75,000 per witness, per year, and \$ 125,000 per family, per year.

²² CCP, #157-2 to 157-4.

²³ The 1999 amendment of Thailand's Criminal Procedure Code only applies to victims who are children under 18 years old.

the use of screens when the witness is a juvenile (as in the case of Fiji). In practice, the same modes of protection can be extended to witnesses in cases involving TOC, such as the trafficking of children.

By the same token, Italy's Law No. 11 of 7 January 1998 provides the bases for allowing the use of audio-visual equipment (video conference) to cover the deposition of cooperating witnesses whose lives may be in serious danger as a result of, or in connection with, a case involving TOC. In Germany, it is possible to interrogate the witness in another place, the proceedings therein recorded on videotape, and such tape brought to court as evidence. The witness need not be physically present in court, as long as the questioning is monitored via video link.

Article 164 of Pakistan's Qanun-e-Shahadat allows any evidence which may become available due to modern devices. Thus, the court can resort to video link evidence, although such facility is not yet available in Pakistan.

(iii) Isolation of the Witness

Under the CCP of Japan, to maintain order in the court,²⁴ or when the judge believes a witness will be unable to fully testify due to the presence of the accused²⁵ or of spectators,²⁶ the court may order such accused or spectators to withdraw from the courtroom

during the examination of the witness. This is the same practice in Laos and Pakistan, where an accused may be ordered to leave the courtroom when the witness is testifying, whether in an ordinary case or in a case involving TOC.

(iv) Out-of-court Examination

Under certain circumstances, Japan's CCP also permits the court to order the examination of a witness at any place other than the court,²⁷ or on dates other than those fixed for public trial,²⁸ even before the first fixed trial date.²⁹ In the latter case, the accused/suspect and the defense counsel may attend the examination only when the judge believes their presence will not interfere with the criminal investigation,³⁰ and the statement obtained thereby may-as an exception to the hearsay rule-be admitted in evidence during the trial even without presenting the declarant.³¹

Similarly, the laws of India, Malaysia, Nigeria, and Uganda allow in-chamber trials to be conducted if it is important to keep the public away from the proceedings.³² For its part, a witness in Pakistan may be examined in his home by the court itself, or by a commissioner appointed by the court for that purpose. The defense counsel can also examine the witness, but the court may stop him or his client from asking questions which may

²⁴ CCP, #288.2; See also Court Organization Law, # 71-2.1

²⁵ Ibid., #304-2.

²⁶ Id., #202.

²⁷ Id., #158.1.

²⁸ Id., \$281.

²⁹ Id., #227.1

³⁰ Id., #228.2

³¹ Id., #321.1(1).

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cause fear or embarrassment to, or threaten, the witness.³³

(v) **Non-Disclosure of Personal Information About the Witness**

In Japan, if there is danger that the witness might be injured or his/her property damaged, the court may limit questions by which the domicile or other personal circumstances of the witness may be known by the defendant. During the disclosure of evidence, the prosecution may also request the other party's consideration in protecting the security of some witnesses.³⁴ The same is true in Pakistan, where it is the prosecution's prerogative whether to keep the address and name of such witness confidential.

3. **Criminalization of Certain Acts to Protect Witnesses**

While China has no specific law on witness and victim protection, Article 307 of its Criminal Law penalizes with an imprisonment of not more than three years, or, in severe cases, three to seven years, any person who (a) prevents with violence, threat, bribe, and other methods, a witness from testifying, or (b) instigates others to make false testimony. Article 308, on the other hand, punishes with the same penalty any person who resorts to persecution or retaliation against a witness. In Fiji, interfering with the witness is punishable under Section 131, Penal Code Cap.17. The offense carries a penalty of imprisonment of two years. This

law, however, does not always protect a witness because it does not cover witnesses identified at the investigation stage.

On the other hand, Section 105.2 of the Penal Code of Japan punishes any person who intimidates a witness in connection with such person's or another person's case. Under Section 10 of the 1991 Witness Protection, Security and Benefit Act of the Philippines, accused persons discharged to be State witness under Sections 9 and 10, Rule 119 of the 1985 Rules of Criminal Procedure may also avail of the benefits under the witness protection programme. Furthermore, Section 17 penalizes any person who shall harass a witness and thereby hinder, delay, prevent, or dissuade such witness from otherwise cooperating with the prosecution.

C. Assessment

The breadth and coverage of TOC countermeasures differ from one State to another. An effective witness protection programme is just one of such countermeasures. The Draft UN Convention on TOC included witness protection precisely because of the alarming growth of TOC worldwide. This is obviously a recognition of the fact that, although some countries currently have no serious problems with TOC, this state of affairs may drastically worsen in view of the rapid and continuing spread of TOC. In other words, countries which have not yet felt the full impact of TOC might eventually feel it in the near future.

It has been observed that many countries do not have witness protection programs that specifically apply to cases involving TOC. A number of States, however, have programs that are generally used in ordinary crimes, programs that may also be effective in fighting TOC, in addition to legal provisions that do not form part of any witness protection scheme.

³² #237(2), Criminal Procedure Code of India; #7, Criminal Procedure Code of Malaysia (Similar provisions are reflected in #101, Subordinate Court Act of 1998, and #15, Judicature Act of 1997); Uganda's Children State of 1996.

³³ Criminal Procedure Code of 1898.

³⁴ CCP, #295.2 and 299-2.

This does not mean that all countries should adopt a uniform plan for witness protection. For one, as suggested earlier, different countries are not similarly situated as far as their exposure to TOC is concerned. There is also a divergence of experience in witness protection, especially with regard to TOC. For example, Germany has a sophisticated programme for giving a witness a new identity, but this facility is rarely used because their TOC problem is not serious enough to warrant the use of such a programme. Secondly, the details of each programme may vary for each country, depending on the peculiar circumstances present in their jurisdiction. Some countries, for instance, do not have adequate programs, or may have them but are not using them wisely. One of the reasons is financial. With inadequate funds, it may be difficult to devise a witness protection programme, or even to implement it. The other reason is that it is difficult to define the scope of witness protection. Should the protection be limited to the witness, or should it include his family, and if so, to what degree? Should the witness and/or his family receive protection or assistance only during the time of trial, or should it continue indefinitely as long as the threat exists? How much should financial assistance be? Unfortunately, there is no available data that would answer these questions. Some countries, on the other hand, have relatively new programs, so their efficacy cannot yet be gauged. Because each legal system is distinct from one another, the setting of standards for witness protection will inevitably have to be made on a country-to-country basis.

IV. CONCLUSION

The battle against transnational organized crime is fought in two major arenas. One is in the field of law enforcement, the other in a court of law.

To secure a victory, the system of justice must succeed in both. An element common to these two is evidence. Without sufficient material proof, no indictment will ever prosper. A key factor in evidence gathering is finding witnesses who have adequate information regarding a crime which is under investigation or one which is about to be committed. It makes no difference whether the witness be the victim, or a disinterested third party, or even an accomplice. If their testimony will lead to an arrest or a conviction, they must be persuaded to come to court and testify against a member of a TOC group. Since the most common reason why witnesses will refuse to testify is that their life or limb, or that of their families, may be placed in peril if they divulge what they know, their cooperation can be gained by offering them protection and other benefits, or, in the case of co-defendants, by granting them immunity from prosecution or a mitigation of sentence.

These strategies are strongly endorsed by the United Nations. Upon passage of the UN Convention on TOC before the end of this year, States Parties may have to devise feasible immunity programs, adopt legislation specially designed for the protection of witness and victims, or otherwise enhance existing systems so that they will conform to international standards and best practices. Inter-country cooperation in this regard will be more attainable if the necessary domestic laws are already in place.

GROUP 3
PHASE 2

**COMPONENTS AND LEGAL FRAMEWORKS FOR COMBATING
TRANSNATIONAL ORGANIZED CRIME.
CRIMINALIZATION OF PARTICIPATION IN ORGANIZED
CRIMINAL GROUPS/CONSPIRACY; ANTI-MONEY
LAUNDERING SYSTEM; ASSET FORFEITURE SYSTEM (FOR
ASSETS DERIVED FROM ORGANIZED CRIMES)**

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I. INTRODUCTION

The monumental negative effects of transnational organized crime on the economic, political and social spectrum of nations cannot be over-emphasized. Transnational organized crime undermines the very foundations of world economies. It tends to weaken and destroy governmental machinery and institutions. The sophistry in which members of organized criminal groups perpetuate their nefarious activities certainly has become a great source of concern to governments and law enforcement agencies all over the world. The concerted efforts of various countries within the ambit of the United Nations to curtail the negative consequences of transnational organized crime is indicative of the fact that transnational organized crime poses great danger to peace and tranquility of the world.

The increasing bottlenecks in tackling TOC both on domestic and international levels can be attributed to the complex nature of transnational organized criminal groups. There is a dichotomy between the individual criminal and the organized criminal group. The arrest, prosecution and conviction of a member of any organized criminal group does not necessarily lead to the demise of the group. Organized criminal group are stratified into different levels. Every level requires to play a particular role in the entire criminal enterprise.

Consequently, criminalization of participation in organized criminal groups, developing anti-money laundering system and articulating asset forfeiture system that enables law and enforcement agencies worldwide to deprive criminals of their proceeds becomes imperative.

In this paper, however, attempt will be made to analyze the components and legal frameworks for combating transnational organized crime within context of criminalization of participation in organized criminal group, anti-money laundering system and asset forfeiture system (for assets derived from organized crimes).

II. CRIMINALIZATION OF PARTICIPATION IN ORGANIZED CRIMINAL GROUPS/CONSPIRACY

A. Draft UN Convention Proposal

Previous efforts notwithstanding, the tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, Austria, 10-17 April, 2000 set in motion instrument "to align national laws in criminalizing acts committed by organized criminal groups". The Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime came out with a draft UN Convention against TOC, in July, 2000. The draft Convention proposes to criminalize participation and conspiracy in regard to organized criminal groups. Article 5 seeks to criminalize such activities as agreeing to commit a serious crime, participation in criminal activities of organized criminal group, and organizing, directing etc. the commission of serious crimes.

B. Criminalization of Participation

Experience in various countries has shown that the existing penal provisions are not sufficient to deal with serious crimes perpetrated by members of organized criminal groups which came into existence in such countries. Provisions were therefore made in the penal laws to include criminalization of participation by such criminal activities as organizing, directing, facilitating, counseling commission of serious crimes or taking part

in the criminal and certain other activities of the organized criminal group as a specific criminal offence.

One of such countries is Italy which incorporated these provisions in its laws. In a wider perspective, the Italian law characterizes participation in an organized criminal group into four types, namely;

- (i) association for purposes of committing offences (simple organized crime or conspiracy - article 416 penal code),
- (ii) association for the purposes of terrorism or subversion (subversive organized crime - article 270 - bis penal code),
- (iii) Mafia - type association (Mafia - type organized crime - article 416 bis penal code); and
- (iv) association for the purposes of illicit trafficking of narcotic or psychotropic substances - (Article 74 of Presidential Decree No. 309/1990).

The difference between membership of Mafia-type organization and the other three associations is that while the latter only require the creation of a stable organization for the purposes of committing indeterminate number of offences, membership of Mafia-type organization additionally require the organizations to have acquired genuine capacity for intimidation in their area. The members of the organizations must also exploit this power to coerce third party with whom the organizations enter into relations and oblige them to enter into a conspiracy of silence (Mafia method).

In China, the Criminal Law was amended in 1997. Article 294 stipulates that anyone who organizes, leads and actively joins any organization having characteristics of underworld society which by violation, menace or other methods

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commits crimes organizationally, domineers in locality, makes hostile attacks, forces and harms masses cruelly, and infringes gravely upon economic and social order, will be punishable with imprisonment of 3 to 10 years.

In Japan, however, law regarding participation in an organized criminal group has not found favour with the authorities as it may not be compatible with the constitutional provision of freedom of association. To this end, if a common provision were to be introduced regarding definition of organized criminal group, it may perhaps pose a great difficult to include certain organization while keeping others out of its purview. There has been noticeable strong feeling among certain sections of the Japanese society against introducing an omnibus legislation criminalizing participation in an organization. In view of such obvious technical issues and perceived opposition, it has become a herculean task to arrive at a definite conclusion for criminalization of participation in organized criminal groups in Japan.

In India, the existing laws were found sufficient to deal with organized crime, but with the organized groups forming a Mafia type of organization, sometimes operating from foreign countries, the laws have been found wanting in many respects. The offence of criminal conspiracy which could cover all the conspiring members could no longer cover the top echelons of the organized criminal groups who sometimes were not taking part in day-to-day criminal conspiracies to commit offences. However, they were running the criminal empire from a distant position and were the kingpins of all criminal activities of the group. With such inadequacies in view, the state Government of Maharashtra enacted Maharashtra Control of Organized Crime Act in 1999. A central Act is however

needed to deal with this problem in other parts of India, and therefore, the Government is already engaged in making a draft legislation to be introduced in the Parliament.

C. Conspiracy

Article 5(1)(a)(i) of the draft UN Convention proposes that agreeing with one or more persons to commit a serious crime should be a penal offence. A similar provision already exists in many countries like Fiji, India, Indonesia, Laos, Malaysia, Nigeria, Pakistan, Papua New Guinea, Philippines, Tanzania, Thailand and Uganda where conspiracy is a distinct offence. The offence of conspiracy generally states that when two or more persons agree to do, or cause to be done an illegal act, the act is designated as a criminal conspiracy.

In Japan, the penal code, Chapter XI, Articles 60 - 65 deal extensively with complicity among co-principals, instigators, and accessories. However, a mere agreement to commit a crime is not an offence except in some cases like insurrection. The United States Code (Annotated) Title 18, Chapter 19 categorizes conspiracy into three sections. Section 371 deals with conspiracy to commit offence or to defraud United States; section 372 deals with conspiracy to impede or injure officer; and section 373, solicitation to commit a crime of violence.

D. Recommendation

From the foregoing, undoubtedly, many countries do not criminalize participation in organized criminal group or the laws are not all embracing. In some countries, the scope of the offence of conspiracy is limited. There may be necessity in some countries like Japan (for groups such as Boryokudan) to expand the concepts of complicity or conspiracy to agreeing with others to commit serious offences. There is apparent need in accordance with draft UN

Convention to criminalize participation in organized criminal group, both in the activities of the group as well as in agreeing to commit serious crime. If such provision is not incorporated, it may be possible for an offender accused of participation in an organized criminal group to find refuge in a country where there is no such law and in that event, his extradition may not be possible as the requirement of dual criminality will not be fulfilled. The draft convention is all encompassing, gives guidelines and the concrete basis on which states can enact comprehensive domestic laws for criminalization of participation in organized criminal group. Once the draft convention becomes applicable it would provide a bold legal framework in combating organized crime. While ratifying the convention, States may do well to provide a concise definition of the organized criminal group and make a criminal offence of participation in an organized criminal group, at the same time, ensuring that both the types of conduct are punishable, i.e. participation (as in Italy) and conspiracy (as in common law countries).

III. ANTI MONEY-LAUNDERING SYSTEMS

Money laundering has a direct linkage to crimes that are organized in character, scope and content. According to the definition adopted by the international criminal police organization (ICPO/INTERPOL), "*money laundering denotes any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources*".

Money laundering typifies a deliberate, complicated and sophisticated process by which the proceeds of crime are camouflaged, disguised or made to appear as if they were earned by legitimate means.

Money laundering can be categorized into a three-stage process. Firstly, severing any direct link between the money and the predicate crime generating it, secondly, obscuring the money trail to foil pursuit, and thirdly, re-investing the crime proceeds in furtherance to commit more crimes.

The major thrust of Vienna Declaration on Crime and Justice: Meeting the Challengers of the Twenty-first Century and the Naples Political Declaration and Global Action Plan against Transnational Crime was to initiate procedure to develop legal framework for Anti money-laundering system. The draft UN Convention against transnational organized crime, Articles 6 and 7 aptly provide for criminalization of the laundering of proceeds of crime and measures to combat money-laundering respectively. Considering the draft UN Convention as an index to articulate comprehensive legal framework for combating money laundering, indeed, many countries run short of the draft Convention expectations .

Japan has legislation against money laundering though reported cases of money laundering are relatively low. In 1992, Law Concerning Special Provisions for the Narcotics and Psychotropic Control Law etc. and other Matters for the Prevention of Activities Involving Controlled Substances through International Cooperation, commonly known as "Narcotics Special Provision Law", was enacted. Under this special law there are provisions against concealment of crime proceeds, receipt of crime proceeds and presumption of illicit proceeds.

In the same direction, in 1999, Law for Punishment of Organized Crimes, Control of Crime Proceeds and other matters, commonly known as "Organized Crime Punishment Law", was enacted. This law is designed to enable Japan to effectively

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cope with transnational organized crime. Chapter V, Articles 54 - 58 of this law provide for report of suspicious transactions.

In Italy, the legal instruments to deal with money laundering are embodied in Article 648 bis and 648 ter of the Penal Code, let alone Article 12 quinquies of Decree-Law n.306/1992 (fraudulent transfer of valuables). Article 648 bis stipulates, "Except in cases of participation in the (predicate) offence, any person substituting or transferring money, goods or assets obtained by means of intentional criminal offences, or any person seeking to conceal the fact that the said money, goods or assets or the proceeds of such offences shall be liable to imprisonment of 4 - 12 years and to a fine of Lit 2 to Lit 30 million". Article 648 ter punish, with the same penalty, the use of money, goods or assets of unlawful origin for economic or financial activities, In accordance with EU directives, Italy enacted Law N0.197/91 and made subsequent modifications regulating the mechanism of the report of suspicious transactions to Italian Exchange Bureau. Suspicious Transactions Service was also established in Italy's National Anti-Mafia Bureau. This system, of banks and other financial institutions reporting suspicious transactions is an essential ingredient to control and detect laundered money.

Pakistan enacted The Control of Narcotic Substances Act in 1997. This Act has substantial provisions to deal with illegal proceeds derived from drug trafficking. The National Accountability Bureau Ordinance 1999, coupled with other administrative regulations, has a comprehensive scheme against illegal proceeds derived from other crimes. In neighbouring India, law on money laundering is in a draft stage.

In the wake of an upsurge of drug trafficking and other related offences in Nigeria, the government promulgated Money Laundering Decree 1995, Section 14 of which provides :

"A person who:

- (a) converts or transfers resources or property derived directly or indirectly from illicit trafficking in narcotic drugs or psychotropic substances, with the aim of either concealing or disguising the illicit origin of the resources or property; or aiding any person involved in the illicit traffic of narcotic drugs or psychotropic substances to evade the legal consequences of his action or;*
- (b) collaborates in concealing or disguising the genuine nature, origin, location, disposition, movement or ownership of the resources, property...*
- (c) is guilty of an offence..."*

Added to the promulgation of money laundering decree, there was establishment of Money Laundering Surveillance Unit in Central Bank of Nigeria.

In an effort to stem money laundering, Brazil in 1998 enacted law for combating money laundering. This law was followed by the establishment of Council of Financial Activities (COAF), a Council that is responsible for identifying illicit activities related to money laundering.

In China, Article 191 of the Criminal Law deals with money laundering which stipulates that whoever knowing clearly that illegally gotten wealth and its profits are coming from drug crimes, or organized crimes, smuggling, in order to hide and conceal its origin and nature by various methods will be sentenced up to 5 years imprisonment and deprived of all ill-gotten wealth and its profits.

Thailand enacted the Money Laundering Control Act in 1999 as the existing laws were not able to cope with the problems. Therefore, Money Laundering Control Board was established to deal with the money laundering problems, and Transaction Committee was set up to examine and audit transactions and properties related to criminal or predicate offences. The law requires financial institutions to report the excessive cash deposits, the over valued properties and suspicious transactions as stipulated by Ministerial Regulations.

While Tanzania and Uganda have not developed any substantive anti money laundering legal frameworks, they have formed National Anti Money laundering Committees in line with principles of the East and Southern Africa Anti Money Laundering Group (EASAALMLG). In Philippines, there is no specific legislation criminalizing money laundering and the anti money laundering regulations have been found wanting especially in respect of such basic features as customer identification, record keeping and excessive bank secrecy provisions.

In its annual report for 1999-2000, FATF estimated that revenue generated from narcotics trafficking in the USA alone ranged from US\$ 40 billion to US\$ 100 billion. However, under United States money laundering laws, it is a crime to knowingly conduct a financial transaction with the proceeds of certain specified unlawful activity set forth in the statute with either the intent to promote or to conceal the specified unlawful activity.

A. Recommendations

Money laundering is an integral part of organized crime. Evidently, there are still yawning gaps in legal frameworks of many countries to effectively tackle this problem. The draft UN Convention seeks to include

in the predicate offences, offences described in Article 6 (criminalisation of money laundering), Article 8 (criminalization of corruption), Article 23 (criminalization of obstruction of justice) and a comprehensive range of offences associated with organized criminal groups. There are certain countries whose bank secrecy laws make it attractive to deposit money without easy identification while there are others whose procedures do not effectively deter opening of fictitious bank accounts. There are a number of countries whose company laws make it easy to register offshore companies on payment of a small fee with the result that there is no proper auditing of financial accounts. Such facilities tend to promote money laundering. In this respect, the draft UN convention recommends adequate record keeping and reporting of suspicious transactions which may require a basic change in the policy regarding banks, non-banking financial companies, and company registration and accounts. Furthermore, a Financial Intelligence Unit is proposed to be established in member countries to collect, analyze and disseminate information about potential money laundering.

As long as the difference between the countries with strict anti money laundering systems and with the lax ones remains, it is not possible to have an effective global anti money laundering programme. In other words, the difference in the rules of the strict and lax countries contribute to the transnational criminal organizations to exploit the diversities to frustrate international efforts against money laundering. It therefore becomes imperative for all member countries to incorporate the draft UN Convention into their domestic laws. In addition to such incorporation, it may be necessary for all member countries to adopt a more strict attitude against money laundering.

IV. ASSET FORFEITURE SYSTEM

The overriding objective of members of organized criminal groups is to acquire enormous economic power and amass wealth in area of property acquisition and huge bank accounts. Organized criminal groups have consistently developed new techniques to conceal substantial crime proceeds from the jurisdiction where such illicit wealth was generated. Asset forfeiture system is a veritable tool for law enforcement and judicial criminal process to deprive criminals of illegally acquired proceeds, and plough back such proceeds to the community for the greater good of the society.

The draft United Nations Convention against Transnational Organized Crime, Article 12, provides legal framework to weaken financial empire of transnational organized groups. This article deals with confiscation and seizure. Article 13 lays down the framework for international cooperation for purposes of confiscation. Article 14 enumerates the methodology and procedure for disposal of confiscated proceeds of crime or property. The central idea of Articles 12-14 is generally to make transnational organized crime unattractive and unproductive.

The legal provisions regarding asset forfeiture system differ from country to country. In countries like Nigeria, Tanzania and Uganda, there are no discernible laws relating to asset forfeiture. However, in Nigeria, Advance Fee Fraud and other related offences Decree and the Money Laundering Decree have provisions that allow for seizure and confiscation of proceeds of crime but with limited scope. Similarly, in Malaysia, Dangerous Drugs (forfeiture of property) Act was enacted in 1988 for forfeiture of assets.

In Indonesia, Part Four (Articles 38-46) of the Code of Criminal Procedure provides for confiscation of proceeds of crime. Such goods (proceeds of crime) in confiscation because of a civil case or bankruptcy can also be confiscated in the interest of the investigation, prosecution and trial of a criminal case. In Laos, Article 32 of Penal Code provides for seizure and confiscation of properties. Seizure of properties may be sentenced only in case of serious cases mentioned in the Penal Code.

The legal framework for asset forfeiture, confiscation, attachment or seizure in India is contained in Criminal law Amendment Ordinance (1944), sections 111 and 112 of Customs Act (1964), Smugglers and Foreign Exchange Manipulators (forfeiture of property) Act (1976), chapter V-A (sections 68A-68Y) of Narcotic Drugs and Psychotropic substances Act (1985) and sections 102 and 452 of Criminal Procedure Code.

While Brazil does not have an asset forfeiture system specific to the cases of organized crime, Pakistan Criminal Procedure Code provides for seizure by police and forfeiture by court of illegal proceeds of crimes. Sections 516A and 517 fully empower the courts to dispose of property used or resulting from a crime. Similarly, Custom Act, 1969 provides for seizure and confiscation of illegal goods. The Narcotics Control Substances Act, 1997 and NAB Ordinance, 1999 fulfill the requirements of UN Convention 1988 and UN Convention on TOC.

In China, Section 8, Article 59 of the Criminal Law provides for confiscation of proceeds of crime partially or totally. If proceeds are to be totally confiscated, provision should be made leaving enough amount for meeting the daily expenditure to sustain the family life. In Thailand, there is provision for forfeiture under the

Money Laundering Control Act, 1999.

The Japanese asset forfeiture system for organized crime is embedded in Organized Crime Punishment Law, 1999. In this law, the system of securance of confiscation and securance of collection of equivalent value is provided, which is helpful for asset forfeiture system. There is also provision for asset forfeiture in drug related offences in Narcotics Special Provision Law, 1992. In this law, there is presumption of illicit proceed relation to property obtained by the parties during engagement in drug related offences, if the value is deemed unreasonably large and such property or equivalent thereof is liable to be confiscated.

The United States has two forfeiture systems in operation, the civil and the criminal forfeiture system. The basic distinction between criminal and civil forfeiture is that criminal forfeiture is limited to a convicted defendant's personal interest in property subject to forfeiture, whereas civil forfeiture focuses on the property itself. A criminal, upon conviction, may be ordered to forfeit all profits or proceeds derived from criminal activity or any property, real or personal, involved in the offence, or property traceable to the offence such as property acquired with proceeds of criminal activity.

In Hong Kong, Section 8 of the Confiscation Order permits the High court or District court where a person has been convicted of a specified offence defined under this ordinance including both schedule 1 and 2 offence, to make a confiscation order in relation to the person's proceeds of that specified offence.

The Italian Penal Code, Article 416 bis co.7, prescribes that "In the event of conviction, articles which were used or intended to be used to commit the offence

and the proceeds thereof shall be forfeited". Furthermore, Law No. 356 of 1992 provides for compulsory forfeiture of properties owned by convicts on charges of Mafia crimes, which turn out disproportionate in comparison with the legal income of the owner; and Law No. 646 of 1982 provides for compulsory forfeiture of goods of persons suspected to belong to Mafia type organization which are disproportionate to the legal income. According to the Italian jurisprudence, there is a sharing of the burden of proof in respect of the assets which, being disproportionate in comparison with the legal income, are liable to be confiscated. In such cases, the prosecution has to first prove that the assets are effectively owned directly or indirectly by the suspect (who usually use figureheads or strawmen), and then that the assets are disproportionate to the income of the suspect. The suspect thereafter must prove the lawful origin of the assets.

A. Recommendations

The draft UN Convention proposes that the offender has to demonstrate the lawful origin of the alleged proceeds of crime or other properties liable to confiscation if permissible as per the domestic laws. However, there is no provision like the Italian one whereby disproportionate assets could be forfeited. It therefore may be desirable to incorporate such provisions if permissible as per the domestic laws of various countries.

There is need for international cooperation in freezing, seizure, forfeiture and confiscation of proceeds of crime. When the proceeds of crime are derived in one country but moved to other countries with different laws, difficulties are faced by the authorities in securing them for the purpose of judicial and other proceedings. Letters of request are usually sent to the foreign authorities to make the proceeds

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of crime available. In cases where the suspect is convicted, the trial judge may have to order confiscation to return the proceeds of crime to the victim. In this respect, it is necessary that bilateral or multilateral agreements should be entered into by various countries to facilitate easy transfer of such proceeds to the requesting country. However, in certain situations, it may become expedient to share assets on case-to-case basis, especially in offences where there is no rightful owner of the proceeds, such as proceeds out of drug trafficking from one country to another. There should be provision in the mutual assistance agreements in this regard.

In order to accomplish the objective of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the asset forfeiture systems of signatory countries have to be more comprehensive.

V. CONCLUSION

In conclusion, against the backdrop of globalization of crime, the most appropriate measure to check the negative trend of transnational organized crime with its attendant characteristics is for nations to borrow a leaf from the draft UN Convention against organized crime by criminalizing participation in organized criminal groups, criminalization of the laundering of the proceeds of crime and ensuring that proceeds of crime are forfeited on domestic and international levels. The Convention provides a framework which can be utilized by the member countries to enact or amend their own laws keeping sanctity of constitutional, legal and social structure in mind. Such laws will work as a common thread running through diverse legal systems paving way for smooth international cooperation. It may, however, be naive to expect that transnational criminal organizations will surrender to

this UN sponsored global action against them. The international community will have to mobilize far more effective countermeasures to fight the battle against transnational organized criminal groups. The success, however, will greatly hinge upon the overall capacity of various nations to remain united, rising above minor differences that might crop up while initiating and executing requests for legal assistance. Given the world wide support extended to the UN efforts so far, nations can hope to provide their citizens a more safe and secure world in the twenty first century.

RESOURCE MATERIAL SERIES No. 58

PART TWO
RESOURCE MATERIAL SERIES
No. 58

Work Product of the 117th International Seminar
“CURRENT SITUATION AND COUNTERMEASURES AGAINST
MONEY LAUNDERING”

UNAFEI

VISITING EXPERTS' PAPERS

COUNTERING MONEY LAUNDERING: THE FATF, THE EUROPEAN UNION AND THE PORTUGUESE EXPERIENCE, PAST AND CURRENT DEVELOPMENTS

*Gil Galvão **

I. INTRODUCTION

A. What is Money Laundering?

Money laundering is the processing of the criminal proceeds to conceal their illegal origin¹. In popular terms, it consists in “making dirty money look clean”: The objective of the launderer is to disguise, definitely, the illicit origin of the substantial profits generated by the criminal activity, so that such profits can be used as if they were derived from a legitimate source. This is done by screening the sources, changing the form, or moving the funds to less controlled places.

Three stages have been identified in the traditional laundering procedure. The first is the placement: the launderer gets rid of the cash originated by the criminal activity and introduces it in the financial system². This is the choke point of the procedure, where the launderer is more vulnerable and the attempt to launder can more easily be identified. The second stage is the layering: the launderer executes, or orders the execution of, so many transactions, as needed, in particular of international

nature, so that, definitely, the tracing of the origin of the monies is lost. Finally, the third stage is the integration: the money, now apparently of legal origin, is used for investment or for the acquisition of goods and services.

Fighting money laundering is, thus, an attempt to depriving criminals from the possibility of profiting from their criminal acts. The concept underlying the fight against the laundering of the proceeds of a criminal activity is therefore the following: if you cannot prevent the criminal activity itself from existing, you should at least make all the efforts to deprive the criminals from the proceeds of their crimes! But this is also the reason why any action against money laundering can only be ancillary to any other action, preventive or repressive, taken against crime and criminal activity in general: it's always a remedy - it comes at all times after an offence has been committed!

B. Why Should We Act Against Money Laundering?

There are, of course, many good reasons - moral, social or political - to ground the well-founded principle that the criminal

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¹ According to Webster's, money laundering is defined as “transferring illegally obtained money or investments through an outside party to conceal the true source”.

² Usually it was only into the financial system that the cash was directly introduced. However, with the anti-money laundering measures taken with regard to this sector, experience shows that cash is now tentatively introduced also through other channels.

should not profit from its criminal activity. In fact, no decent, legitimate, democratic society can be built based on ill-gotten gains.

However, there have been identified some macro-economic reasons which also justify that action is taken against money laundering. According to a Statement by the Staff of the IMF, presented to the Washington Plenary of the Financial Action Task Force in June 1996³, "potential macroeconomic consequences of money laundering may be summarised as follows:

- (i) Changes in the demand for money that seem unrelated to measured changes in fundamentals;
- (ii) Volatility in exchange rates and interest rates due to unanticipated cross-border transfers of funds;
- (iii) Increased instability of liabilities and heightened risks for asset quality for financial institutions, creating systemic risks for the stability of the financial sector and for monetary developments generally;
- (iv) Adverse effects on tax collection and allocation of public expenditures due to misreporting of income and wealth;
- (v) Contamination effects on legal transactions as transactors become concerned about possible criminal involvement;
- (vi) Other country-specific distributional effects or asset price bubbles due to disposition of "black money."

Nevertheless, there are not only potential macroeconomic effects of money

laundering. Also at the microeconomic level most pernicious consequences can be found. A total distortion of competition, and the elimination of legitimate businesses by people linked to money launderers and other criminals, may derive from the money laundering process. In fact, with the huge margin of profit that the criminal activities generate, it is possible in a systematic way, to bring legitimate businesses to bankruptcy, through dumping and/or the monopoly of entire sectors of economic activity.

On the other hand, money laundering can corrupt parts of the financial system and undermine good governance of financial authorities. The integrity of financial markets, an essential element for the prosperity of the economies, depends heavily on the application of high legal, professional and ethical standards. Should proceeds of crime be laundered through a financial institution, the reputation of such an institution would be seriously damaged. This would affect the willingness of customers and other institutions to deal with that institution, and could affect the market as a whole.

Finally, money laundering can lead to the bribery of individuals, institutions and even of governments. In the beginning, good and bad monies coexist, but in the end, Gresham's law⁴ operates, and we run the risk of remaining only with the corrupt entities. This can seriously weaken the moral and ethical standards of society and even damage the principles underlying democracy. For all these reasons, action should be taken against money laundering.

³ "Macroeconomic implications of money laundering" - IMF Staff Statement - Meeting of the Financial Action Task Force, Washington, D.C., June 26-28, 1996.

C. Why Does Action Against Money Laundering Need To Be Universal?

In a time of globalisation of financial markets, it is nevertheless not sufficient to ensure domestic measures to prevent money laundering. On the contrary, it is paramount that action against money laundering and measures to prevent it are universally applied. It is widely acknowledged that the strength of the anti-money laundering system depends of the strength of its weakest link: if a country does not participate in this battle, the money being laundered will flow quickly through it and then return to the globalised financial system. In such a situation, experience shows that detecting the illegal origin of the amounts at stake becomes much more troublesome. This means that, although many efforts have been made to raise awareness of the problem and to develop international co-operation in this field, actions must be developed to ensure the co-operation in the fight against money laundering is widespread worldwide, and that every jurisdiction is engaged in the fight against this plague.

D. How to Fight Money Laundering?

Some arguments have been developed in the sense that the fight against money laundering determines the abandon of the liberalisation of the financial markets and the return to administrative controls of foreign exchange and of investment. It does not seem that there is a need to be so. In fact, the prevention of money laundering

depends of an adequate legislative framework, of the monitoring of information and of international co-operation. The same occurs with the needed supervision to ensure a smooth functioning of free and competitive financial markets - adequate legislation, timely and complete information and international co-operation.

This paper reports on three different but related experiences. Section I deals with the FATF experience, and the strategy to build a worldwide anti-money laundering network. Section II discusses the developments of the European Union fight against money laundering, in particular the Directive "on the prevention of the use of the financial system for the purpose of money laundering". Section III informs on the Portuguese experience to fight money laundering. A short Conclusion tries to bring together some thoughts on the future of the fight against money laundering.

II. THE FATF EXPERIENCE

A. Early Initiatives

The recent fight against money laundering had some precursors. In 1980, on June 27, the Council of Europe approved its Recommendation No R (80) 10 on Measures Against the Transfer and Safekeeping of Funds of Criminal Origin. This was the first call of attention on the possible abuse of banks for the purpose of concealing illegally acquired funds, and it included a general recommendation on the identification of clients.

In December 1988, the Basle Committee on Banking Regulations and Supervisory Practices adopted a Statement of Principles on the prevention of criminal use of the banking system for the purpose of money laundering. The three main principles refer to customer identification - "know your customer", compliance with laws and

⁴ According to this principle, which seems to have been known since at least Aristophanes, but is usually attributed to Thomas Gresham, "bad money drives out good money". So, when we have two coins of equal legal value in circulation, but one is intrinsically lower value than the other, the worse coinage will drive the better out of circulation, since the better will be hoarded or melted down.

co-operation with law enforcement agencies. The Statement encouraged banks to put in practice measures to ensure that all customers are properly identified, that transactions that do not appear legitimate are discouraged and that co-operation with law enforcement agencies is achieved.

Still in 1988, on the 19th of December, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) was adopted, and the incrimination of money laundering was included in an international Treaty for the first time.

In 1989, in response to mounting concern over money laundering, namely over drug trafficking money laundering, the Financial Action Task Force on Money Laundering (FATF) was established by the G-7 Arche Summit that was held in Paris. The Task Force included representatives from the G-7 members, the European Commission and eight other countries. In April 1990, the Task Force published a report containing forty Recommendations to fight money laundering, which were to become the standard by which anti-money laundering measures should be judged.

Almost one year later, on the 11th of November 1990, the Council of Europe opened for signature its Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. This Convention is open for signature by the member States of the Council of Europe and the non-member States which have participated in its elaboration and for accession by other non-member States. It criminalizes money laundering the way the Vienna Convention had already done it.

Finally, to close this cycle of international instruments, the Council of

the European Economic Community approved, on the 10th June 1991, the Directive 91/308/EEC "on the prevention of the use of the financial system for the purpose of money laundering".

B. Initial Developments

The Financial Action Task Force on Money Laundering (FATF) was established as an inter-governmental body to develop and promote policies, both at national and international levels, to combat money laundering. The Task Force is thus a "policy-making body", aiming at improving measures to combat money laundering.

The FATF does not have a tightly defined constitution or an unlimited lifespan. For the time being, the Task Force has been reviewing its work and mission every five years, and it has been agreed to continue until 2004. Its future depends on the assessment made by the members' governments that the FATF is still needed and that its structure is the best and most efficient way to carry on the mission assigned to it. However, due to its own nature of a Task Force, there will be a point in time where the question will be renewed on whether to conclude its work or to change its nature.

The first five-year mandate of the FATF lasted from 1989 through 1994. During such period, the Task Force achieved considerable results. The report on the money laundering situation was drafted and the Forty Recommendations were established. The first substantial enlargement of the Group took place with all the at that time members of the OECD joining the Group, together with Hong-Kong and Singapore, as well as the Gulf Co-operation Council. The monitoring of members' progress in implementing anti-money laundering measures was launched. Self-assessments of the situation in each member were prepared. The first round of

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mutual evaluations of all Task Force members, an essential tool to exercise the "peer pressure" that contributes to the definition of the nature of the Group, was finalised. The typologies exercises were started in order to give us an update of money laundering trends and techniques, and possible countermeasures. Interpretative Notes on several Recommendations were drafted to clarify some issues and provide additional guidance. The Caribbean Financial Action Task Force was launched.

The most important achievement of the period was undoubtedly the issuance of the Forty Recommendations. They cover the role of the legal and financial systems in the fight against money laundering, as well as the area of international co-operation. They provide a complete set of measures to build a coherent anti-money laundering system, and are intended for universal application. Nevertheless, they provide sufficient flexibility to be followed and adopted by countries and jurisdictions with different legal systems, in different regions of the globe.

In April 1994, the London Plenary meeting of the FATF approved the document FATF-V/PLEN7/REV1 on the future of the FATF, prepared by the United Kingdom Presidency. The Ministers of the FATF members later endorsed this document, which set the FATF strategy for the period 1994 through 1999. It was then decided that the FATF should continue for five years more, to monitor members compliance with the Forty Recommendations, to revise and update such Recommendations and to increase the role of external relations work of the FATF.

C. Consolidation and Recognition

The second five-year mandate of the FATF (1994-1999⁵) was an important period of consolidation of the work of the

Task Force and of recognition of its work from the outside world. The FATF improved the level of its Forty Recommendations, monitored the implementation of the Recommendations in the member countries, continued to develop the typologies exercises, and contributed to the launching of the Asia Pacific Group on money laundering and of the Committee of the Council of Europe for countries that are not FATF members- the PC-R-EV Committee.

1. The Forty Recommendations

During this second period of existence, the FATF carried out the review of the Forty Recommendations to keep them fully up to date with existing trends and to anticipate future threats. This occurred under the Us Presidency of the FATF, in 1995/96. Additional consideration was given to nine particular matters. Some Recommendations were amended and new ones were introduced. The major changes were⁶:

- (i) The extension of the money laundering predicate offences beyond narcotics trafficking, to include all serious crimes;
- (ii) The mandatory reporting of suspicious transactions;
- (iii) The application of the financial Recommendations to the bureaux de change and all other non-bank financial institutions;
- (iv) The application of the financial Recommendations to the financial activities of non-financial businesses or professions;
- (v) The expansion of the Recommendation on customer

⁵ The FATF rounds (coinciding with each Presidency) run from July 1st through June 30th.

⁶ A full description of the stocktaking review of the Forty Recommendations can be found at the FATF VII Annual Report, available at the FATF Internet site: <http://www.oecd.org/fatf/>.

- identification, to take into account problems raised by the identification of legal entities;
- (vi) The particular attention required when dealing with shell corporations;
 - (vii) The need to pay special attention to and if necessary take measures to preclude the use of new or developing technologies for money laundering purposes;
 - (viii) The encouragement of the use of “controlled deliveries” techniques;
 - (ix) The monitoring of cross-border cash movements.

The FATF 40 Recommendations gained worldwide recognition as the international standards in this area during this period. They have been endorsed by the Caribbean Financial Action Task Force (CFATF), the Commonwealth Heads of Government and Finance Ministers, the Council of Europe, the Black Sea Economic Cooperation, the Three Baltic States (Riga Declaration) and the Offshore Group of Banking Supervisors (OGBS). The revised terms of reference for the Asia Pacific Group (APG), adopted in Tokyo in March 1998, also recognised that the Forty Recommendations are accepted international standards. Finally, on June 10th, 1998, the Special Session of the United Nations General Assembly recalled that “the Forty Recommendations of the Financial Action Task Force... remain the standard by which anti-money laundering measures adopted by concerned states should be judged”. It also approved a political declaration recommending the States that have not yet done so to adopt, by the year 2003, national anti-money laundering legislation and programmes in accordance with the action plan against money laundering.

The action plan, a document entitled “Countering Money Laundering” whose content derives directly from the Forty

Recommendations, offers an excellent panoply of principles to be applied and measures to be taken. Essentially, it refers to the three FATF main levels of intervention: the legislative, the financial and the law enforcement. At the legislative level States are urged to establish a legislative framework to criminalize money laundering from serious crimes and to permit prevention, investigation and prosecution of money laundering. Important tools: freezing, seizure and confiscation of the proceeds of crime, international co-operation and legal mutual assistance. At the financial level States are urged to establish a regulatory regime to deny criminals and their illicit funds access to national and international financial systems. Main tools: customer identification in accordance with the well grounded principle “know your customer”, record keeping, mandatory reporting of suspicious activity and removal of bank secrecy impediments. At the enforcement level, the main tools are: information-sharing mechanisms, extradition procedures and other measures to provide for effective detection, investigation, prosecution and conviction of criminals engaged in money laundering activities. It can be immediately recognised that the document incorporates the policies established in the Forty Recommendations, and has therefore added weight to the approach outlined therein.

Further to the review of the Recommendations, several other essential FATF documents were produced from 1994 through 1999, in particular on the policy for expansion of the membership; on the policy for dealing with members not in compliance with the Forty Recommendations; on the participation of international organisations in FATF meetings, and on the assessment of the performance of non-members.

2. The Mutual Evaluations

The Task Force continued to monitor the implementation by its members of the Forty Recommendations, namely through self-assessment exercises, cross-country reviews of measures referring to particular Recommendations and the conclusion of the second round of mutual evaluations of all its members.

The mutual evaluation process has been a central pillar of the work of the FATF, and has led to important improvements in the standard of anti-money laundering measures in all FATF members. This peer pressure system whereby countries open themselves to independent scrutiny, and are evaluated and subject to criticism by their own peers, has been very successful. This success stems not just from the process that is used to produce the country report (questionnaire, on-site visit, discussion in the Plenary), but also from the capacity of the Group to follow up the measures that are taken to rectify any deficiencies found.

All FATF-style regional groups have accepted the mutual evaluation concept and some groups have now completed a substantial number of reports. The advantages for the country evaluated are significant:

- (i) It receives an independent and objective analysis of its money laundering system;
- (ii) The review is a comprehensive one, which looks at all aspects of the system;
- (iii) The evaluated country obtains advice on best practice elsewhere and on how its own system could be improved; and
- (iv) The persons who participate as evaluators, and the countries they represent, benefit by evaluating the system in another country.

The mutual evaluation process is enhanced by the FATF's policy for dealing with members not in compliance with the Forty Recommendations. The measures contained in this policy represent a graduated approach. There are five steps in this policy. The first is a progress report at plenary meetings. A letter by the FATF President and/or a high-level mission to the non-complying country can follow it. Then comes the application of Recommendation 21, which requires financial institutions to pay special attention to transactions with persons, including companies and financial institutions in countries that do not or insufficiently apply the Forty Recommendations. As a final measure, the FATF membership of the country in question can be suspended. Steps taken in the year 2000 with regard to anonymous passbooks by a FATF member are an excellent example of how mutual evaluations can lead to a more effective international anti-money laundering system.

3. Preparing the Future

During FATF-IX, under the Belgian Presidency, the FATF conducted a review of its future. On April 28 1998, the Ministers of the FATF and the European Commissioner for Financial Services approved the FATF's strategy for the years 1999 through 2004. In substance, the need for continued action against money laundering was acknowledged, the membership strategy was defined and the future direction and objectives of the FATF were considered. It was recognized that, although standards have improved enormously in the past few years, particularly within the FATF membership, the challenge is to make those standards truly global. The FATF's strategy for the future therefore emphasises the importance of spreading the anti-money laundering message to all continents and regions of the globe. The other major tasks

of the FATF are the improvement of the implementation of the Forty Recommendations in FATF members and the strengthening of the review of money laundering trends and techniques.

This strategy intends to give a theoretical and practical answer to the present circumstances of the globalisation. In today's open and global financial world, characterized by the strong mobility of funds and the rapid development of new payment technologies, the need for international co-operation has increased substantially. This strategy is deemed the most cost-efficient way of countering money laundering.

D. Opening to the World

1. Spreading the Anti-Money Laundering Message

The main objective of the FATF for the period 1999/2004 is to create a worldwide anti-money laundering network. This is to be achieved by expanding the FATF to a limited number of strategically important countries; fostering the development of credible and effective FATF-style regional bodies; improving the co-operation with relevant international organisations, and securing the adoption of adequate anti-money laundering measures in non-member countries through the application of the FATF's policy for assessing non-members.

As it was already mentioned, in the present circumstances of the world economy, it is paramount that the fight against money laundering becomes truly global. The strength of the anti-money laundering system relying on the strength of its weakest link, we cannot afford to have "black holes" in the system whereby the efforts of all countries that are coherently fighting money laundering are jeopardized by those countries who do not wish to do anything or who are doing little against the

money laundering threat. The FATF has therefore, in 1999/2000, under the Portuguese Presidency, started this ambitious project of creating the worldwide anti-money laundering network.

- (i) *Expanding the FATF to a limited number of strategically important countries*

In June 2000, it materialized the second enlargement of the membership in the history of the FATF, by accepting Argentina, Brazil and Mexico as new full members⁷, after all three candidates having completed successfully a mutual evaluation exercise. The efforts are now geared to other regions of the globe where the Task Force is less represented, namely Africa, Asia and Eastern Europe.

- (ii) *Fostering the development of credible and effective FATF-style regional bodies*

The FATF external relations programme contributed to raise awareness of the money laundering problem throughout the world. Under the current strategy, the systematic development of existing FATF-style regional bodies, and the encouragement to establish new ones is vigorously pursued. A regional group, committed to the Forty Recommendations, exerting peer pressure among its members; conducting mutual evaluations based on a FATF-endorsed procedure; carrying out self-assessment surveys and regional typologies exercises; having one or several FATF members within their membership and a secretariat which would liaise regularly with FATF, is vital for the development of the strategy.

⁷ Argentina, Brazil and Mexico had joined the FATF as observer members, pending their mutual evaluation process, at the September 1999 Plenary meeting in Porto, Portugal.

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Therefore, the FATF continues to support the work of the already existing FATF-style regional bodies - the Asia/Pacific Group on Money Laundering (APG), the Caribbean Financial Action Task Force (CFATF), and the Council of Europe PC-R-EV Committee, as well as the anti-money laundering initiatives of the Offshore Group of Banking Supervisors (OGBS). The worldwide anti-money laundering network requires, nevertheless, an entire coverage of all regions. This is why the policy of the FATF is to strongly support the establishment of new FATF-style regional bodies. These are the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG)⁸, the Intergovernmental Task Force against Money Laundering in Africa (ITFMLA)⁹, and the Financial Action Task Force in South America - GAFISUD¹⁰. Finally, it is envisaged to promote the development of further regional groups where none exists.

- (iii) *Improving the co-operation with relevant international organisations*

A third element indispensable for developing the worldwide network is the co-operation with relevant international organisations. Indeed, the FATF does not act in a vacuum, and a number of other international organisations or bodies (from the United Nations to the regional development Banks) play a significant role in the fight against money laundering. Being the world's leading authority for setting standards and monitoring compliance in the anti-money laundering area, the FATF's policy is to strengthen co-operative links with all relevant

international organisations, and in particular with the Multilateral Development Banks and the International Monetary Fund.

- (iv) *Securing the Adoption of Adequate Anti-money Laundering Measures in Non-member Countries through the application of the FATF's policy for assessing non-members*

A last and essential component of the strategy to counter money laundering worldwide relates to the situation in non-member countries. Taking into account the interdependence and interrelation of anti-money laundering policies it is of paramount importance to secure the adoption of adequate anti-money laundering measures in non-member countries to prevent, detect and punish money laundering. In this context, the Non Co-operative Countries and Territories (NCCTs) exercise plays an irreplaceable role to reduce the vulnerability of the international financial system to money laundering.

The FATF has therefore engaged in a significant initiative to identify key anti-money laundering weaknesses in jurisdictions inside and outside its membership. It started by setting up twenty-five criteria, consistent with the Forty Recommendations, to identify detrimental rules and practices that obstruct international co-operation against money laundering. Main obstacles identified were loopholes in financial regulation, inadequate or no requirements for the registration of businesses and legal entities and the identification of their beneficial owners, lack of international administrative and judicial cooperation, and inadequate resources for preventing, detecting and repressing money laundering. Then, the FATF reviewed the anti-money laundering regimes of a

⁸ Launched in Arusha, Tanzania, in August 1999.

⁹ Its first meeting took place in Dakar, Senegal, in November 2000.

¹⁰ Launched on the 8th of December 2000, in Cartagena de Indias, Columbia.

number of jurisdictions against the above-mentioned twenty-five criteria. The reviews involved the gathering and analysis of all the relevant information. A draft report was prepared and each reviewed jurisdiction sent their comments on their respective draft reports. These comments and the draft reports themselves were discussed between the FATF and the jurisdictions concerned during a series of face-to-face meetings. Subsequently, the FATF Plenary discussed and approved the reports.

On the 22nd June 2000, the last FATF Plenary under the Portuguese Presidency made public a “Report to identify Non-Co-operative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures”¹¹. Fifteen countries have been identified as Non-Co-operative in the fight against money laundering: Bahamas, Cayman Islands, Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russia, St. Kitts and Nevis, St. Vincent and the Grenadines. It is expected that this NCCTs exercise, along with the efforts of regional anti-money laundering bodies, will contribute for all jurisdictions to match international standards in the global fight against money laundering, and to join the worldwide anti-money laundering network.

The FATF is continuing to review the situation in the fifteen countries named as non co-operative, as well as in other countries that had not yet been subject to the NCCT survey. As the NCCT list is an open one, it is expected that some names will be deleted while some others could be added. A particularly important issue is to guarantee fairness and transparency throughout the whole process, the only way

to avoid undermining the credibility of the FATF, and to secure the possibility to deal constructively with the reviewed jurisdiction in a pro-active manner to ensure future co-operation. In fact, we cannot lose sight that the aim of the exercise is too bring all jurisdictions to apply the international standards in the fight against money laundering. The best result to be achieved by the NCCT exercise would be to arrive at the conclusion that there are no countries to be listed.

2. Strengthening the Review of Money Laundering Trends and Countermeasures

Further to the spreading of the anti-money laundering message, another major task to be accomplished by the FATF during the years 1999/2004 is to strengthen the review of money laundering trends and techniques (the third consisting in the improvement of the implementation of the Forty Recommendations in the member countries).

Deep knowledge of money laundering trends and techniques is essential to find the adequate countermeasures. The typologies meetings have generated the main source of expertise in this field, with law enforcement officials exchanging their experiences, annually. However, an effort to make discussions more interactive should be made. The increased contribution from FATF-style regional bodies and other relevant observer international organisations, as well as the participation of law enforcement and regulatory delegates from non FATF members is an experience that has started during FATF XI and I hope it will continue in the future permitting to increase the international knowledge of the money laundering phenomenon. An extension of the geographical scope of the future typologies exercises is also in the agenda for the next meetings.

¹¹ The full text of this report can be found at the FATF website: <http://www.oecd.org/fatf/>

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The next years will be of crucial importance for the fight against all forms of serious crime, in particular against organized crime, narcotics trafficking, corruption, terrorism, etc. The fight against money laundering can make an important contribution to that purpose, as it may deprive criminals from the use of the profits of their criminal activity. However, it should be taken into account that no action against the laundering of the proceeds of serious crimes will, by itself alone, achieve the goal of overcoming the problems raised by organized crime. A much more comprehensive action is needed, and any illusions on this point can only give rise to future delusion!

**III. THE EUROPEAN UNION
EXPERIENCE**

A. The 1991 Directive

The European Commission was a member of the Financial Action Task Force since 1989. However, the first legal text of the Economic Community (EEC) on money laundering was published only in June 1991. The legal instrument chosen to set the Community standards on the matter was the Directive 91/308/EEC "on the prevention of the use of the financial system for the purpose of money laundering"¹².

The Directive profited substantially from the work of the FATF, and most of the

solutions included in its text were already contemplated in the Forty Recommendations. Nevertheless, while the Forty Recommendations dealt with the legal and financial systems, as well as with the international co-operation, the Directive, in accordance with the Community rules then in force, had its scope limited to the financial system. As the title indicated, the objective of the Directive was much more limited than the Recommendations: it sets the rules to "prevent the use of the financial system for the purpose of money laundering". The reason for the introduction of the Directive was mainly the protection of the financial system of the Community. On one hand, protection against the advantages the launderers could try to take of the existing freedoms of capital movement and to supply financial services; on the other hand, protection of the single market, since the lack of Community action against money laundering could lead Member States, to adopt measures which could be inconsistent with completion of such market.

The Directive used a definition of money laundering taken from that adopted in the Vienna Convention¹³, but admitted the possibility for the Member States to extend the predicate offences beyond drug trafficking to any other criminal activity designated as such for the purposes of the Directive by each Member State.

1. Obligations Imposed to the Member States

The Directive imposes several obligations on the Member States. The first is the obligation to ensure that money laundering as defined in the Directive is prohibited. It is assumed that the prohibition will be made mainly by penal means, within the framework of the Vienna and Strasbourg Conventions. However, it is acknowledged that the penal approach

¹² Under Community law, a directive sets the results that have to be obtained and imposes the obligation on the Member States to achieve such results. However, it gives the Member States the liberty and flexibility to find the most adequate ways to accomplish their task through the transposition of the directive into its internal law. The 1991 Directive sets only minimum standards, and for that reason, any Member State may adopt or retain in force stricter provisions in the field covered by the Directive to prevent money laundering.

should not be the only way to counter money laundering and, therefore, several obligations with regard to the financial system¹⁴ are imposed on the Member States.

Member States are required to ensure that credit and financial institutions identify their customers by means of supporting evidence when entering into business relations, particularly when opening an account or savings accounts, or when offering safe custody facilities” (article 3). The most important contribution the financial system can give to the fight against money laundering is

the help to detect and to trace illegal funds. Therefore, the Directive introduced several other important obligations. The obligation to keep a copy or the references of the evidence required for customer identification for a period of at least five years after the relationship with their customer has ended, or in the case of transactions, of the supporting evidence and records for a period of at least five years following execution of the transactions (Article 4). The obligation to examine with special attention any transaction which financial institutions regard as particularly likely, by its nature, to be related to money laundering (Article 5). The obligation of the financial institutions to cooperate fully with the authorities responsible for combating money laundering, by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering, without alerting the customers concerned, and by furnishing those authorities, at their request, with all necessary information (Articles 6, 7 and 8). Lastly, the obligation for credit and financial institutions to establish adequate procedures of internal control and communication in order to forestall and prevent operations related to money laundering, and to take appropriate measures so that their employees are aware of the provisions contained in the Directive.

The most striking contrast between the obligations created by the Directive and the 1990 FATF Recommendations was the mandatory nature of the reporting of suspicious transactions. In fact, while the 1990 Recommendations admitted that the report could be made only on a voluntary basis, the Directive, from the very beginning, established a mandatory regime of suspicious transactions report. The remaining obligations created by the Directive were equivalent to the measures suggested in the FATF Recommendations.

¹³ “Money laundering means the following conduct when committed intentionally:

- 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,
- 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,
- 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,
- 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.

Knowledge, intent or purpose required as an element of the abovementioned activities may be inferred from objective factual circumstances”.

¹⁴ The Directive covers credit institutions and financial institutions, as well as insurance companies in so far as they carry out life insurance activities. It covers also branches located in the Community of all such institutions even if their head offices are situated outside the Community

They constitute the basis for the co-operation of financial institutions and their supervisory authorities with the authorities responsible for combating money laundering.

2. The Lifting of the Banking Secrecy

A major discussion took place in the late eighties/first half of the nineties around banking secrecy. Traditionally, the relations within the financial sector were based on the confidentiality of the relationship between the banker and his customer: the banker did not ask questions; the customer did not make disclosures. The fight against money laundering, namely against drug trafficking money laundering, introduced an entirely different approach. For the first time, it was said that the bankers should care about the origin of their customer's money, co-operate with law enforcement agencies, and denounce suspicious transactions of their customers, without alerting them to this fact. For the traditional banking system, this constituted a Copernican revolution.

To introduce this new concept in the financial sector was not an easy task. A complete change of mentalities both of the bank directors and employees, as well as of the supervisory authorities was needed. The idea met many resistances, and it was said that it could not succeed. Some saw banking secrecy as the essential basis of the financial business. Nevertheless, the Forty Recommendations clearly established that "secrecy laws should be conceived so as not to inhibit implementation of the Recommendations", and the Directive required Member States to lift the banking secrecy, either of financial institutions or of supervisory authorities, whenever necessary, namely when a suspicion arises. The mandatory reporting of suspicious transactions came into force for all EC Member States on the 1st January 1993.

Ten years later the discussion, as far as the financial system is concerned, seems entirely outdated¹⁵. In fact, in particular after the BCCI case, financial institutions understood that it was in their interest to avoid being tainted by money laundering. The image and good reputation of a financial institution depends heavily on the perception that high legal, professional and ethical standards apply. Any suggestion that an institution is deliberately or negligently involved in a money laundering case can only contribute to its discredit. No serious institution can afford to see its image and reputation shaken by these reasons.

B. The Amendment of the 1991 Directive

1. The Amendment Process

The application of the 1991 Directive in the Member States, accompanied by the work of a Contact Committee created to follow up the developments of the fight against money laundering in the Community, showed that some amendments to update the Directive, and to extend its scope were needed. The European Commission, came to the conclusion that the 1991 Directive, "*as one of the main international instruments in the fight against money laundering, should be updated in line with the conclusions of the Commission and the wishes expressed by the European Parliament and the Member States. In this way the Directive should not only reflect best international practice in this area but should also continue to set a high standard in protecting the financial sector and other vulnerable activities from the harmful effects of the proceeds of crime*". Having reached this conclusion, the European Commission, who has the right of initiative under

¹⁵ It restarted, however, with regard to the so-called gatekeepers: lawyers and accountants.

Community law, presented, in 1999, a Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering. The proposal was ambitious. According to the Explanatory Memorandum, “*as the 1991 Directive moved ahead of the original FATF 40 Recommendations in requiring obligatory suspicious transaction reporting, the European Union should continue to impose a high standard on its Member States, giving effect to or even going beyond the 1996 update of the FATF 40 Recommendations. In particular, the EU can show the way in seeking to involve certain professions more actively in the fight against money laundering alongside the financial sector*”. The main changes introduced by the Proposal with regard to the 1991 Directive were a widening of the prohibition of money laundering to embrace not only drugs trafficking but also all organized crime, and an extension of the obligations of the Directive to certain non-financial activities and professions.

According to the European Union legislative process, a Working Group of the Council¹⁶ was set to analyse the Commission’s Proposal and the European Parliament prepared its opinion. The Council Working Group started to consider the Proposal in late 1999, and concluded its work under the Portuguese Presidency of the European Union during the first semester of the year 2000. The European Parliament, after having considered the Proposal in several different Committees, formally approved its opinion on July 5, 2000. Taking into account the opinion of the European Parliament, as well as the opinion of the Economic and Social

Committee, a political agreement was unanimously reached at the Council level in September 2000 to adopt a Common position of the Council with a view to the adoption of the new Directive. The European Parliament has now to consider whether it fully accepts the views of the Council or still suggests amendments. If the Parliament accepts the Common Position of the Council, the Directive is immediately adopted; if the Parliament makes new suggestions, there will be a conciliation process between the Parliament and the Council.

2. The Contents of the Amendments

The Commission’s proposal had the intention to widen the predicate offences and to extend the scope of the 1991 Directive to several non-financial businesses and professions, since the whole financial sector (including non-bank financial institutions, such as bureaux de change, financial leasing, brokers, dealers, etc.), was already covered. The main changes to the 1991 Directive resulting from the Council’s Common position, and currently under consideration by the European Parliament, affect mainly those areas. However, there are also some other minor changes to clarify some points.

The first clarification affects the definition of “financial institution” to ensure that *bureaux de change* and money transmission/remittance offices, as well as branches located in the Community of financial institutions, whose head offices are inside or outside the Community come explicitly under the directive. It also included in the definition investment firms and collective investment undertakings marketing its units or shares, and thus made them subject to the obligations contained in Directive.

One of the two major changes to the 1991 Directive is the definition of criminal

¹⁶The Council integrates Ministers from each Member State.

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activity. Under the 1991 Directive, criminal activity means “a crime specified in Article 3 (1) (a) of the Vienna Convention and any other criminal activity designated as such for the purposes of this Directive by each Member State”. This was a narrow definition, which was already left behind by the revision of the FATF Forty Recommendations, namely Recommendation 4, which refers to serious crimes. The new EU definition identifies criminal activity with any kind of criminal involvement in the commission of a serious crime. It then defines serious crimes as being, at least, narcotics trafficking, the activities of criminal organisations, fraud against the European Communities’ financial interests; corruption and any offence which may generate substantial proceeds and which is punishable by a severe sentence of imprisonment in accordance with the penal law of the Member State. Moreover, Member States agree that, before three years from the entry into force of the new directive, they will revise the definition of predicate offences to money laundering, (essentially to include all crimes punishable with more than one year imprisonment)¹⁷. With the new wording, two major causes of concern come now explicitly under the definition of criminal activity: organized crime and corruption.

In addition to the widening of the list of predicate offences, the second major change the Common position introduces in relation to the 1991 Directive is the extension of the obligations imposed therein to several non-financial businesses and professions. According to the new Article 2a, Member States shall ensure that the obligations laid down in the Directive are imposed on auditors, external accountants and tax advisors; real estate agents; notaries and other independent legal professionals, dealers in high-value goods and casinos¹⁸. Thus, the European Union tries to give an

answer to the modern trends in money laundering. Actually, there is evidence that the tightening of controls in the financial sector has prompted money launderers to seek alternative methods for concealing the origin of the proceeds of crime, with an increased use of non-financial businesses. Further to accountants and lawyers, with whom we will deal in particular in the next section, real estate agents, dealers in high value goods, whenever payment is made in cash, and in an amount of 15000 Euro or more, and casinos will now be required to comply with the Directive’s obligations. They will have to respect the rules on customer identification, record-keeping, increased diligence, co-operation with law enforcement authorities and internal control and training.

The new directive will also improve the rules on customer identification, in

¹⁷ The full definition of serious crimes in the Common Position reads:

- “Serious crimes are, at least:
- any of the offences defined in Article 3(1)(a) of the Vienna Convention;
 - the activities of criminal organisations as defined in Article 1 of Joint Action 98/733/JHA;
 - fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the protection of the European Communities’ financial interests;
 - corruption;
 - an offence which may generate substantial proceeds and which is punishable by a severe sentence of imprisonment in accordance with the penal law of the Member State.”

Member States shall before [*three years from the entry into force of the Directive*] amend the definition provided for in this indent in order to bring this definition into line with the definition of serious Crime of Joint Action 98/699/JHA. The Council invites the Commission to present before [...] a proposal for a Directive amending in that respect this Directive.

Member States may designate any other offence as a criminal activity for the purposes of this Directive”

particular to deal with the increased risk created by new technologies, Internet banking, direct banking and other types of non-face to face financial transactions. A new Article 3 (10) has been agreed and requires Member States to ensure that specific measures are taken to deal with this problem¹⁹.

3. Lawyers and Accountants - the Gatekeepers

The question of the submission of lawyers and accountants to anti-money laundering obligations has raised controversy. During the last year or two, a new term has made its career in the anti-money laundering jargon: the gatekeeper. A gatekeeper can be defined as someone who is responsible for allowing someone else access to a field, although he/she does not necessarily own the gate or the field he/she allows you access to.

Gatekeepers are, according to the recent terminology, lawyers and accountants. They provide several services that may open “gates” to financial transactions. Such financial transactions may be used for laundering purposes. In fact, financial transactions made for money laundering purposes are no different in substance from legitimate financial transactions: the only difference being the origin of the funds involved. Moreover, lawyers and accountants have been found involved into money laundering schemes, and therefore

¹⁸ Article 2A of the Common position reads: “Member States shall ensure that the obligations laid down in this Directive are imposed on the following institutions:

1. credit institutions as defined in point A of Article 1;
2. financial institutions as defined in point B of Article 1;
and on the following legal or natural persons acting in the exercise of their professional activities:
3. auditors, external accountants and tax advisors;
4. real estate agents;
5. notaries and other independent legal professionals, when they participate, whether:
 - (a) by assisting in the planning or execution of transactions for their client concerning the
 - (i) buying and selling of real property or business entities;
 - (ii) managing of client money, securities or other assets;
 - (iii) opening or management of bank, savings or securities accounts;
 - (iv) organisation of contributions necessary for the creation, operation or management of companies;
 - (v) creation, operation or management of trusts, companies or similar structures;
 - (b) or by acting on behalf of and for their client in any financial or real estate transaction;
6. dealers in high-value goods, such as precious stones or metals, whenever payment is made in cash, and in an amount of EUR 15000 or more;
7. casinos.”

¹⁹ Article 3 (10): “Member States shall, in any case, ensure that the institutions and persons subject to this Directive take specific and adequate measures necessary to compensate for the greater risk of money laundering which arises when establishing business relations or entering into a transaction with a customer who has not been physically present for identification purposes (“non-face to face operations”). Such measures shall ensure that the customer’s identity is established, for example, by requiring additional documentary evidence, or supplementary measures to verify or certify the documents supplied, or confirmatory certification by an institution subject to this Directive, or by requiring that the first payment of the operations is carried out through an account opened in the customer’s name with a credit institution subject to this Directive. The internal control procedures laid down in Article 11 (1) shall take specific account of these measures.”

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attention has been brought to the role of “gatekeepers.

Gatekeepers may provide numerous services, which can be misused for money laundering purposes: introduction to banks and other financial institutions, management of deposit, savings or securities accounts, real estate transactions, investment services, company formation, creation of trusts and financial and tax advice. However, lawyers, and in some cases accountants, have a special privileged relation with their clients within the framework of the fundamental right of defence. Therefore, the imposition of the obligations laid down in the directive on lawyers and accountants raises some difficult issues, namely on how to harmonize the requirements of the professional secrecy and the needs to fight organized crime. A balanced solution requires a lot of good sense, and a particular ability to find the adequate answers to several questions, specifically when lawyers and accountants should be subject to anti-money laundering provisions and when their activities should be excluded from any such provisions.

After a deep debate, the Council decided that notaries and independent legal professionals, as defined by the Member States, should be made subject to the provisions of the Directive when participating in certain financial or corporate transactions, since in these transactions there is a greater risk of their services being misused for money laundering purposes. However, it is acknowledged that where independent legal professionals are ascertaining the legal position for a client or representing a client in legal proceedings, there should be an exemption from any obligation to report any information obtained in the course of ascertaining the legal position for a client or before, during or after judicial

proceedings. The same kind of reasoning applies to auditors, external accountants and tax advisors who, in some Member States, may defend or represent a client in the context of judicial proceedings or ascertain a client's legal position.

The new Article 2 A-5 (see footnote 18), subjects notaries and other independent legal professionals to the obligations laid down in the directive in two different situations: when they assist in the planning or execution of certain transactions for their clients or when they act on behalf of their clients in any financial or real estate transaction. The rationale for this solution is the idea that the privilege of professional secrecy was granted to the lawyer/customer relationship to safeguard the fundamental right of defence. The intervention in financial transactions, namely in the transactions referred to in the new directive, cannot be construed as a typical act of the lawyer's profession, and therefore does not deserve that kind of protection. On the other hand, from the axiological point of view, the value of the fight against serious criminality precedes, in these cases, other values.

Another issue that had to be solved in the new directive was the question of the entity that should receive suspicious transactions reports from notaries and other independent legal professionals. The solution found was that Member States should be allowed, in order to take proper account of these professionals' duty of discretion owed to their clients, to nominate the bar association or other self-regulatory bodies for independent professionals as the body to which reports on possible money laundering cases may be addressed by these professionals. Thus, the new Article 6 (3) states that “*In the case of the notaries and independent legal professionals referred to in Article 2a(5), Member States may designate an appropriate self-*

regulatory body of the profession concerned as the authority to be informed of the facts referred to in paragraph 1(a) and in such case shall lay down the appropriate forms of cooperation between that body and the authorities responsible for combating money laundering.

Member States shall not be obliged to apply the obligations laid down in paragraph 1 [obligation to report suspicions and to provide the authorities with all necessary information] to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings”

This is the status of the discussions as far as the European Union directive is concerned. A final word, however, should be said on other developments at the EU level. A Political agreement has been reached on a framework decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, and also on the extension of Europol’s mandate to laundering transactions in general. A Decision has been approved facilitating cooperation and information exchange between the financial intelligence units of the Member States. All these measures try to make the fight against financial crime more effective.

IV. THE PORTUGUESE EXPERIENCE

Portugal being a member of the FATF and of the European Union, the Portuguese experience follows naturally the development of the fight against money laundering in these “fora”. From this point of view, more than repeating the contents of all legislation, which materializes, and in some cases anticipates, the solutions of the Forty Recommendations and of the EU Directive, it might be more interesting to draw the attention to one particular aspect of the implementation of an anti-money laundering system: the need for co-operation. Co-operation needed, first, between the legislators and the financial, judicial and law enforcement sectors, and, after the entry into force of the legislation, among these sectors.

A. The Development of the Portuguese Anti-Money Laundering Legislation

The development of the Portuguese legislation against money laundering started with the implementation of the rules of the 1988 United Nations Convention (the Vienna Convention).

In January 1993, a Decree-Law was issued (Decree-Law nr. 15/93, dated 22-01-93), which incriminated autonomously the money laundering conduct, i.e., created the offence of drug money laundering. This was a major change, since before the entry into force of such law, money laundering was punishable within the framework of the obstruction to justice offence, but there were no cases under this legislation.

The first sign of the need for co-operation in this field arose during the drafting of the Decree-Law (actually during the drafting of the Bill to be approved by the Parliament authorising the Government to legislate in this field, due to the exclusive

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competence of the Portuguese Parliament to legislate on criminal matters under Portuguese constitutional law). In fact, that legislation was prepared by a multidisciplinary group with representatives of the Ministry of Finance, Ministry of Justice, central Bank, Office of the Attorney-General, Criminal Investigation Police, Customs Authorities (as well as Health and Education Ministries, since we were dealing also with drug trafficking).

This proved to be very interesting because, since the beginning, all Ministries, Departments and Agencies to be involved in the fight against money laundering had an opportunity to give their opinions and consider each others' issues in the drafting of the legislation itself. This method was followed in the further developments of the Portuguese legislation, in particular in the implementation of the European Community Directive on money laundering, and in the development of new initiatives in the fight against money laundering.

The Directive was implemented through Decree-Law nr. 313/93 (dated September 15, 1993), which created a number of obligations for all financial institutions (either bank or non-bank financial institutions, including currency exchange businesses - "bureaux de change") and for offshore branches. The obligations created by the Decree-Law were our already known obligations imposed by the Directive: customer identification, record keeping, special diligence, report of suspicious transactions, and training and internal control. The Decree-Law was also drafted by a task force with representatives from all the already mentioned Ministries and Agencies, the only peculiarity being, in this case, the consultation made to the Portuguese Banking Association, which had almost all Portuguese Banks as

members.

Finally, this method of co-operation between legislators and ministries and agencies involved in the fight against money laundering was also followed in the last important development of the Portuguese legislation, which we may call stage III. With the co-operation of the Ministry of Commerce and of both the General Inspectorate of Gambling and the General Inspectorate of the Economic Activities, as well as of the other entities already mentioned, a new Decree-Law was drafted and published on December 2, 1995 (Decree-Law nr. 325/95).

This Decree-Law anticipates almost all the solutions that are now being discussed at the European Union level within the framework of the amendment of the 1991 Directive. In fact, save for the issues related to lawyers and accountants²⁰, all other matters are already covered. It extends the offence of money laundering beyond drug proceeds to those arising from all serious economic crimes and from other crimes which generate important proceeds (terrorism, arms trafficking, extortion, kidnapping, pandering, corruption, etc.). It extends some of the obligations imposed to the financial institutions (customer identification for cash transactions above a given threshold, record keeping and suspicious transaction reporting) to some non-financial businesses. The entities covered by this Decree-Law are casinos, real estate agents, bookmakers and lottery dealers and traders in goods of high individual value (precious stones and metals, antiques, objects of art, aircrafts, boats and automobiles).

²⁰ It should be said, however, that in the beginning of the nineties the intervention of Portuguese lawyers in financial transactions was much more reduced than some years later.

The first conclusion, that can be drawn from the fact that this legislation has been approved without opposition, is that the involvement in its drafting of the several Ministries and Agencies anyhow related with the fight against money laundering has created a “consensus” not only about its need, but also about its content. The point is particularly important since some of the solutions introduced by the legislation were not quite orthodox. This, if nothing else, would be an important reason to start the national co-operation against money laundering at the level of the drafting of the legislation.

B. The Legislative Solutions in Practice

Once entered into force, the legislation requires the co-operation of the entities which have to fulfil the obligations created by the law (financial or non-financial institutions either privately or publicly owned) and the different authorities with responsibilities in the fight against money laundering (either judicial or supervisory). The system that the Portuguese legislation has created is the following:

- (i) The institutions covered by law (all financial institutions, including all non-bank financial institutions, and some non-financial institutions) have to comply with the regulations and to fulfil a certain number of obligations, the most significant of which, by its external relevance, is the obligation to report suspicious transactions;
- (ii) The supervisory authorities (including those that control the activities of non-financial institutions) are required to control the compliance of the supervised or controlled entities and have the power to apply administrative sanctions in case of non-compliance. The administrative

sanctions are, in most cases, pecuniary, but, in the extreme cases, can be either the suspension or the revocation of any authorisation needed for the entity to carry on its business;

- (iii) The report of suspicious transactions is made directly to the Office of the Attorney-General, who commands both the competent Public Attorney to open an inquiry and to start a procedure, and the special unit of the Criminal Investigation Police, which centralises the reports (BIB-FIU), to carry on the investigations;
- (iv) Should the investigations be successful, the competent Public Attorney brings the case to court for judgement.

One issue has to be solved before and during the course of the investigations: the problem of bank secrecy. As far as bank secrecy is concerned, it must be said that Portugal, due to historic reasons, which had their genesis in the years immediately after the 1974 Revolution, has a strong bank secrecy regime. Only in very few cases, namely in cases of judicial investigations of criminal activities, is bank secrecy overridden. However, in cases of money laundering, the Portuguese legislation made it clear that there is no room for bank secrecy. This is of vital importance for the development of the fight against money laundering. The existence, in some countries, of bank secrecy rules which prevail, even in cases of criminal activities such as money laundering, can be held responsible for some of the unsuccessful cases in the fight against money laundering at the international level, and was one of the reasons that lead the FATF to engage in the Non-cooperative Countries and Territories exercise.

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The Portuguese system overrides the bank secrecy in cases of money laundering and the abrogation of the bank secrecy rules has two important consequences. The first is that any institution subject to bank secrecy rules (or other rules of professional secrecy), which has to comply with the obligation to report suspicious transactions, is exempted from any liability whatsoever, provided that it has reported in good faith. The disclosure of information to the authorities, by its own initiative of the reporting entity, does not involve any breach of any duty of secrecy or any liability provided that, as mentioned, such disclosure is made in good faith (Article 13 of Decree-Law nr. 313/93, dated September 15, 1993, applicable to the non-financial sector by means of article 9 of Decree-Law nr. 325/95, dated December 2, 1995). The second consequence is that no entity can refuse the disclosure of any information requested by the competent judicial authority in cases of investigation of money laundering (article 60 of Decree-Law nr. 15/93, dated January 22, 1993). According to this rule the communication of any requested information, either manually stocked or in a computer data-base, or the surrender of requested documents may not be refused by any entity, either public or private, the only peculiarity being the fact that, in the case of financial institutions, the request is made through the central bank.

A system in action to fight money laundering requires a deep co-operation of many entities, institutions and authorities, but one clear conclusion that can be drawn from the Portuguese experience is that there cannot be any room for bank secrecy rules in the fight against the laundering of the proceeds of serious crimes.

Portugal has not created any special body to ensure co-operation between the domestic authorities concerned. However,

the Portuguese delegation to the FATF, which includes representatives from the Ministries of Finance and Justice, from the Supervisory Authorities (central Bank, Insurance Institute and Securities Commission), as well as from the Office of the Attorney General and the Criminal Investigation Police, has been the forum to share experiences, co-ordinate actions and suggest improvements either to the legislation or to the practice. On the other Portugal has, since 1991, a very comprehensive domestic legislation governing international judicial co-operation. It provides for full mutual co-operation with the authorities of other countries in the fields of extradition, transfer of criminal cases and execution of sentences, as well as the transfer of convicted persons and assistance in criminal matters, including the detection, seizure and confiscation of the proceeds of criminal activities. These provisions were contained in Decree-Law Nr. 43/91 of 22 January, which has been substituted and reinforced by Decree-Law Nr. 144/99 of 31 August, which entered into force on 1 October 1999. This text is applicable when there is no treaty or convention with a country, and is based on the principle of reciprocity with respect to coercive measures. When there is an existing treaty or convention laying down the framework and terms of co-operation, this legislation still applies, but it is limited to the subsidiary role of defining co-operation procedures and determining which entities implement these procedures.

C. Training

One final word should be written about training and the co-operation in this field. When fighting money laundering, it is necessary to ensure that financial institutions know what are the needs of law enforcement people and that law enforcement people know how financial transactions are carried on. It is also

further needed that all are aware of how money launderers work and that everybody is kept updated with the new technologies used for money laundering purposes. Training, together with some form of feedback to the reporting institutions, is thus of paramount importance.

Considering this, in Portugal, a training programme was prepared, based on a Protocol signed between the Criminal Investigation Police School of the Ministry of Justice and the Training Institute of the Portuguese Banking Association. According to this programme, seminars were held for the staff of financial institutions with the presence of speakers from the School of the Criminal Investigations Police and, on the other hand, senior staffs from financial institutions and from the supervisory authorities of financial institutions have participated in sessions for the students of the Criminal Investigation Police School.

This co-operation has also proved to be of great importance, not only because it permitted to share experiences between people with different backgrounds and not always used to work together (police people and financial people), but also because it helped to build the basis for an informal co-operation between the people involved. This informal co-operation has proved to be, in some cases, the main key for success in the fight against money laundering.

The Portuguese legislation has had during the last years some other minor amendments in order to improve its effectiveness. As it was acknowledged during FATF evaluations, the Portuguese authorities have worked very hard to establish a particularly comprehensive anti-money laundering system. All players, in both the public and the private sector, have mobilised their forces to implement wide-ranging prevention measures. The

main task is now to ensure the correct application of the existing legislation in order to improve the effectiveness of the anti-money laundering system. This will depend, however, not only of the domestic efforts, but also of the degree of international co-operation.

V. CONCLUSION

A huge effort is being made worldwide to counter the laundering of the proceeds from serious crimes. The FATF, The European Union, and many countries and jurisdictions, as well as many international Organisations are taking measures to eradicate this plague from the face of Earth. The FATF strategy to create a worldwide anti-money laundering network, with the co-operation of FATF-style regional bodies, the European Union improvement of the legislation of their Member States, and the efforts of many States to introduce more effective measures to fight financial crime are concurring to make this objective achievable. The most recent United Nations Convention Against Transnational Organized Crime (Palermo Convention), open for signature on the 12th of December 2000, will undoubtedly represent a huge step forward and will give a further impulse to the current fight.

However, it should be retained that the basis for success in this field is co-operation. Therefore, it is of paramount importance to ensure that all the pending efforts to improve the anti-money laundering systems keep or increase a high degree of co-operation. This applies to the FATF exercise on NCCT's, as well as to the review of the Forty Recommendations, where co-operation with FATF-style regional bodies has to be warranted. It applies to the European Union efforts, where co-operation among Member States should be increased. It applies at the domestic level, where co-operation between different

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agencies and different sectors is absolutely needed. Finally, it applies to the work of relevant international Organisations.

The fight against money laundering became somehow fashionable in the last years. Ten years ago, only a few pioneers were engaged, in very difficult conditions, it must be said, in the dissemination of the anti-money laundering idea. Today, many entities, bodies, organisations, even commercial companies, have initiatives on the fight against money laundering. All these entities have their own agendas and coordination is sometimes very difficult. However, further to the co-operation that is needed, an effort of coordination should be made to avoid duplication and other forms of wastefulness.

CANADA'S ANTI-MONEY LAUNDERING REGIME

*Daniel P. Murphy **

I. INTRODUCTION

Canada enacted criminal law which, *inter alia*, criminalized money laundering in 1989. Part XII.2 of the *Criminal Code of Canada*¹ contains a money laundering offence². This Part also establishes all the essential provisions required to seize, restrain and ultimately forfeit “proceeds of crime”³. That Part is the procedural foundation for most money laundering investigations in Canada. The provisions in the Part go on to limit the crimes for which special search, restraint and forfeitures orders are available to a number

of predicate offences, which Canadian law describes as “enterprise crime offences”⁴.

There is some thought of a revision to the existing provisions so that proceeds of all crimes would be covered by the Part XII.2 scheme.⁵ The problem with a law that attempts to list crimes, which may result in forfeitures, is that individuals frequently migrate to non-listed crimes for profit. They can avoid the loss of their criminal profits and, ultimately, they become more successful criminals.⁶

In the last decade there has been a concerted effort to estimate the magnitude of the money laundering problem. In UNAFEI's 117th International Senior Seminar Rationale and Objectives document the magnitude of the laundering phenomenon is described in the seminar rationale. I was impressed with that document's references to US\$300 to \$500 billion in money laundering from the drug trade alone. I was as impressed with the reference to the Bank of Credit and Commerce International (BCCI) affair and the seizure of US\$12 Billion in assets.

In spite of those figures, I always asked myself why we should be concerned with the magnitude question. The magnitude of a problem is important if you are considering the issue *ab initio*. You may also need to understand the magnitude of the problem if you have to determine the

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¹ Revised Statutes of Canada, 1985, Part XII.2, as amended. This can be accessed, over the internet, at <http://canada.justice.gc.ca/en/laws/C-46/36036.html#rid-36081>

² Section 462.31. An identical money laundering offence was included in the relevant drug law. Subsequently, money laundering offences were included in the new *Controlled Drugs and Substances Act*, the *Customs Act*, and the new *Corruption of Foreign Public Officials Act*. As appropriate, money laundering offences are included in other federal laws.

³ The *Code* creates an expansive definition of proceeds. It includes proceeds from Canadian and foreign offences. The definition reads as follows :

“proceeds of crime” means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of

(a) the commission in Canada of an enterprise crime offence or a designated substance offence, or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated substance offence.

⁴ Section 462.3 sets out the list of relevant offences. Currently, the predicate offences include 48 broad classes where the common element is that the offence could generate profits (i.e. “proceeds of crime”).

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amount of investigative and prosecution resources you propose to put against the issue. It should not become an overarching issue since such figures are impossible to prove and as difficult to justify. The simple fact is that criminals launder their profits of crime to defeat a state's attempt to seize those profits. I suggest that the magnitude issue is less relevant to a better appreciation of the approaches States can take to the money laundering problem. Naturally, this assumes that countries agree that money laundering is a criminal justice issue.

There have been numerous studies on the harm to national economies and the global financial system as a result of money laundering.⁷ I do not intend to discuss the magnitude of money laundering issue. I take the phenomenon as a truism and the magnitude issue is less important than the ability to investigate and prosecute (civilly or criminally). In Canada's case we have elected to investigate and prosecute money laundering under our criminal law.⁸ Criminals will move their criminal profits, abuse the financial system and ignore national laws because they are criminals. Anyone who sells deadly drugs, illegally,

⁵ The initial impetus for criminal forfeitures, at the international level, can be found in the 1988 *Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. Pressure to expand beyond a drug based attack against criminal profits developed in the 1985 *Milan Plan of Action* (i.e. a Plan adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders) and the 1994 *Naples Political Declaration and Global Action Plan*. The Naples meeting was the precursor to the very recent *United Nations Convention against Transnational Organized Crime*.

The Financial Action Task Force [(see: <http://www.oecd.org/fatf/index.htm>), an international body that emerged from an initiative of the 1989 G7 Summit, as well as the growth of regional FATF type bodies (such as the Asia/Pacific Group on Money Laundering (APG) (see: http://www.oecd.org/fatf/Ctry-orgpages/org-apg_en.htm) and the Caribbean Financial Action Task Force (CFATF) (see: http://www.oecd.org/fatf/Ctry-orgpages/org-cfatf_en.htm)] advocated a broadly based money laundering provision. This is the clear intent of the FATF's *Recommendation 4*. It reads as follows:

Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country

would determine which serious crimes would be designated as money laundering predicate offences.

⁶ In 1892 Canada abolished the common law's historic ability to forfeit upon conviction for a felony. The 1892 Code prohibited "any attaindre or corruption of blood, or any forfeiture or escheat" but it retained the ability to forfeit as part of a sentence. Until 1989 forfeitures were reserved to specified things (e.g. guns, explosives) and offences. The new provisions implemented the 1988 Vienna Conventions requirements, expanded the concept to the listed enterprise crimes and created a criminal offence of money laundering.

⁷ The Basel Committee on Banking Supervision (see <http://www.bis.org/>) developed the "*Core Principles for Effective Banking Supervision*" (see: <http://www.bis.org/publ/bcbs30a.pdf>). In addition, the Basel Committee's study on "*Prevention of Criminal Use of the Banking System for the purpose of Money-Laundering*" (see: http://www.oecd.org/fatf/pdf/basle1988_en.pdf) illustrates the financial community's concern with money laundering. Similar concerns can be seen in the securities and investment sector (see the International Organisation of Securities Commissions' *Core Principles*, at <http://risk.ifci.ch/144440.htm>), and the insurance sector, where various principles and standards of the International Association of Insurance Supervisors (IAIS) and the Offshore Group of Insurance Supervisors consider money laundering issues

for profit does not care that they may have to bribe a banker or corrupt a government official. That type of activity is a cost of doing business. I expect that other experts at the Seminar will be better able to fully discuss the magnitude of the money laundering phenomenon.⁹ I leave that issue to those experts.

The more interesting issue is how a country approaches money laundering problems. What are the lessons, if any, it has learned? What are its roadblocks to effective money laundering investigations and prosecutions? How can nations combine their sovereignties to react to criminals who use territorial sovereignty to shelter their profits or hinder investigations? These are all valid questions. In this paper I will try and answer some questions that develop from Canada's anti-money laundering regime. In a second discussion I will examine the emerging development of privacy laws, electronic cash and similar issues in the anti-money laundering context.

II. INVESTIGATIVE AND FORFEITURE'S ROLE IN CANADA'S PROCEEDS OF CRIME REGIME

The 1989 revision to Canada's Criminal Code built upon earlier work. In 1973 the offence of possession of property obtained by crime was added to the Canadian

criminal law.¹⁰ The possession offence was not generally used. In the early 1980 the RCMP established an anti-drug profiteering unit to attack the property obtained by drug traffickers. They targeted a bank account but the courts ultimately overturned their search warrant. That warrant purported to seize the money held on deposit in the bank and the court held that a warrant could only seize tangibles while the money on deposit was an intangible.¹¹

The inability of the police to freeze the assets in the Montreal bank account created added impetus for the subsequent major proceeds of crime amendments. The Part XII.2 scheme created an ability to trace and freeze proceeds of crime at the investigative stage, long before charges were laid.¹² Once property is seized or retrained further provisions apply to the property. The court has jurisdiction to accept applications to challenge the seizure or restraint orders. A person effected by the seizure, (i.e. the person in possession or a person having a valid interest in the thing) can seek to overturn the order or,

⁸ On December 5, 2000 the Province of Ontario tabled the *Remedies for Organized Crime and Other Unlawful Activities Bill*, a new civil forfeiture of proceeds of crime law. (See Bill 155, at <http://gateway.ontla.on.ca/library/bills/155371.htm>). It is an interesting option but investigative and litigation results will be the final arbiter of the success of that approach.

⁹ If this assumption is incorrect the FATF publishes reports from its annual money laundering trends and typologies meetings. (see http://www.oecd.org/fatf/FATDocs_en.htm#Trends)

¹⁰ S.C., 1972, C.13, s.27. The provision is now found in subsection 354(1). It creates an offence punishable by two years, whenever anyone possesses property obtained from the commissions of an indictable offence. The subsections states:

354. (1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

(a) the commission in Canada of an offence punishable by indictment; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

¹¹ *Royal Bank v. Bourque* (Sub nom. *Quebec A.G. v. Royal Bank*) (1985) 18 C.C.C. 98

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alternatively, seek payments from the targeted assets to cover reasonable living business and legal expenses.¹³

Any proceeds investigation can proceed simultaneously with the investigation of a predicate offence. It can follow the predicate offence or it can be a stand-alone investigation. This is because the possession offence is itself a predicate charge. The Canadian system is flexible. A criminal could be charged and convicted of the single predicate offence and all of her proceeds of crime could be forfeited. This forfeiture must occur at the time of sentence for the offence. The onus on the prosecutor is to establish that the property is proceeds from the offence charged, on a balance of probabilities standard of proof.¹⁴

Alternatively, the offender could have served their time on the principal charge and subsequently face a possession of proceeds of crime charge that allows for forfeiture. They could also be charged with a money laundering offence. In those scenarios the forfeiture options continue. Independent money launders, not involved in the underlying offences that gave rise to the proceeds of crime, could also be investigated and charged with that offence. Forfeiture is available. In addition, Canadian law, for any drug or organized crime offence, provided that "offence related property", sometimes referred to as an instrumentality, can be seized, restrained and subsequently forfeited upon

conviction.

**III. MONEY LAUNDERING,
TRANSACTION REPORTING AND A
FINANCIAL INTELLIGENCE UNIT,
CANADA'S REGIME**

In 1991 Canada enacted a *Proceeds of Crime (money laundering) Act*.¹⁵ This Act's declared object, as provided in section 2, specified that:

The two referenced sections are Canada's money laundering offences at the time the Act was drafted. This object was accomplished by a regulatory package¹⁶. The regulations established financial sector account creation; customer identification; record keeping; and related record requirements. The regulations came into force on March 26, 1993 and the result partially satisfied international expectations. It created a paper trail for money laundering investigations and prosecutions. It did not oblige effected businesses to actually report suspicious transactions.

There was no specific bank secrecy law in Canada when the Act became law. Financial institutions and other effected business could "voluntarily report" suspicious transactions.¹⁷ Subsequent developments resulted in the new *Proceeds*

¹² Sections 462.32 and 33 of the *Criminal Code* allow applications to the court with evidence that supports a reasonable belief that the targeted property may be forfeited. Subsection 462.35 provides that the seizure or restraint is in force for six months. It is renewed once charges are laid but it can be extended if the investigation is continuing.

¹³ Section 462.34

¹⁴ Section 462.37(1)

¹⁵ Statutes of Canada 1991,c.26, in R.S.C 1985, C. P-24.5 as amended. (see <http://canada2.justice.gc.ca/en/laws/P-24.5/79312.html>)

"(T)he object of this Act is to establish record-keeping requirements in the financial field in order to facilitate the investigation and prosecution of offences under subsection 462.31(1) of the *Criminal Code* and subsection 9(1) of the *Controlled Drugs and Substances Act*.

¹⁶ *Proceeds of Crime (Money Laundering) Regulations*, as amended, SOR/93-75 (see <http://canada2.justice.gc.ca/en/laws/P-24.5/75/145024.html>)

of *Crime (Money Laundering) Act*¹⁸. This new law is now being implemented over a suitable transition period. Prior to examining these new provisions it is important to consider other legal developments.

IV. INCREASED PRIVACY EXPECTATIONS

Privacy expectations of Canadians have significantly evolved since 1993 when the first *Proceeds of Crime (money laundering) Act* came into force. The precursor to increased privacy expectation is seen in constitutional protections in Canada's 1984 *Charter of Rights and Freedoms*.

Subsequently, the courts have adopted an expansive interpretation of an individual's reasonable expectation of privacy.¹⁹ This development evolved as courts interpreted the scope of s. 8 of the *Charter* in various cases.

Concomitantly, privacy expectations became the banner for significant changes as a result of the explosive growth of the Internet and the need to protect electronic commerce. This led to a new law that has a direct impact on every business in Canada. The *Personal Information Protection and Electronic Documents Act*²⁰. It came into force on January 1, 2001. It specifically covers banks; other federally regulated financial institutions; and other federal business organizations. Transitional provisions provide that all

¹⁷The common law established an expectation of confidentiality between a financial institution and its client. A reporting concept was a voluntary obligation in light of the confidentiality relationship between a financial institution and its client. Section 462.47 of the *Criminal Code* (see <http://canada.justice.gc.ca/en/laws/C-46/36036.html#rid-36081>) developed the voluntary reporting theory by providing as follows :

"For greater certainty but subject to section 241 of the *Income Tax Act*, a person is justified in disclosing to a peace officer or the Attorney General any facts on the basis of which that person reasonably suspects that any property is proceeds of crime or that any person has committed or is about to commit an enterprise crime offence or a designated substance offence."

¹⁸The most important development was the significant revision to the FATF's Recommendation 15. Its predecessor called upon States to consider a requirement to report suspicious transactions to competent authorities. Canada's voluntary reporting regime could be said to comply with the earlier recommendation. It did not comply with the revised recommendation which states, as follows:

15. If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.

¹⁹For many years the leading case on bank secrecy was the *Tournier v. National Provincial Bank of England*, [1924] 1 K.B. 461 (C.A.). See also *Canadian Imperial Bank of Commerce v. Sayani* [1994] 2 W.W.R. 260 (B.C.C.A.). In a 1993 case, *R. v. Plant* (<http://www.canlii.org/ca/cas/scc/1993/1993scc96.html>), the Supreme Court of Canada held that s. 8 of the *Charter* protected a biographical core of personal information maintained by a commercial enterprise in certain scenarios. In *Plant* the police obtained hydro consumption records from a city utility company without a search warrant. Justice Sopinka, for the majority, opined on the issue of access to commercial information as follows :

"The United States Supreme Court has limited application of the Fourth Amendment (the right against unreasonable search and seizure) protection afforded by the United States Constitution to situations in which the information sought by state authorities is personal and confidential in nature: *United States v. Miller*, 425 U.S. 435 (1976). That case determined that the accused's cheques, subpoenaed for evidence from a commercial bank, were not subject to Fourth Amendment protection. While I do not wish to be taken

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other Canadian businesses will become subject to that law within three years. This law controls the business collection of personal information and the subsequent use and disclosure of such information. I will address the investigative impact of this initiative in another paper but, for the present, it is sufficient to indicate that a customer's personal information held by any business in Canada now has greater protection than ever.

**V. THE NEW PROCEEDS OF CRIME
(MONEY LAUNDERING) ACT**

The development of an increased privacy concern for personal information held by commercial businesses is crucial to any appreciation of the evolution of Canada's new *Proceeds of Crime (Money Laundering) Act*. This law received assent on June 29, 2000 Canada's but it is, as yet, not fully in force. Part III was quickly proclaimed in

force on July 5, 2000. That Part was implemented to provide sufficient opportunity to establish and equip Canada's new Financial Transactions and Reports Analysis Centre. The remainder of the Act will come into force with a complete regulatory package, after the Centre is ready for business.

All businesses covered under the predecessor Act will remain covered in the new law. The new Act allows additional sectors to be added by regulation. The Act and Regulations will also create a cross border currency regime. Individuals and businesses that conduct cross-border transfers of large amounts of money will be required to report these transfers to Canada Customs. Again, regulations will be developed to allow effective customs reporting and forfeiture provisions. The Act further provides that unreported cash at the border can be forfeited and available, in appropriate cases, for sharing²¹.

as adopting the position that commercial records such as cancelled cheques are not subject to s. 8 protection, I do agree with that aspect of the *Miller* decision which would suggest that in order for constitutional protection to be extended, the information seized must be of a "personal and confidential" nature. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. The computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence."

²⁰ S.C., 2000, C.5

The new, independent, financial intelligence unit, known as the Financial Transactions and Reports Analysis Centre of Canada (the Centre), was established to operate as the competent authority for the purposes of the FATF's Recommendation 15. This Centre will receive and administer the information transmitted to it in accordance with the Act. It will analyse the information in all filed reports and disclose designated information to an appropriate police force, when specified conditions are met.

The establishment of a suspicious transaction-reporting centre in Canada is a novel development in Canada's law. The concept has been widely accepted throughout the world²². International pressure to establish a financial intelligence unit must be considered in

²¹ S.C. 2000, C. 17, s. 22

light of Canada's constitutional framework and its *Charter*. Our *Charter* normally requires a prior judicial authorization before an agent of the state, such as the new Centre, obtains information.²³ This had a significant impact upon the drafters as the new law developed. The RCMP, as a law enforcement agency, could not host the Centre without creating a Charter risk. Essentially, if a law enforcement agency, directly or through a subsidiary part of the enforcement agency, obtained personal information without a warrant. It operates under a significant section 8 *Charter* risk. The solution was to establish a new independent agency.

This new Centre was deliberately established without investigative powers. The law also placed significant restrictions on the amount of data that the Centre could divulge to investigators.²⁴ Otherwise, the Centre's information collection activity activities would be challenged. Its

authority to collect suspicious or proscribed transaction reports may have been seen as a backdoor device for law enforcement. The Charter required law enforcement to use search warrants and similar prior authorizations. The new Centre was a deliberate choice in the Proceeds of Crime (Money Laundering) Act as a suitable compromise to undertake a regulatory and analysis function, rather than a law enforcement function.

When fully implemented, the Act repeals its predecessor. Structurally, the Act consists of five parts. Part I contains specific objects²⁵ which define the purposes for the legislation. This Part obliges a designated business to make and maintain records; report either questionable (i.e. suspicious) or proscribed financial transactions²⁶ to the new Centre. The record keeping and maintenance provisions will continue to facilitate an investigative paper trail. Law enforcement will have to

²² This is best seen in the work of the Egmont Group.)

²³ The seminal Supreme Court of Canada's decision on point is *R. v. Hunter and Southam* [1984] 2 S.C.R. 145

²⁴ Section 55 first states that the Centre may not disclose the information it collects, other than under the provisions set out in subsection 55(3), (4) and (5). Those subsections provide, as follows :

(3) If the Centre, on the basis of its analysis and assessment under paragraph 54(c), has reasonable grounds to suspect that designated information would be relevant to investigating or prosecuting a money laundering offence, the Centre shall disclose the information to

- (a) the appropriate police force;
- (b) the Canada Customs and Revenue Agency, if the Centre also determines that the information is relevant to an offence of evading or attempting to evade paying taxes or duties imposed under an Act of Parliament administered by the Minister of National Revenue;

(c) the Canadian Security Intelligence Service, if the Centre also determines that the information is relevant to threats to the security of Canada within the meaning of section 2 of the *Canadian Security Intelligence Service Act*; and

(d) the Department of Citizenship and Immigration, if the Centre also determines that the information would promote the objective set out in paragraph 3(j) of the *Immigration Act* and is relevant to determining whether a person is a person described in subsection 19(1) or (2) or section 27 of that Act or to an offence under section 94.1, 94.2, 94.4, 94.5 or 94.6 of that Act.

(4) The Centre may disclose designated information to an institution or agency of a foreign state or of an international organization established by the governments of foreign states that has powers and duties similar to those of the Centre if

(a) the Centre has reasonable grounds to

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use search warrants or voluntary disclosures to access that trail. On the other hand, the Centre will have significant financial information for its purposes

Part II creates cross border currency and monetary instrument reporting obligations. Persons must report to

suspect that the information would be relevant to the investigation or prosecution of a money laundering offence or a substantially similar offence; and

(b) the Minister has, in accordance with subsection 56(1), entered into an agreement or arrangement with that foreign state or international organization regarding the exchange of such information.

(5) The Centre may disclose designated information to an institution or agency of a foreign state that has powers and duties similar to those of the Centre if

(a) the Centre has reasonable grounds to suspect that the information would be relevant to the investigation or prosecution of a money laundering offence or a substantially similar offence; and

(b) the Centre has, in accordance with subsection 56(2), entered into an agreement or arrangement with that institution or agency regarding the exchange of such information.

²⁵ The objects are found in s. 3 and state :

The object of this Act is

(a) to implement specific measures to detect and deter money laundering and to facilitate the investigation and prosecution of money laundering offences, including

(i) establishing record keeping and client identification requirements for financial services providers and other persons that engage in businesses, professions or activities that are susceptible to being used for money laundering,

(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary

Canada's Customs and Revenue Agency²⁷. Persons will be obliged to report the importation or exportation of proscribed currency or monetary instruments. Part III establishes the Centre to collect, analyse, assess and disclose designated information in order to assist in the detection, prevention and deterrence of

instruments, and

(iii) establishing an agency that is responsible for dealing with reported and other information;

(b) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves; and

(c) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering.

²⁶ Two sections are relevant. The first, section 7, deals with suspicious transaction reporting; the second, section 9, deals with proscribed transaction reporting. Section 7 provides, as follows:

7. In addition to the requirements referred to in subsection 9(1), every person or entity shall report to the Centre, in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence.:

Section 9 provides for proscribed transaction reporting, as follows:

9. (1) Every person or entity shall report to the Centre, in the prescribed form and manner, every prescribed financial transaction that occurs in the course of their activities.

The Act specifies that something is proscribed by regulations. Therefore, the subsequent regulatory package will establish when specific transactions,

laundering the proceeds of crime. The Centre is also responsible for ensuring compliance with Part I of the Act. Part IV authorises the Governor in Council to make regulations. Part V creates offences, including the failure to report suspicious financial transactions and the prohibited use of information under the control of the Centre.²⁸

VI. CURRENT MONEY LAUNDERING INVESTIGATIVE SITUATION IN CANADA

The Royal Canadian Mounted Police (RCMP), within its federal policing portfolio, operate the national proceeds of crime programme.²⁹ They have developed thirteen Integrated Proceeds of Crime (IPOC) Units tasked with investigative responsibility for proceeds of crime. These units include peace officers (RCMP members and seconded officers from local

as opposed to suspicious transactions, will have to be reported to the Centre.

²⁷ This will comply with the FATF's Recommendations 22. The Act establishes a cross border reporting regime as follows:

12. (1) Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations, the importation or exportation of currency or monetary instruments of a value greater than the prescribed amount.

(2) A person or entity is not required to make a report under subsection (1) in respect of an activity if the prescribed conditions are met in respect of the person, entity or activity, and if the person or entity satisfies an officer that those conditions have been met.

(3) Currency or monetary instruments shall be reported under subsection (1)

(a) in the case of currency or monetary instruments in the actual possession of a person arriving in or departing from Canada, or that form part of their baggage if they and their baggage are being carried on board the same conveyance, by that person;

(b) in the case of currency or monetary instruments imported into Canada by courier or as mail, by the exporter of the currency or monetary instruments or, on receiving notice under subsection 14(2), by the importer;

(c) in the case of currency or monetary instruments exported from Canada by courier or as mail, by the exporter of the currency or

monetary instruments;

(d) in the case of currency or monetary instruments, other than those referred to in paragraph (a) or imported or exported as mail, that are on board a conveyance arriving in or departing from Canada, by the person in charge of the conveyance; and

(e) in any other case, by the person on whose behalf the currency or monetary instruments are imported or exported.

(4) If a report is made in respect of currency or monetary instruments, the person arriving in or departing from Canada with the currency or monetary instruments shall

(a) answer truthfully any questions that the officer asks with respect to the information required to be contained in the report; and

(b) on request of an officer, present the currency or monetary instruments that they are carrying or transporting, unload any conveyance or part of a conveyance or baggage and open or unpack any package or container that the officer wishes to examine.

(5) Officers shall send the reports they receive under subsection (1) to the Centre.

Once again, the regulations will flesh out the reporting requirements.

²⁸ Sections 74 to 80 of the Act create a number of offences where persons or entities (e.g. corporations) criminally fail to comply with the Act. The penalties vary with the relevant offences but they include incarceration for up to five years and fines up to \$2 million dollars.

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police departments), tax and customs officers, forensic accountants, and legal counsel (i.e. prosecutors and advisors). In addition the Federal Prosecution Service, the prosecution arm of the Canadian Department of Justice, has thirteen regional offices and branch offices or agents, throughout Canada, who routinely prosecute proceeds of crime cases investigated by the RCMP and the major police forces in Canada.

It should also be appreciated that there is only one source for criminal law in Canada. The federal government has the sole authority to enact criminal law and laws of criminal procedure. This is why Part XII.2 of the *Criminal Code* applies to any proceeds of crime criminal investigation and prosecution.

Various prosecutors can undertake criminal prosecutions. Federal prosecutions routinely involve non-*Criminal Code* money laundering prosecutions, unless a provincial Attorney General agrees that a federal prosecution can include a *Code* "enterprise crime offence".³⁰ On the other hand, provincial Attorneys General and local law enforcement can investigate and enforce the criminal law in Canada. The dual ability of federal and provincial Attorneys General to prosecute is a novel feature of the Canadian criminal justice system.

²⁹ The RCMP acts as a contract police force for all but two provinces (Ontario and Quebec). It also is a significant player in many municipal police contracts. It is the major proceeds of crime investigative authority in Canada. You can access further information on this particular aspect of their work on the Internet, at <http://www.rcmp-grc.gc.ca/frames/rcmp-grc1.htm>. The RCMP currently maintains thirteen Integrated Proceeds of Crime (IPOC) units across Canada in the major cities and regions.

VII. CANADA'S APPROACH TO CRIMINAL ORGANIZATIONS

Recently, the money laundering debate has been intermixed with the issue of transnational organized criminal groups. Canada has joined in that debate. There was a very recent significant modification to the Canadian criminal law. In 1996 the public's perception of a problem with criminal organisations resulted in a significant expansion of the criminal law and investigative powers in Canada.³¹ The RCMP re-focused investigative priorities to deal with the organized crime issue. Their earlier approach to proceeds of crime investigations has now become an integrated approach where proceeds and criminal organizations are dealt with in tandem³².

The two issues are easily related. Any effective attack against organized crime must consider the profits from that crime. Canada and the various Provincial governments have collectively undertaken an expanded organized crime programme as a national initiative. It is primarily directed against organizations that are involved in a violent turf war (e.g. outlaw motorcycle gangs) and others involved in transnational organized crime. Obviously,

³⁰ Section 2 of the *Criminal Code* defines and controls the case prosecutor in Canada. Broadly speaking anyone can institute most criminal charges and prosecute a case. The *Code* allows the Attorney General, as defined in s. 2, to intervene and take over a private prosecution. In addition, only counsel for the Attorney General can make various proceeds of crime applications, such as applications for special search warrants and restraint orders against proceeds of crime and all forfeiture applications. It is therefore important to ascertain which Attorney General is conducting a prosecution. Equally, any forfeiture goes to the Attorney General who made the forfeiture application. (See s. 462.37 of the *Code*)

this initiative targets groups of individuals. After all, an organization, by definition, must include five or more persons. This creates increased investigative costs and systemic issues for the criminal justice system³³.

There are proceeds of crime and money laundering ramifications in any criminal organization investigation. Collectively, the organization should realise more criminal activity. A criminal organization targets profitable crimes. This justifies more intensive investigative resources. Does this mean that states should only concentrate on organizations? I believe that such a decision would be a mistake.

³¹ Section 467.1 created a new participation in a criminal organization offence with a maximum punishment of fourteen years. Section 2 of the Code defined a criminal organization in the following manner :

“criminal organization” means any group, association or other body consisting of five or more persons, whether formally or informally organized,

(a) having as one of its primary activities the commission of an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, and

(b) any or all of the members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences;

The *Code’s* wiretap provisions were also modified (e.g. A one year wiretap authorization could be obtained) and other related amendments were made.

³² In February 2000 the RCMP announced a major new organized crime initiative. See <http://www.rcmp-grc.gc.ca/frames/rcmp-grc1.htm>.

³³ The system must adapt to larger trials. The evidence is much more complex. Year long wiretap investigations, multiple defendants and increased legal aid costs are some of the problems in this initiative.

Any organized criminal or criminal organization, and I intentionally distinguish between the two concepts, launders to protect their profits. The activity of either requires that criminal profits be laundered. Any money laundering has a serious negative effect upon financial systems. It involves the same issues and creates demands for the same limited investigative resources. The individual “organized” criminal and criminal organizations, in general equally harm societal interests. The scale of the criminal activities and profits is the only significant difference.

The fact is criminal profits can be used to buy financial and other advice. The international financial system is available for a rich individual criminal or a criminal organization. Either type of criminal must use the same techniques to launder their criminal profits. Indeed, with the evolution of the global financial system, any criminal’s laundering difficulties are easier. Apart from exceptional investigative authority³⁴ available in a criminal organization offence, the investigative effort is the same.

The problem is that criminal organizations are merging to take advantage of expertise available in another organization. Why compete when a merged organization is more efficient? The merged groups work off each other’s strengths. They do not compete for the media’s attention. They do not have to worry what they next year’s budget allocation will be and how their manpower needs will be resolved. The reality is that organized crime groups are sometimes more efficient

³⁴ Section 186.1 of the Criminal Code permits a one year wiretap authorization when the underlying investigation is committed for the benefit of, at the direction of or in association with a criminal organization.

than law enforcement. National self-interest and laws are irrelevant to a criminal organization!

In order that nations respond to this reality their law enforcement agencies must do their investigations more effectively. States and law enforcement must co-operate or recognise that criminal organizations will continue on the basis that laws and the police are minor inconveniences. This means that new forms of international co-operation must be developed. Time and space restraints limit a discussion of this issue.

I can raise at least one investigative technique to illustrate this fact. Money laundering creates a need to develop proactive investigative techniques. The police can not wait at their station for a remorseful criminal to walk in and confess³⁵. One effective technique can be seen in a law enforcement storefront operation. Does a storefront money laundering operation offer the police a problem free effective alternative investigative technique?

³⁵ R. v. Bond, 135 A.R. 329 (Alberta C.A.) at page 333 opined

Illegal conduct by the police during an investigation, while wholly relevant to the issue of abuse of the court's processes, is not *per se* fatal to prosecutions which may follow: *Mack, supra*, at 558. Frequently it will be, but situational police illegality happens. Police involve themselves in high speed chases, travelling beyond posted speed limits. Police pose as prostitutes and communicate for that purpose in order to gather evidence. Police buy, possess, and transport illegal drugs on a daily basis during undercover operations. In a perfect world this would not be necessary but, patently, illegal drug commerce is neither successfully investigated, nor resisted, by uniformed police peering through hotel-room transoms and keyholes or waiting patiently at police headquarters to receive the confessions of penitent drug-traffickers :

VIII. MONEY LAUNDERING INVESTIGATIVE TECHNIQUES AND THE RULE OF LAW

Law enforcement can undertake a storefront money laundering operation where the police and co-operating agents hold themselves out as service providers for criminals. This type of investigative technique has advantages and problems. The police must conceal and convert criminal assets in this type of operation. That is the essence of a money laundering operation. The police view the operation from a different perspective. They move money or other assets to record the criminal's instructions and gather evidence for subsequent prosecutions. If someone reviews the law enforcement activity from a justice policy viewpoint the investigators may have a good motive but they are committing crimes. Are they any better than the criminals? Some consider this issue through the eyes of law enforcement others argue that the rule of law should apply to the police and the criminals alike.

A. Police Illegality

The Supreme Court of Canada considered the police illegality issue in a police reverses sting drug investigation. In *R. v. Campbell and Shirose*³⁶, the court held that the police were not immune from criminal liability for criminal activities committed in the course of a *bona fide* criminal investigation. However, while observing that "everybody is subject to the ordinary law of the land", the Supreme Court explicitly recognised that "if some form of public interest immunity is to be extended to the police...it should be left to Parliament to delineate the nature and

³⁶ This and other Supreme Court decisions can be found at : http://www.scc-csc.gc.ca/Judgments/Jugements/menu_e.htm . *R. v. Campbell and Shirose* can be accessed at <http://www.canlii.org/ca/cas/scc/1999/1999scc18.html>.

scope of the immunity and the circumstances in which it is available". The Court noted further that "in this country it is accepted that it is for Parliament to determine when in the context of law enforcement the end justifies the means that would otherwise be unlawful". This means that the law must keep up with criminal activity and address the needs of proactive law enforcement. That is a difficult requirement in any democracy.

B. Benefits in a Storefront Operation

The use of storefront money laundering techniques has been proven to be very effective. The technique has several advantages. Criminals come to the undercover police operation rather than the police attempting to infiltrate a criminal's organization. Criminals, once satisfied that the storefront money laundering operation can deliver, frequently divulge information. Often that is information that law enforcement would never discover in their ordinary investigations. Essentially, criminals brag about their criminal prowess. Their admissions provide invaluable criminal intelligence. As a money laundering service, the storefront allows law enforcement to better track the assets moved by the undercover operatives. The storefront client can tell the undercover operative where they want the asset to go, or better yet, the undercover operative can suggest alternative routes and investments. In either scenario the long-term goal is to track, trace, freeze and ultimately, forfeit the assets.

C. Associated Problems in a Storefront Operation

Storefront money laundering operations also create problems. Frequently the laundered assets must be moved offshore. Obviously, foreign law enforcement must co-operate in these investigations. Otherwise a domestic investigation that

moves outside Canada runs the risk of infringing another State's law. These operations must be long term. The up-front development costs would be easily frustrated if the police immediately arrested the first criminal that brought in a suitcase of cash to be laundered. There is a continuous risk that the storefront's laundered cash could be used to purchase more drugs or foster other criminal activity. This is a difficult reality to deal with as some point in every storefront investigation.

D. A Police Officer Exception to the Money Laundering Offence

In Canada we have a concern with illegal police conduct. The undercover police officer must inevitably commit a money laundering offence. The police are subject to the rule of law. Laundering is a broadly defined concept in Canada's criminal law.³⁷ The offence provisions are broad enough to include the controlled delivery of assets that the police know or believe are proceeds of crime. Essentially, the scope of the section could be seen to resemble controlled deliveries of drugs.³⁸ The important point to remember is that the "rule of law"

³⁷ Section 462.31 (1) provides as follows :

Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of an enterprise crime offence or a designated substance offence; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated substance offence.

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applies. If the police commit an unlawful act in their investigation the defence will argue that their illegal activity taints the investigation and justifies a judicial “stay of proceedings”.

Parliament, to use the words of the Supreme Court, in *R. v. Campbell and Shirose*, delineated “the nature and scope of the immunity and the circumstances in which it is available”. This occurred as a result of a statutory money laundering exception for law enforcement.³⁹

³⁸ The 1988 Vienna Convention specifically calls upon countries to co-operate in controlled deliveries of drugs. In 1996 Canada's new *Controlled Drugs and Substances Act's (CDSA) new Controlled Drugs and Substances Act (Police Enforcement) Regulations*, SOR/97-234 (see <http://canada2.justice.gc.ca/en/laws/C-38.8/234/67999.html>) established a very rigorous administrative regime for state supplied drugs and exceptions for law enforcement when they undertake investigations that could infringe the CDSA offences.

³⁹ Subsection 462.31(3) of the *Criminal Code*, as well as identical amendments in other money laundering offences, provides as follows :

- (3) A peace officer or a person acting under the direction of a peace officer is not guilty of an offence under subsection (1) if the peace officer or person does any of the things mentioned in that subsection for the purposes of an investigation or otherwise in the execution of the peace officer's duties

This is not a wide-open exception for any peace officer. For example foreign law enforcement official would not be considered to be a peace officer in Canada. That foreign law enforcement officer or any civilian agent assisting a peace officer must act under the direction and control of a peace officer. In addition the peace officer must be undertaking the money laundering investigation as part of his/her duties.

It should be noted that the mere existence of a law enforcement exception does not mean that the storefront money laundering operation's client has no defences. The exception operates as a shield for law enforcement and persons acting under the direction and control of the peace officer but it does not obviate any defence for the accused individual. Entrapment continues to be a recognised legal defence in Canada⁴⁰.

⁴⁰ In 1985, in *R. v. Jewitt* [1985] 2 S.C.R. 128, 136-137, the Supreme Court of Canada found that courts had a discretion, although it could only be exercised in “the clearest of cases”. Subsequent decisions from the court have expanded upon the concept. Madam Justice L'Heureux-Dub_ has been quite instrumental in developing the law in this area. In *R. v. Conway*, [1989] 1 S.C.R. 1659, 1667 she said that:

“ ... where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.”

In *Power* [1994] 1 S.C.R. 601, she defined “the clearest of cases” to mean “conduct which shocks the conscience of the community.” She said the cases of this nature will be extremely rare. In *O'Connor* [1995] 4 S.C.R. 411, 465, she said a stay will only be appropriate when two criteria are fulfilled:

1. Where the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome (in other words, this is not a remedy for past misconduct per se; there has to be some continuing abuse); and
2. Where no other remedy is reasonably capable of removing that prejudice.

Finally, *R. v. Mack*, [1988] 2 S.C.R. 903 is the seminal decision on point. It fully canvassed all aspects of the issue and raised the problem caused by police illegality.

E. Storefront Operation Implementation Issues

In the last decade the RCMP has undertaken a number of storefront money laundering operations. They have also assisted foreign law enforcement in money pick ups and ancillary activity. The existence of the law enforcement exception has assisted the police as they determine if a proposed storefront or other proactive investigative technique is appropriate. In spite of this exception, every storefront money laundering proposal creates other significant issues.

Some issues are obvious. These operations became security problems. Generally, the undercover team deals with significant amounts of cash. Proper personal and exhibit security is required. Cover teams; safe locales; and record keeping systems are essential. Storefront enforcement cases also have other unexpected surveillance costs.

F. One-party Interceptions

Every case commences with the expectation that the best admissible evidence is sought. Frequently, this requires the interceptions of the participant's conversations and video surveillance of their conduct. This is required for the personal security of the operatives. Equally, interception evidence is important for the intrinsic value of the evidence obtained by means of the interception. The problem is that Canadian interception law creates pre-conditions that all investigative participants in a storefront operation should understand.

Electronic surveillance evidence is admissible against an accused person, in Canada, provided that the evidence was lawfully obtained. Canadian law⁴¹ provides that a judicially authorised one-party consent interception order can and should

be obtained in all cases. This is important consideration in any Canadian storefront laundering case. A Canadian peace officer must work on the case so that the officer and others are sheltered within the exception created by ss. 463.31. Any undercover operation will use a Canadian peace officer. Every foreign peace officer, posing as an agent, or civilian agent, must operate under the Canadian peace officer's direction and control to shelter under the exception. They are agents of the state for interception purposes. This has an impact on any possible interception.

These operations frequently include an international dimension has an effect on interception options. Canada's *Criminal Code*, and, in particular, Part VI does not apply outside Canada. This means that interceptions of private communications outside Canada must comply with the law in the territory upon which the interception occurred. *Charter* considerations may continue to apply⁴² in some cases. The best advise is to obtain judicial authorisations whenever possible.

⁴¹ Part VI of the *Criminal Code* governs. (See <http://canada.justice.gc.ca/en/laws/C-46/35184.html>). The interception of private communications by an «agent of the state» with the consent of one of the participants but without prior judicial authorization violates s. 8 of Canada's *Charter of Rights and Freedoms*. The Supreme Court of Canada, in *R. v. Duarte*, refused to apply American jurisprudence and opined that while a s. 184 criminal offence did not occur in a one party consent interception scenario that in all cases where state agents consented a prior judicial authorization was a constitutional prerequisite. (see : <http://www.canlii.org/ca/cas/scc/1990/1990scc2.html>). As a result subsections 184.1 to 184.4 were added to Part VI of the Code.

⁴² Section 8 of the *Charter* gives persons "the right to be secure against unreasonable search and seizure". Case law indicates that the Charter may apply outside Canada in certain cases.

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G. Other Investigative Conduct

Undercover investigations are a routine feature in Canadian law enforcement. Apart from the one-party intercept scenario undercover operatives have few legal roadblocks to control their activity. Recently, the defence bar has seized upon the *R. v. Campbell and Shirose* and its predecessors to successfully argue that any police illegality taints an investigation and inures to the benefit of the criminal defendant.

The tainted police conduct shocks the community's standards of fairness. The argument is that this conduct requires the court to enter a stay of proceedings. This has been argued in several cases. Most occurred before the recent amendment to 462.31 creating a law enforcement exception.⁴³ The money laundering exception does not create exceptions for other unlawful conduct. The defence frequently looks for unlawful activity to advance a defence. Therefore investigators must be aware of this concern.

H. Profits or Evidence

Finally, what happens to the profits from a Canadian storefront money laundering investigation? Canada's financial administration provisions and the criminal law⁴⁴ have another unexpected impact upon storefront money laundering operations. The storefront operator charges the criminal for their investment or cash conversion activity. If they did not the criminal would be suspicious. Law

enforcement would like to re-invest these charges into the operation to help fund the storefront's costs. This is a problem.

The realities are that the operation's costs, recovered from the criminal, are retained as a case exhibit. The heavy investigative costs for these operations must be included in the investigative budget. There can not be a direct transfer of the criminals laundering costs to the storefront's operations budget. The mere fact that money is obtained does not convert an exhibit into property which the police can use for their own purposes. These exhibits are ultimately disposed of, generally by forfeiture orders.⁴⁵ There is no direct payment or financial benefit to law enforcement.

IX. CONCLUSION

Canada has adopted a moderate and balanced approach to the problems created by money laundering. It has constantly reviewed its laws and attempted to reflect the best practices of other jurisdictions around the world. I always end these types of discussions with the observation that criminals are more organized than States. Criminals use national borders as a shield whenever it suits their purposes. Criminals are free to organise for their own self-interest. They merge as needed and compete as required.

⁴³ In *R. v. Mathiesson* ((1995), 172 A.R. 196 (Q.B.)), a case where the police laundered money. In *R. v. Cresswell* (<http://www.courts.gov.bc.ca/jdb-txt/ca/00/05/c00-0583.htm>) the British Columbia Court of Appeal returned the matter for reconsideration.

⁴⁴ At the federal level, the *Financial Administration Act*, RSC 1985, C. F-11 and the *Criminal Code* have an impact on the money realized in a storefront money laundering operation.

⁴⁵ The subsequent disposition of the forfeited property, in any case prosecuted by the Attorney General of Canada, is controlled by the *Seized Property Management Act* (<http://canada2.justice.gc.ca/en/laws/S-8.3/83666.html>). This law specifies that everything is deposited into a special purpose account. It also permits domestic sharing with Provincial governments and international sharing with foreign governments.

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States seem prone to an approach that suggests co-operation while investigators compete for budgets and media attention. The Attorney General of Trinidad and Tobago advised the International Association of Prosecutors, in a speech at Ottawa, in September 1998, that nations had to pool their sovereignties to protect their sovereignties. Free trade and the easy movement of capital and information merely accelerates the need to actually adopt the Attorney General's observation.

THE IMPACT OF THE DIGITAL AGE ON MONEY LAUNDERING INVESTIGATIONS

*Daniel P. Murphy **

I. INTRODUCTION

In the film Jerry Mcguire one of the main characters uttered a phrase that popularises the criminal's justification for most profit motivated crimes "SHOW ME THE MONEY". The volume of cash in many criminal activities creates a problem for the criminal and their advisors.

What is we look at currency as nothing more than pieces of paper? Nations stand behind the value represented by the paper but it remains paper. I am not intimately familiar with national or international finances. My knowledge of banking is minimal and personal, rather than professional. On the other hand, my experiences tell me that drug traffickers need to move their currency for a variety of reasons. This gives the State an investigative opportunity. It also provides an opportunity to forfeit a criminal's cash. These are two different issues.

The simple fact is that a dollar bill, or a \$20 dollar bill, weighs a gram. The weight of currency in a drug transaction, at the higher levels, is greater than the weight of the drugs. This creates it own security risk. The cash has to be moved around the world. It has to be converted into other currency. Cash should be seen as a business inconvenience.

Cash is an important justification for every currency transaction reporting systems.¹ Canada recently revised and

replaced its *Proceeds of Crime (Money Laundering) Act*.² That law will cover cash transactions, which occur in a variety of business sectors.³ The Regulations contain the implementation provisions for this new anti-money regime. In the anti money laundering environment the regulation of the financial sector is more than a means to test a financial institution's institutional stability or its "know your customer" policies.

Canada's new law and its ancillary regulatory package will establish some cash transaction reporting requirements in Canada. Essentially, transaction reporting will be triggered by proscribed amounts of cash, deposited or involved in a transaction. In addition, Part 11 of the Act will establish a regime to gather information concerning the cross border movement of cash and monetary instruments.⁴ The provisions in the regulatory package will eventually evolve beyond concerns on paper currency

¹ FINCEN recently released *A Survey of Electronic Cash, Electronic Banking and Internet Gambling*, an excellent review of the field. <http://www.ustreas.gov/fincen/e-cash.pdf>

² S.C. 2000, C. 17

³ Section 6 specifies that persons subject to the Act will keep and maintain records. The Act improves upon and replaces the previous *Proceeds of Crime (money laundering) Act* and *Regulations*. Statutes of Canada 1991,c.26, in R.S.C 1985, C. P-24.5 as amended. (see <http://canada2.justice.gc.ca/en/laws/P-24.5/79312.html>)

⁴ Section12 specifies that the part will deal with currency or monetary instruments greater than a proscribed amount.

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and address the new world of digital cash.

This law depends upon currency transaction reporting and the ancillary financial institution record keeping requirements. It will include emerging issues as they impact on the money laundering issue. In fact, three emerging issues have developed and each connects to the emerging digital age. These are:

- (i) The issue of personal information protection in the digital age.
- (ii) The issue of an investigator's capacity to capture digital communications, and
- (iii) The ability for individual's to move and conceal digital information.

Consider this last issue, for a minute. A letter or a fraudulent receipt can be used to acquire money. Good documentary evidence is the essence of a financial crime investigation. Investigators will look under the bed; search file cabinets and continually seize the paper. After all it is the best evidence. In the last decade the search for documents has been frustrated by the evolution of the digital age. You now need to search computers yet the Internet and data safe havens can easily convert a personal computer into an expensive paperweight. The State's ability to search the Internet and seize Internet communications is a common concern for all nations. It is also new territory.

Unfortunately, this territory ignores national borders yet national laws depend upon borders. In this paper I will attempt to raise some issues with respect to the three emerging issues set out above.

How does the digital revolution impact on the investigative imperatives of the modern world? That is a question everyone must ask since the entire world has jumped into a digital whirlpool. This is especially

important in an era the individuals response is to demand that states enact laws to protect individual privacy.

II. PERSONAL PRIVACY PROTECTION

Hollywood movies suggest that nothing is secure from the intrepid Internet search engine and a sophisticated digital detective.⁵ Canada's Constitution includes a *Charter of Rights and Freedoms*, which impacts upon the ability of the state to search and seize information which includes a reasonable expectation of privacy exists.

In a 1993 case, *R. v. Plant*,⁶ the Supreme Court of Canada held that Canada's s. 8 *Charter* protected a biographical core of personal information maintained by a commercial enterprise, in certain scenarios. In *Plant* the police obtained hydro consumption records from a city utility company without a search warrant. Justice Sopinka, for the majority, opined that the Charter protected a biographical core of personal information from the State. He opined as follows:

"The United States Supreme Court has limited application of the Fourth Amendment (the right against unreasonable search and seizure)

⁵ Coincidentally, as I was finishing this brief paper my local newspaper arrived with an insert magazine called *Backbone*-Premier issue. It contained a short article by Sheldon Gordon, *Diary of a Digital Detective*. The article described a fictional denial of service attack against a Canadian on-line grocery service business. I suspect that a future article could be on how a person can access personal information from any computer. The issue is that computers make our lives easier while they risk our privacy.

⁶ <http://www.canlii.org/ca/cas/scc/1993/1993scc96.htm>

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protection afforded by the United States Constitution to situations in which the information sought by state authorities is personal and confidential in nature: *United States v. Miller*, 425 U.S. 435 (1976). That case determined that the accused's cheques, subpoenaed for evidence from a commercial bank, were not subject to Fourth Amendment protection. While I do not wish to be taken as adopting the position that commercial records such as cancelled cheques are not subject to s. 8 protection, I do agree with that aspect of the *Miller* decision which would suggest that in order for constitutional protection to be extended, the information seized must be of a "personal and confidential" nature. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. The computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence. "

Commercial businesses, including financial institutions, collect a significant amount of personal information on their customers. Traditional businesses obtained personal information, via paper

transaction or otherwise. They obtained that information for their credit files: customer preference files: and other reasons. E Business obtains the same information electronically. They could also capture essential information the moment that an individual accessed the business's web site. Frequently, an Internet business includes a specific privacy policy. Individuals had an opportunity to acknowledge that they have read and agreed to the site's privacy policy. I often wonder who takes the time to read those privacy statements and policies.

The result is that individuals have grown concerned with the Wild West type of privacy infringement, which they perceive exists in the commercial world. Nations have responded to this perception. Type in Information Privacy on an Internet search engine and you access thousands of hits.⁷ You could also immediately access the Council of Europe's Directive 95/46.⁸ You will quickly note a significant movement to protect the "data subject's" (i.e. a Counsel of Europe expression) privacy. Their Directive specifically requires that third countries receiving data adopt an adequate level of protection for personal information.

III. CANADA'S LEGISLATED RESPONSE TO PERSONAL INFORMATION

Canada recently enacted its *Personal Information Protection and Electronic Documents Act*.⁹ Part 1 of this law (which I will describe as the PIPED Act) establishes a right of protection for personal information collected, used or

⁷ One interesting site I discovered was Privacy and the Information Highway, by Ian Lawson at <http://strategis.ic.gc.ca/SSG/ca01021e.html>

⁸ http://www.privacy.org/pi/intl_orgs/ec/eudp.html and save a lot of time.

disclosed in the course of commercial activities. It establishes principles to govern the collection, use and disclosure of personal information. The accuracy of any records holding personal information is a significant issue of concern in the *PIPED Act*. It also requires businesses to provide adequate security for records containing personal information. It requires business to make information management policies readily available. In addition, business was required to provide individuals with access to information about themselves. It further provides that a Privacy Commissioner could receive complaints concerning contraventions of the Act's principles; conduct investigations; and attempt to resolve such complaints. Unresolved disputes relating to certain matters can be taken to the Federal Court for resolution.

A. Some Details on the Act

The *PIPED Act* came into force on January 1, 2001. It specifically covers banks; other federally regulated financial institutions; and other federal business organizations. Transitional provisions provide that all other Canadian businesses will become subject to that law within three years. This law controls the business collection of personal information and the subsequent use and disclosure of such information. The *PIPED Act* will have a significant impact on how a business uses the personal information it collects. It will also have an impact upon investigations since it applies the concept of personal information protection and access, in a manner that is similar Canada's *Privacy Act*.¹⁰

B. Business Records Impact

The *PIPED Act* establishes two results that have yet to be fully appreciated. The

first impacts upon businesses. Every business must convert their record keeping systems into a personal information retrieval system. Their customers have a right to access all their personal information held by the business.¹¹ That business must assist the individual in preparing the access request, if necessary. In addition, the "organization"¹² must respond to an individuals access request with due diligence and in any case not later than thirty days after receipt of the request.¹³

The business must insure that their records are accessible. In addition, they had better insure that the personal information they collect, use and disclose is accurate; used in the manner intended; and properly disclosed.¹⁴ The individual, in addition to their right to access their personal information, has a right to complain to the Privacy Commissioner. The Commissioner has the statutory right

¹¹ *PIPED Act*, Section 8 allows individuals to submit written requests for access to a business

¹² *PIPED Act*, Subsection 2 defines an "organization" to include an association, a partnership, a person and a trade union. Section 4 then provides that the Act applies to any "organizations" that collects personal information. Section 2 defines personal information to mean "information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization". Finally, since personal information is contained in records, section 2 defines records, in an expansive definition, to include any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine-readable record and any other documentary material, regardless of physical form or characteristics, and any copy of any of those things.

¹³ *PIPED Act*, subsection 8(3).

¹⁴ *PIPED Act*, section 7 controls the collection use and disclosure of personal information.

⁹ S.C. 2000 c. 5, http://canada.justice.gc.ca/en/laws/ann_stat.html

¹⁰ R.S.C. 1985, c. P.21, as amended.

to investigate the individuals complaint and take the matter to Court.¹⁵ Finally, the court has the power to remedy the complaint Section 16 of the *PIPED Act* allows the court to:

- (a) order an organization to correct its practices in order to comply with sections 5 to 10;
- (b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (a); and
- (c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.

There have not been any decisions, to date, since the Act came into force at the beginning of 2001.

Current reality, vis-à-vis business records, is that individuals have a very difficult challenge obtaining access. Law enforcement has a similar challenge. In light of the *Charier*, and the courts ability to determine that personal information accessed from a commercial enterprise goes to the biographical core of information deserving of protection, the police are always well advised to access business information under the authority of a warrant. The problem is that the records are not readily available. Frequently the police wait, in sufferance, while the required record is retrieved. The law will, over time, compel organizations to shift their record-keeping paradigm toward accessibility. Accessibility by law enforcement will be improved.

¹⁵ Sections 12 to 15.

C. Impact on the Police

I indicated that there were two unexpected impacts as a result of the *PIPED Act*. The Act controls how business discloses personal information they retained. If law enforcement obtains access to personal information held by a business, they may have to disclose that fact if the person asks for instances where their information is used. This will have an unexpected impact upon law enforcement. The essence of the *PIPED Act* is that individuals should have the right to know the use and disclosure activities of any business that retained their information. Organizations are required, under the *PIPED Act*, to advise their customers, upon a request from the customer, with respect to any business use of personal information. Subsection 7 (c); (c.1); (d); and (e) authorise disclosure without consent.¹⁶ The individual, however, retains the right to access their personal information record in the organization and determine if the organization has made any disclosures under the authority of subsections 7 (3)(c) to (e).

This means that a police investigative interest, even if the police used a warrant that authorised a surreptitious disclosure,

¹⁶ The relevant sections read as follows:

- (c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;
- (c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that
 - (i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,
 - (ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an

should be disclosed to a requesting individual. Indeed, any competent criminal or criminal organization, might, as a matter of routine, file *PIPED Act* section 8 requests to determine if the organization has disclosed to authorities. This can be equated to an early warning mechanism for interested individuals.

The *PIPED Act* responded to this possibility by allowing the organization to notify the authorities about an access request and delay access pending a decision, by the authorities to object.¹⁷ I will not set out the specific provisions but the result is that law enforcement must create some type of system to respond to a business's notification about access requests. If the deadline to object passes without an objection from the relevant authority the business must tell the person

investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province;

(d) made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization

(i) has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or

(ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

(e) made to a person who needs the information because of an emergency that threatens the life, health or security of an individual and, if the individual whom the information is about is alive, the organization informs that individual in writing without delay of the disclosure;

¹⁷ *PIPED Act*, subsection 9(21.) to 9 (2.4).

who made the request about the earlier disclosure to law enforcement.

D. Suspicious Transaction Reporting

There is one other aspect to the *PIPED Act*. It contemplates consent disclosure, informed consent and a confirmation of the fact of a disclosure to law enforcement. Recall however, that Canada's new *Proceeds of Crime (Money Laundering) Act* create a suspicious transaction reporting requirement and a new tipping off offence.¹⁸ Section 97 of that *Proceeds of Crime (Money Laundering) Act* includes conditional and consequential amendment to the *PIPED Act*. It adds a subsection 7(3) and 9(2.1)(a)(I), (2.3) and (2.4)(c)(I) to specifically cover suspicious transaction reporting.

IV. THE GROWTH OF INTERNET COMMUNICATIONS AND CYBERCRIME

There is a phenomenal amount of literature on the Web concerning the growth of cybercrime. The United States' National Information Infrastructure Protection Act of 1996¹⁹ illustrates how significant a problem this is for one jurisdiction. At the 10th United Nations Conference on Prevention of Crime and Treatment of Offenders' Computer Crime Workshop, last April, the Attorney General of Canada summarised the problem created by the Internet and the personal computer in a few words. The Attorney General advised the group that:

Computer networks, and the Internet, in particular, have managed to shrink our

¹⁸ S.C., 2000, C. 17. Section 8 creates an offence to disclosure that a suspicious transaction report has been made.

¹⁹ 18 U.S.C. 1830 http://www.cybercrime.gov/1030_new.html

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vast world. Today's technology allows us to share information with people in other countries, and on other continents with minimal expense.

With the internet the possibility now exists for people all over the world to have access to the stores of knowledge and products and services that were once only accessible by a very few. This possibility has provided new opportunities to draw the world together. The emergence of e-commerce is allowing small businesses around the world to compete with their larger competitors.

But, the Internet has also created corresponding opportunities for criminals. Like everyone else, criminals have embraced high technology to further their goals. We are becoming increasingly aware of the threats posed by the Internet. Hate literature and child pornography can be disseminated easily. Even traditional crimes such as fraud and forgery can now be committed with the Internet.

In October 1999, the G8 Ministers of Justice and the Interior adopted a set of principles on transborder access to stored computer data. The principles cover many issues relevant to computer evidence; including, the secure rapid preservation of data, and transborder access to data through expedited mutual assistance, and in some cases direct transborder access in cases of public internet sites or with consent of an authorized user.

On March 28, 2000 F.B.I. Director Louis Freeh made a statement on the Record before the United States' Senate Committee on Judiciary.²⁰ The Director analysed the problems created by the cybercrime phenomenon. I can not improve

upon his excellent overview and recommend the statement for anyone seeking a general description of the issues. I can only add that nations must consider this problem or recognize the reality that their borders and sovereign interests are completely artificial.

Concomitantly to the 10th United nations Convention; the work of the Ministers of Justice and Interior and the efforts in the United States, the Council of Europe, over the last three years, has been negotiating a draft Convention on Cyber-crime, which will be open to signature to all of its members and to non-member states.

The purpose of the Convention is "to deter actions directed against the confidentiality, integrity and availability of computer systems, networks and computer data, as well as the misuse of such systems, networks and data, by providing for the criminalisation of such conduct, as described in the Convention, and the adoption of powers sufficient for effectively combating such criminal offences, by facilitating the detection, investigation and prosecution of such criminal offences at both the domestic and international level, and by providing arrangements for fast and reliable international co-operation."²¹

In particular, the Convention has four major components:

- (1.) Requiring State Parties to criminalise certain forms of abuse against computer systems (i.e., illegal access, illegal interception of communications, data interference, system interference and misuses of hacking and virus

²⁰ <http://www.fbi.gov/pressrm/congress/congress00/cyber032800.htm>

²¹ The most recent public draft of this convention, i.e. version 25, can be accessed at: <http://conventions.coe.int/treaty/EN/projets/cybercrime25.htm>

programs and devices) and certain forms of crimes committed through the use of computer systems (i.e., forgery, fraud, production/distribution/possession of child pornography, and infringement of copyright as defined under national law pursuant to fulfilling obligations under a number of specific copyright treaties).

- (2.) Requiring State Parties to enact, or take such other measures as are necessary, to ensure that various enforcement powers can be exercised by law enforcement authorities for the purpose of criminal investigations or proceedings (i.e., orders for the preservation of specific computer data pending its acquisition by legal measures, search and seizure of computer data, orders for the production of computer data, collection of traffic data, interception of communications) in relation to Convention offences, any other criminal offence committed by means of a computer system and evidence in electronic form of any criminal offence.
- (3.) Requiring State Parties to adopt legislative and other measures to establish jurisdiction over the Convention offences when the offence is committed: in its territory; on board a ship or airline registered under the law of that Party; or by one of its nationals if the conduct is a criminal offence where it was committed or if the offence is committed outside the territorial jurisdiction of any State.
- (4.) Requiring State Parties to provide, to the widest extent possible, each other co-operation in the

investigation and prosecution of Convention offences and any offence in respect of which evidence is in electronic form (e.g., mutual legal assistance, extradition). State Parties are entitled to use the Convention to supplement any existing treaties among them or where there are no existing treaties or other arrangements.

The cybercrime issue can become overly focused on how Internet communications occur. The environment changes faster than the law. This means that it is difficult to stay in front of the communications. Essentially this becomes an interception issue.

V. INTERCEPTION ISSUES

The interception of private communications, as an investigative technique, varies around the world. Some countries do not have any specific laws controlling this technique. Others have a law that permits investigators to use wiretaps provided they do so for intelligence purposes.²² Canada, and other countries, legislated specific laws and use wiretaps to gather evidence that is used in prosecutions.²³ The Canadian interception law was found to be an acceptable procedure under Canada's *Charter of Rights and Freedoms*. From the Canadian perspective, the parties involved in a targeted communication have a reasonable expectation of privacy and a judicial authorization is required before the interception occurs if the State intends to use the interception as evidence.

²² The United Kingdom's Regulation of Investigatory Powers Act.

²³ In Canada Part VI of the Criminal Code, for criminal evidence purposes and the Canadian Security Intelligence Services Act, for national security purposes.

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Considering the person's expectation of privacy, there is minimal difference between phone communications and communications involving the Internet. Part VI authorizations are obtained by the police to intercept e-mail and other Internet communications while they are in transit. In the United States Title III was influenced by *Berger v. New York*²⁴ and *Katz v. U.S.*²⁵ Canadian wiretap law should apply the same analysis. They are as concerned with the need to control the threat posed to individual privacy by indiscriminate police use of wiretapping.

The American and Canadian wiretap legislation were drafted very broadly in order to regulate and control the technological invasive of privacy. Legislative amendments have also been made to keep pace with new police investigative techniques and technology that were not contemplated by the initial enactments. In Canada warrants in relation to videotaping, digital number recorders, tracking devices and cell phones were added to the *Criminal Code*.

The United States Supreme Court has described and outlined the history of the formation of the Internet:²⁶

[para25] The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military programme called "ARPANET," which was designed to enable computers operated by the military, defense contractors, and

universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of world-wide human communication."

[para26] The Internet has experienced "extraordinary growth." The number of "host" computers - those that store information and relay communications-increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.

The Reno court opined on the extra territorial nature of the Internet as a medium of communications:

[para28] Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail ("e-mail"), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these

²⁴ *Berger v. New York* 388 U.S. 41 (1967)

²⁵ *Katz v. U.S.* 389 U.S. 347 (1967)

²⁶ *Reno, Attorney General O v. American Civil Liberties Union* (06/26/1997), From *Wiretapping and Other Electronic Surveillance*, By Hubbard, Brauti and Fenton, Canada law Book

methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium-known to its users as "cyberspace" - located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet. (Emphasis added)

[para29] E-mail enables an individual to send an electronic message-generally akin to a note or letter to another individual or to a group of addressees. The message is generally stored electronically, sometimes waiting for the recipient to check her "mailbox" and sometimes making its receipt known through some type of prompt. A mail exploder is a sort of e-mail group. Subscribers can send messages to a common e-mail address, which then forwards the message to the group's other subscribers. Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted every day. In most newsgroups, postings are automatically purged at regular intervals. In addition to posting a message that can be read later, two or more individuals wishing to communicate more immediately can enter a chat room to engage in real-time dialogue-in other words, by typing messages to one another that appear almost immediately on the others' computer screens. ... It is "no exaggeration to conclude that the

content on the Internet is as diverse as human thought."

[para30] The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web "pages," are also prevalent. Each has its own address-"rather like a telephone number."

[para31] Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the "surfer," or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer "mouse" on one of the page's icons or links. Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

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The United States' Electronic Communications Privacy Act (ECPA) of 1986 attempted to update the wiretap statute by prohibiting the unlawful access, use and disclosure of electronic communications. The intent was interpreted to exclude stored electronic message, once the intended recipient opened the messages.²⁷ Other cases adopted a more restrictive interpretation of the law.²⁸

VI. CANADA'S APPROACH

The *Criminal Code's* search provisions were amended to provide for a search warrant to be used to search computers. The regular warrant provision contained in s.487 of the Code was amended to afford

broad latitude to the police to conduct searches of computers without complying with Part VI. Section 487 specifically deals with computer searches as follows:

- (2.1) A person authorized under this section to search a computer system in a building or place for data may
- (a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;
 - (b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;
 - (c) seize the print-out or other output for examination or copying; and
 - (d) use or cause to be used any copying equipment at the place to make copies of the data.

(2.2) Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search

- (a) to use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;
- (b) to obtain a hard copy of the data and to seize it; and
- (c) to use or cause to be used any copying equipment at the place to make copies of the data.

It seems self evident that a search warrant, rather than a Part VI authorization, is the appropriate order to search a computer. The problem is that an interception or a search, whichever the order required in the circumstances, depends upon laws that are limited to the territory of the state.

²⁷ *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir., 1994)

²⁸ *United States v. Smith*, 155 F.3d 1051, 98 Cal. (9th Cir., 1998) In Canada, *R. v. McQueen* (1975), 25 C.C.C. (2d) 262 at 265 (Alta. C.A.) the court interpreted the word intercept contained in s.183. The court stated:

In interpreting new legislation, a good starting place is to consider the dictionary definition of words used. The Shorter Oxford English Dictionary, 3rd ed., defines:

Intercept 1. trans. To seize, catch, or carry off on the way from one place to another; to cut off from the destination aimed at -- 1548. b. To stop the natural course of (light, heat, etc.); to cut off (light) from anything 1945. c. To interrupt-- 1759. d. To check, cut off (passage or motion) from one place to another 1596. 2. To prevent, check, stop, hinder 1576. 3. To mark off or include (a certain space) between two points or lines; hence, to contain, enclose. 4. To cut off (one thing) from another, or (ellipt.) from sight, access, etc. 1662.

In, at least, its primary sense the word intercept suggests that there must be an interference between the place of origination and the place of destination of the communication. If Parliament intended the word intercept to be used in this primary sense, then there was no interception here.

A Canadian search warrant or authorization has no effect outside Canada. Conversely a foreign search warrant or intercept authorization is ineffective in Canada. Mutual legal assistance provisions are available to assist another state. Canada has enacted *the Mutual Assistance in Criminal Matters Act* to use in various requests under relevant Treaties and Conventions. S. 10 of the Act permits a foreign country to request Canadian authorities to obtain a search authorization on their behalf in Canada. The section provides:

10. The Criminal Code, other than section 487.1 (telewarrants) thereof, applies, with such modifications as the circumstances require, in respect of a search or a seizure pursuant to this Act, except where that Act is inconsistent with this Act.

Part VI of the *Criminal Code* specifically limits authorizations to specifically listed offences. A foreign MLAT request seeks evidence that assists a foreign offence. Therefore a wiretap authorization is not available under the mutual assistance law. It is inconsistent with the Mutual Legal Assistance Act. The Council of Europe's draft Cybercrime Convention illustrates the problem when digital traffic moves across jurisdictions.

It is clear that nations must co-operate if they are every able to respond to Internet crimes. Additionally, the interception of private communications is hamstrung due to shifting technology. Interceptions now occur at the carrier's switch. As global communications and world trade agreements develop, switches are not always located in the country where a targeted private communication occurs. If the place of interception is a switch the locale of the switch may require that the local interception law must be used to

authorize the interception. This raises an interesting question if the offence under investigation prevents the issuance of an authorization. Again, this illustrates that nations must co-operate to address crime in the digital age.

VII. CONCLUSION

Individuals around the world perceive that the digital age minimises privacy to the altar of technological convenience. In Canada, this has led to enhanced privacy obligations for businesses. These provisions have unexpected impact on the police and the business community. The Internet is the latest tool for investigators and criminals.

The ability to investigate this communication medium is something that will challenge law enforcement for the foreseeable future. Equally significant, the territorially limitations of domestic wiretap laws significantly limits law enforcement. Nations will have to respond to these issues or admit that the 21st century creates an unregulated communication environment.

CURRENT SITUATION AND COUNTERMEASURES AGAINST MONEY LAUNDERING - A GERMAN AND EUROPEAN PERSPECTIVE

*Peter H. Wilkitzki **

I. PRELIMINARY REMARKS

I would like to attempt to describe as exhaustively as possible both the problems and the potential solutions related to this very broad topic, without at the same time losing sight of the needs of legal practitioners and of those who must contribute towards legislation.

It is clear to me here that I am running the risk of repeating many matters already dealt with exhaustively in the course of the seminar so far, and that the specific questions on which you expect me to comment may not be covered until the discussion. On the other hand, as a German and a European, I naturally see the topic from the point of view of my continent, and hope that this reveals at least something which is new and interesting for you, and that I can perhaps provide new details and facets.

II. WHAT ACTUAL AND LEGAL PHENOMENA ARE WE DEALING WITH?

Undoubtedly money laundering is closely linked to organized crime. Actually, it is the area where organized crime can best be attacked and hurt. So, the primary goal in suppressing organized crime must be to optimise the siphoning off of the proceeds of crime. This is because crime, and organized crime in particular, depends on making major profits. According to

estimates by the United Nations, the turnover of the worldwide illegal drug trade is much higher than that of the oil industry (some authors even speak of USD 1 trillion per year). Thus, organized crime is most vulnerable at this “nerve centre”; and conversely, any criminal law policy, however repressive it may be, is of little use unless it addresses the question of funding and flows of money. What is of particular importance here is to prevent “dirty” assets being disguised and converted into apparently “legal” money, being “washed white”. The legal term that has entered into English usage is “money laundering” - which is by the way a term that sometimes causes difficulties when translated into the specialist legal terminology of other languages. [e. g., *Chinese*].

Today, we are able to take as a basis a secure definition of the term “money laundering”: This refers to the systematic disguising of illegal assets by smuggling them into the legal financial markets in order to remove them from access by the criminal prosecution organs and to retain their economic value. The simplest case can consist of cash or non-cash transfer of illegally obtained money - mostly cash, frequently in small monetary units. The more refined forms are shown by cross-border transactions and/or by transformation of illegal assets into “legal” company holdings, real estate, etc. Many authors distinguish between the first stage, the “placement stage”, and the second, the “placement stage” where the money, once being in the “circuit”, will be confusingly

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transferred hence and forth. (I will return later to the specific risks connected with electronic banking.)

Even if criminal law is always to be used only as a last resort, there is no doubt that measures embodied in criminal law must be the focus of the suppression of such grievous, menacing phenomena as money laundering. The primary measure targeting the suppression of money laundering must therefore be to criminalise disguising the origin of the proceeds of crime, as well as the third party acquisition, possession or use of articles obtained as a result of criminal offences.

Here, the first question to arise is (even if this may appear to you to be “typically German”): What is the legal interest protected by the element of the criminal offence targeting money laundering? Firstly, it is the state’s administration of justice, and secondly it is the legal interest protected by the element of the criminal offence targeting the crime that preceded it, which is otherwise known as the “predicate offence”. Some researchers feel that this is too narrow; they consider the interests to be protected by the element of the offence to be constituted by the legal economic and financial markets, or internal security as a whole. One German author ironically states that the legal interests protected are just “global interests” that cannot be defined more exactly; another holds that money laundering is just an “investigation concept commuted into a criminal offence”. This uncertainty, which is unusual in criminal law, is connected to the highly preventive characteristic of the element of the offence that aims less to sanction the wrong done in the specific individual case than it aims to address the general, primarily preventive, impact of the suppression of general economic and social phenomena. To say it with another German author’s words: Money laundering

means a double strategy combining criminal punishment of an offender - *in personam* - with siphoning off of proceeds of crime - *in rem* - (I will return later to the preventive measures outside criminal law.)

What are the actions that must be threatened with punishment? Once more, a distinction must be made between two aims: Firstly, disguising articles resulting from specific predicate offences, disguising their origin through misleading activities, preventing or hindering the identification of their origin or their finding and confiscation. Secondly, criminal law means must be used to prevent third parties obtaining, storing or using such articles (for themselves or for others). Once more, we are in the border area of prevention since this alternative is intended to isolate offenders from their environment financially: If no one purchases the illegal proceeds from the offenders, and they are thereby prevented from employing them in genuine legal transactions, those profits become useless and valueless; the offence becomes “not worthwhile” for the offenders.

To what “articles” can such actions refer? To put it briefly: To all moveables and immoveables, as well as to rights and receivables. To be more specific: to money, either as cash or deposits, precious metals and stones, real estate, securities, receivables, shares in companies and other holdings. No limits are set to the (criminal) imagination.

These articles must originate from a suitable “predicate offence”. It goes without saying that this must be a criminal offence; but not every criminal offence qualifies as predicate offence (although in international fora, there is a growing tendency towards recognition of the broadest possible concept, the “all crime principle”).

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Only those specific criminal offences that are typical of organized crime are relevant. The question of how these are to be described within the legal framework can be answered in a variety of ways: Parliament can enumerate all suitable predicate offences or categories of predicate offence in laws (thereby running the risk of needing to amend the law should new forms or fields of crime arise), or it may address the amount of the punishment imposable in abstract terms (with the dual risk of setting the threshold either too high, and omitting to cover some typical predicate offences, or too low, and wrongly covering some predicate offences that are atypical).

The best solution probably lies somewhere in the middle, meaning in a combination of abstractly encompassing all grievous criminal offences above a certain threshold of imposable punishment, individually supplemented by some predicate offences which are less grievous, but which are typical of organized crime. Criminological research has shown that typical predicate offences to money laundering are all property crimes, and in particular fraud, breach of trust, theft, blackmail, corruption, crimes committed on a commercial basis, the forging of documents, drug offences, smuggling, trafficking in human beings, "red-light" crime, computer and environmental crime, terrorism and membership of a criminal association (opinions are however divided as to the last two categories).

It has proven advantageous, especially in cases in which the participation of the money launderers in the predicate offence cannot be detected, to cover not only predicate offences committed by a third party, but also those committed by the money launderers themselves, what can be regarded as proof of the theory that, in fact, the laundering offence aims at

criminalizing the predicate offence - the "front criminality" - rather than the laundering act as such. (If, however, the offender is sanctioned for the predicate offence, there will be no additional sanction for the laundering offence.) Because of the strong international connections in this area, there is a real need also to include predicate offences that have been committed abroad.

In practice, the main problem does not consist in proving the predicate offence as such, but in proving that the article "originates" from the predicate offence. In contrast to the classical element of the offence of fencing, the term "to originate" is to be given a broad interpretation so that the "chains" of exploitative activities, which are typical of money laundering, are also covered, i.e. activities where the original article is replaced by a second and then a third, etc., whilst retaining its value. As long as only the relationship to the original article is retained, each surrogate is to be involved; a border should only be drawn where an article is "transformed" by the separate performance of a third party, or if it was obtained in good faith. The question, which remains unresolved in most cases in the statutory provisions, is that of how one can proceed if a surrogate originates only partly from the unlawfully obtained asset.

Attempted money laundering should be punishable in the same manner as the completed crime. In addition to intentional commission, negligent, or at least reckless commission should be punishable, i.e. cases where the offender omits to recognise because of gross carelessness what should actually be obvious to anyone, namely that the article originates from a criminal offence. Practitioners repeatedly issue calls to go further, and to formally reverse the burden of proof, i.e. always to presume that the offender knew or should have known that the article originates from a criminal

act unless the offender proves the opposite. Such statutory evidentiary rules that place the accused at a disadvantage would naturally meet the needs of practitioners; however, they give rise to considerable problems, partly constitutional in nature, concerning their compatibility with the principle of guilt and the requirements of criminal proceedings based on the rule of law.

As money laundering constitutes serious criminality, the level of sanctions to be inflicted must be rather high (in Germany, there is a minimum sanction of 3 months of prison which theoretically excludes the application of fines and which - more important - means that a lot of procedural measures can be taken the use of which is limited to cases of serious crimes only.)

More important, and something to which offenders are frequently more vulnerable than to their punishment, is to deny them the benefits of the assets that they have acquired. Hence, the substantive law and processorial legal institutions that facilitate the seizure of such assets (and the important provisional measures like freezing and securing that precede it) is of central significance, some authors call this area the "third dimension of combating crime" - "crime must not pay"! Again we observe an important shift from measures "*in personam*" to measures "*in rem*", and it is not for nothing that a major part of the international regulations (which I will be describing later) concerns this area.

It is also practical to alleviate the punishment of anyone who voluntarily reports an offence that has not yet been detected and makes possible the confiscation of the article, or who by voluntarily disclosing their knowledge contributes to the detection of the offence or of another's contribution to the offence of (such alleviation, under certain

preconditions, ranging up to waiving punishment) and to offer them an incentive to withdraw or to file a report by virtue of such regulations.

A problem that has been much discussed recently is the question of whether members of legal, tax and economic consulting professions (lawyers, notaries, tax auditors, auditors) should be able to fulfil the element of the offence of money laundering or whether, in the interest of the administration of justice, precedence is given to the highly-protected relationship of trust with their clients, especially since, at least according to academic studies that have been implemented in Germany, there are no indications in this respect of criminal policy activity being needed. I will be coming back to this question in the context of the EU directive.

As I have mentioned, there is a need for a series of non-criminal law measures in addition to criminal law measures. They pursue the aim of, firstly, preventing the commission of criminal offences of money laundering and, secondly, providing the criminal prosecution authorities with a means of suppressing money laundering:

What is needed for this purpose is to create a traceable "papertrail" to enable one to identify the join between the illegal and legal markets, thus enabling the criminal prosecution organs to reconstruct the financial flows and to access the centres of the organisations.

Firstly, therefore, financial institutions and other enterprises (e.g. financial service institutions, casinos, people in commerce, persons managing third party funds for a fee) must be obliged, when opening accounts and managing cash transactions greater than a certain amount, to require their clients to identify themselves, to record the individual transactions and to

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make these records available to the competent authorities. Furthermore, they must be obliged to inform the criminal prosecution authorities when they have suspicions and in cases of transactions reaching a certain amount, and to interrupt the transaction until the authorities have taken a decision. Here, the interruption period must be long enough to allow a check, but also short enough not to place the legitimate interests of the enterprise at a disadvantage. Finally, special security and verification measures must be imposed on enterprises that can be particularly easily misused for the purposes of money laundering.

All these duties need in turn to be reinforced by means of criminal or at least administrative law sanctions.

**III. WHAT REQUIREMENTS FOR
NATIONAL CRIMINAL LAW
EMERGE FROM THE TOOLS
AVAILABLE UNDER
INTERNATIONAL LAW?**

I have already mentioned the fact that the areas of organized crime and money laundering are characterised by particularly strong international connections. Hence, it is appropriate in these areas for particular emphasis to be attached to drafting international legal instruments and implementing them in national legislation and practice. All major international and regional organisations have addressed this material, and have drafted tools that are worthy of note on the one hand because of their quality, and on the other because of their high degree of agreement.

A. United Nations

The efforts to create an obligation under international law to criminalise money laundering were launched by the United Nations. It is a pleasant duty for me to

remind you of this at an event organized by an organisation belonging to the United Nations family.

The Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, accepted in Vienna on 20 December 1988, is concerned, as its name suggests, only with the area of drug offences. However, its Article 3 contains a duty to establish as criminal offences not only the illicit trade in drugs (para 1 (a)), but

- correctly recognising that drug trafficking, as well as organized crime as a whole, would be largely bereft of its economic basis if it were unable to launder its proceeds
- in accordance with para 1 (b) also for
 - "the conversion or transfer of property, knowing that such property is derived from any (drug offence), for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions" and
 - "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 a (drug offence)".

This definition, accepted after lengthy, difficult negotiations, was intended, as I will explain later, to become the "mother" of all money laundering regulations drafted in the ensuing period in various international fora; it hence demonstrates a unique United Nations "success story".

It is appropriate to the abovementioned special significance attached to siphoning off the proceeds of crime and their surrogates in this area that a whole, extensive Article of the Convention (Art.

5) is devoted to the “confiscation of proceeds”. It places an obligation on the Member States to make this possible under national law, and on request by a foreign state. Art. 6 et seqq. of the Convention contain obligations in the area of criminal law cooperation (extradition, mutual legal assistance, transfer of proceedings).

The “success story” of the United Nations in the area of the suppression of organized crime and money laundering does not end with the drafting of this Convention: The UN Convention against Transnational Organized Crime (with two Additional Protocols) was recently signed in Palermo, on 12 December 2000 - based on a Polish initiative - marking a further milestone on the path towards world-wide suppression of organized crime. Its area of application covers, on the one hand, a series of enumerated criminal offences, including money laundering, as well as all criminal offences that are transnational by nature and in respect of which a maximum penalty of four or more years may be imposed.

Article 6 of the Convention obliges the signatory states to criminalize “the laundering of proceeds of crime”; it is based on the fundamental structure of the corresponding Article of the Drug Convention, and contains in para 2 detailed instructions on including a “widest range of predicate offences”.

Article 7 of the Convention also provides for an obligation, outside criminal law, to take “measures to combat money-laundering”, containing above all: a “comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering ... in order to deter and detect all forms of money-laundering, which regime shall

emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions”.

In this Convention, too, the significance of siphoning off the proceeds and their surrogates is stressed in that three Articles (12 - 14) are devoted to “Confiscation and Seizure” - including international cooperation in this area. Article 16 et seqq. in turn contain regulations for criminal law cooperation.

B. Council of Europe

For the European region, but also for those states outside Europe that are able to accede to the “open” Conventions of the Council of Europe, the work of the Council of Europe in this area is as significant as that of the United Nations. You will not, I hope, therefore accuse me of “Eurocentrism” if I allot a similarly broad span of attention to this field.

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime was opened for signature on 8 November 1990, following a Resolution adopted by the 15th Conference of the European Ministers of Justice (1986) stressing the need for “the formulation, in the light inter alia of the work of the United Nations, of international norms and standards to guarantee effective international cooperation between judicial (and, where necessary police) authorities as regards the detection, freezing and forfeiture of the proceeds of illicit drug trafficking. The Convention, however, goes far beyond this mandate by facilitating international cooperation with regard to all types of criminality, in particular those generating large profits.

For that purpose, the Convention provides a complete set of rules for international cooperation, including

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securing evidence about instrumentalities and proceeds, freezing of bank accounts, seizure of property and similar provisional measures, and executing foreign confiscation orders.

The draftsmen of the Convention recognised that, in order to render these tools effective, the national substantive penal law systems which could realistically not be fully harmonised had at least to be put on an equal footing and that, in particular, the successful fight against serious criminality required the introduction of a laundering offence in states which had not already introduced such an offence. Article 6 of the Convention obliges Parties to criminalize money laundering under their domestic law. The catalogue of offences listed in paragraph 1 is mainly based on the UN Drug Convention of 1988. Paragraphs 2 and 3, however, go beyond the UN Convention by making it clear that the Convention is intended to cover extraterritorial predicate offences, and by also criminalizing negligent and other behaviour. The rest of the Convention mainly contains rules on international cooperation. A whole Chapter (Articles 13 through 17) is dedicated to confiscation.

For the past two years, the Council of Europe has been considering drawing up an **Additional Protocol** to the 1990 Convention in order to adapt it to the rapidly changing money laundering situation. This Protocol could, in particular:

- (i) elaborate explicit provisions for asset-sharing arrangements, possibly also for exchanging information concerning the assets and lifting bank secrecy,
- (ii) create a follow-up procedure supplementing the Convention by making it subject to periodic

review and elaborating recommendations to facilitate its application and giving guidance to Parties in disputes arising out of its implementation,

- (iii) create a clear, institutionalised, legally-binding multilateral mechanism for enabling the Financial Intelligence Units to cooperate with each other,
- (iv) lower the standard of proof in respect of predicate offences,
- (v) overcome legal differences between civil law-based forfeitures and criminal law-based confiscations,
- (vi) limit the available grounds for refusal by eliminating harmful tax competition and restricting exceptions, such as the fiscal offence exception.

Whether, when and with what content an additional protocol will be drafted cannot be forecast at present.

C. European Union

In contrast to Council of Europe Conventions that create obligations only for the states acceding to them, directives of the European Union are binding on all EU States; they must be transposed into national law with no restrictions.

On 10 June 1991, the Council of the European Union issued Directive 91/308/EEC "on prevention of the use of the financial system for the purpose of money laundering". Its preamble starts by stating that, when credit and financial institutions are used to launder proceeds from criminal activities, the soundness and stability of the institution concerned and confidence in the financial system as a whole could be seriously jeopardized, thereby losing the trust of the public, and that therefore coordinated measures at Community level are necessary. As money laundering is usually carried out in an international

context, measures had to be adopted at an international level as well.

Article 2 of the Directive obliges Member States to ensure that money laundering, as defined in Article 1, is prohibited. Articles 3 through 12 concentrate on preventive and administrative measures to be taken by credit and financial institutions. They must in particular:

- (i) require identification of their customers when entering into business relations or conducting transactions,
- (ii) keep for at least five years copies or references of the identification documents and the documents relating to transactions,
- (iii) examine with special attention certain suspicious transactions,
- (iv) make records of examinations available to the competent authorities,
- (v) report suspicious transactions notwithstanding banking secrecy,
- (vi) establish procedures of internal control and training.

Article 12 of the Directive obliges Member States to ensure that its provisions are extended to other professions and categories of undertakings that engage in activities that are particularly likely to be used for money-laundering purposes. In order to fulfil this mandate, the Council recently (November 2000) adopted a Common position with a view to the adoption of a Directive amending the 1991 Directive.

The text approved by the Council is intended, firstly, to expand the list of predicate offences to money laundering. Secondly, the obligations from the 1991 directive are to be expanded to cover further financial institutions and professional groups. It is primarily noticeable and politically disputed because

it is intended not only to include real estate and precious metal agents and casino operators, but also lawyers, notaries, accounting experts and balance sheet auditors. The Federal Government, which had pleaded to remove the legal consulting professions as a whole from the area of application of the directive because of the abovementioned fundamental reservations - that is, concerning collision with the relationship of trust between a lawyer and his/her client, was successful to a degree, in that it was possible to remove out-of-court legal advice ("ascertaining the legal position of their client") from the obligation to report suspicion for legal and economic consulting professions.

The "Common position" is now before the European Parliament for a decision; it remains to be seen whether it will insist on amendments being made to the text. Other EU instruments related to money laundering I will not treat in detail here are the following:

- (i) Second Protocol to the Convention on the Protection of the European Communities' Financial Interests dated 19.6.97
- (ii) Action Plan of the EU heads of state and government to combat organized crime dated 15.8.97 (exchange of information between EU States)
- (iii) Joint Action dated 3.12.98, 98(699/JI) and connected Framework Decision (aiming in particular at reaching better and faster mutual assistance in confiscation matters, as well as advanced training of law enforcement officials in the area of confiscation of proceeds of crime)
- (iv) Draft Framework Decision on money laundering, etc.
- (v) EU Mutual Assistance Convention

**D “G 7 / G 8” States’ Co-operation /
“Financial Action Task Force on
Money Laundering” (FATF)**

The “G 7” group of states deserve to be emphasised at this event because they form a link between the European region, from which I come, and your region. In 1989 at its Paris summit, it set up a Financial Action Task Force on Money Laundering (FATF) that submitted a list of 40 recommendations in 1990. This list was revised in 1996; its update is currently being examined.

The list is accompanied by useful interpretative notes, it may be regarded as one of the most complete and distinct inventories of repressive and preventive items aiming at combating money laundering, containing in particular:

- (i) legal measures in the field of criminal law (criminalization, extension of criminal liability, confiscation, identification, tracing, freezing and seizing, of proceeds of crime, criminal procedural law, banking secrecy law),
- (ii) rules on the role of the financial system, such as duties to customer identification, keeping, maintaining and making records available to competent authorities, paying attention to new technologies, applying increased diligence in cases of complex, unusual and suspicious transactions, developing internal policies and training programmes against money laundering,
- (iii) measures to cope with the problem of countries with insufficient anti-money laundering measures,
- (iv) other measures, such as detecting or monitoring the physical cross-border transportation of cash etc.,
- (v) rules on the role of regulatory and

- (vi) other administrative authorities, and last, but not least, the duty to broaden, strengthen and simplify international co-operation in the administrative and criminal law areas, displaying a detailed catalogue of mutual assistance measures, starting from classical tools like extradition and not ending with modern and sophisticated ones like those aiming at avoiding conflicts of jurisdiction and asset-sharing.

The establishment of Contact Points between FATF states, via which a regular exchange of information is carried out, has proven to be of particular value. By evaluating a questionnaire campaign, a comprehensive compendium of the law and practice of the individual states was drawn up, providing a unique service to practitioners.

The G 7 summits in Birmingham and Cologne appointed the FATF to address the topic of “offshore centres / non-cooperative jurisdictions”. Certain offshore areas (there are still more than 80 such oases) are especially attractive to money launderers and endanger the efforts of those states that recognise and implement the international standards, in some cases hindering the world-wide suppression of money laundering. Permit me to insert, word-for-word, a quote from the communiqué of a G 7/G 8 summit (Moscow, October 1999) in order to describe the problem:

“Jurisdictions with inadequate financial regulation and supervision, as well as excessive bank and corporate secrecy, play a significant role in laundering the proceeds of serious crime. A number of jurisdictions are also characterized by the absence of compulsory financial supervision over the activity of banks and

other providers of financial services, and by the absence of obligations on rendering international legal assistance in the seizure and confiscation of the proceeds of illegal origin. This allows criminal groups to create and make use of offshore financial institutions, trusts, shell companies, and nominee accounts to hide the identity of the beneficial owners for the purpose of laundering the proceeds of crime. These practices should not be allowed to continue.”

In a first step, the FATF 25 drafted characteristics by which to identify non-cooperative jurisdictions, and is currently concerned with identifying such jurisdictions, and where appropriate with enacting suitable sanctions against them.

IV. HOW AND HOW SUCCESSFULLY HAS GERMAN LAW IMPLEMENTED THE INTERNATIONAL REQUIREMENTS?

In 1992, the Federal Republic of Germany inserted a separate element of the criminal offence of money laundering (section 261 Criminal Code [StGB]) into its Criminal Code, which has been expanded several times since then (mainly in its list of predicate offences, which covers in addition to all major crimes, a list of minor crimes which have a special relation to organized crime). As mentioned above, certain instruments under the General Part of the Criminal Code are equally important for combating money laundering. Here, German law has created new and more effective types of confiscation measures.

For the non-criminal law area, in 1993 the Money Laundering Act (Geldwäschegesetz - GWG) was adopted (and amended in 1998); in particular the Act defines duties to require identification

and report suspicion for financial transactions by specific enterprises (bureaux de change were later included here). The duty to require identification is concerned with amounts from DM 30,000 upwards (previously DM 20,000). The obligation to report suspicion can also apply to smaller amounts.

In 1998, amongst other things securing suspicious amounts of money in criminal proceedings was made easier, and it was ensured that financial authorities are informed as early as possible of information that is of fiscal relevance. Furthermore, cash checks were carried out on crossing borders.

In order to avoid repetitions, I would like to refer in other respects to the general information that I provided at the beginning, in which in each case I took German law as a basis, and from which you can therefore obtain the gist of the German provisions.

From 1994 to 1999, German police crime statistics show an increase in the number of cases investigated by the police in accordance with section 261 of the Criminal Code from 198 to 481 annually; in accordance with the court criminal prosecution statistics, 25 persons were convicted in 1998 because of violations of section 261 of the Criminal Code (cases are not included here, however, in which a sentence was also handed down in respect of an element of an offence for which a higher punishment was impossible). Assets were secured in 1999 worth roughly DM 50 million. Approximately the same amount is accounted for by additional tax revenue based on tax investigations in cases related to money laundering.

These figures appear to be disappointingly low in a country with 80 million inhabitants and a highly-developed

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economy, in a country in which according to a plausible estimate the Italian Mafia alone has invested DM 70 billion in Eastern Germany in the ten years following German Reunification. (In fact, the "Reunification criminality" has unfortunately proved to be one of the most important features of organized crime in Germany during the last ten years.) Thus, the obvious conclusion to reach is that there is a gross disproportion between the legislative and practical effort and the efficiency of the measures.

On the other hand, we need to recognise that weighing up effort and proceeds in this area is highly problematic because of the large number of measurement criteria and the database, which of necessity is riddled with gaps. This also applies to the evaluation of suspicion reports submitted by the financial institutions: Whilst it is true that suspicion only became concrete in 7 % of cases regarding the element of the criminal offence of money laundering, it must be regarded as a success that links with existing knowledge held by the criminal prosecution authorities is revealed in 2/3 of all cases of suspicion that are reported, and that additional knowledge of groups of offenders, basic crimes and money laundering activities was obtained and that in 1/4 of cases. Finally, it must be pointed out once more that much of the success of money laundering suppression measures lies in the preventive area, and that it hence cannot be quantified.

However, it is necessary at the same time to admit that the efficiency of the regulations can still be improved. Since one of the main problems is said to lie in confirming suspicion and providing evidence, a central file of suspicion reports has now been created at the Federal Criminal Police Office (BKA) in order to gain information on structures spanning more than one case. (The problem is rooted

in Germany's federal structure, the consequence of which is that suspicion reports are accepted and evaluated not at Federal level, but at Land level.)

Since, as I have already mentioned several times, in the set of legal tools for the seizure of articles concerned with crimes and of their proceeds is particularly significant, efforts are being made in order to increase efficiency here. Project groups that have been formed at Land level, in which specially-trained investigators advise criminal prosecutors, have already led to a considerable increase in the application of mechanisms for the siphoning off of proceeds (just one examples: the new Financial Investigation Units in two of the 16 German L ander alone have confiscated values of more than 50 millions of \$ in 1998), this being fresh proof of the theory that, sometimes, thorough basic and further training of persons acting is more effective than tightening the statutory provisions.

It is unlikely that Germany will be able in future to avoid making amendments to the legal provisions altogether. The abovementioned amendments to the provisions in the context of the European Union could lead to a new need for transposition - be it in the area of the list of predicate offences, or be it in the area of the group of offenders addressed. However, other developments might also require legislative measures (it is only necessary to offer as an example the increased use of the Internet for economic transactions) - a development that has already led to the sceptic question by some authors whether, under the conditions of the new electronic age, the criminalization of money laundering still makes sense at all. Another smaller example: There could be a new need for action (but probably not for Parliament) on the basis of new incentives and opportunities to commit crimes in

connection with the introduction of the EURO.

In any case, Parliament and the administration should make efforts to avoid actionism, to restrict its encroachment to a level of what is absolutely indispensable, and also always to include in the “cost-benefit analysis” the burdens imposed by the new regulations on the non-criminal part of the population and on the economy.

the practitioners who must apply them, the bitter motto with which the author once described the suppression of international crime will remain valid: The criminals are travelling in supersonic aircraft, whilst the criminal prosecution organs are chasing them in a post coach and have to stop at each national border. I would like to ask all of you to contribute in your own workplaces and by your own efforts to soon making this situation truly a thing of the past.

V. CLOSING WORDS - ON INTERNATIONAL COOPERATION

I have already mentioned that, in light of the material, primarily concerned as it is with overcoming cross-border crime, the creation of duties to criminalise and to harmonise or approximate substantive criminal law or other law is only one side of the coin of all international tools, even though it is an important one. These tools are accompanied by provisions aiming at optimising international cooperation, which are at least equally important.

Here we find the greatest potential for optimising the world-wide suppression of money laundering: It is a matter of applying the classical tools of extradition and legal assistance as broadly as possible, i.e. especially in foregoing as far as possible the lengthy, bureaucratic procedures and grounds for refusal, which in some cases still reflect ideas of sovereignty that belong in the Middle Ages.

Above all, there is a need to implement and apply the new legal assistance tools for the cross-border “searching, seizing, freezing and confiscating of assets” that have been developed over the past few years - especially by the new Conventions that I have presented. Until these tools have found their way into the legislation of all states and have been internalised by

THE FIGHT AGAINST MONEY LAUNDERING: THE U.S. PERSPECTIVE

*Susan L. Smith **

I. INTRODUCTION

Money laundering occurs in almost every crime where there is a financial motive. Because of the need to hide the fact that the wealth came from a criminal act, criminals need to disguise the money.¹ These proceeds of crime, particularly cash, must be laundered for reinvestment. This involves a series of complicated financial transactions (structured deposits, wire transfers, purchase of money orders or cashier's checks, etc.) which ultimately results in criminal money becoming "clean" and acceptable for legitimate business purposes.² This laundering of criminally derived proceeds has become a lucrative and sophisticated business in the United States and is an indispensable element of the drug cartels' and organized crime's activities.³ By moving and concealing the existence of enormous amounts of wealth, money laundering gives large scale criminal activity a flexibility and scope which would otherwise be impossible.⁴ In his 1995 remarks to the United Nations on

the Occasion of the 50th Anniversary of its Creation, then President Clinton said:

"Criminal enterprises are moving vast sums of ill-gotten gains through the international financial system with absolute impunity. We must not allow them to wash the blood off profits from the sale of drugs, from terror, or from organized crime."

It is the goal of the United States to ensure that criminals and their laundered money can find no safe haven anywhere and to destroy criminal organizations by taking the profit out of crime. The increased threat from international organized crime, coupled with the globalization of the economy and the explosion of communications technology, requires the United States' anti-money laundering efforts to be multi-dimensional. At the federal level, the United States' efforts to combat money laundering involve the coordinated work of broad array of federal agencies. The Treasury and Justice Departments lead the nation's law enforcement efforts, while the federal financial regulators (the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration and the Securities Exchange Commission) are responsible for the examination of financial institutions within their respective jurisdictions to ensure that those institutions have created effective internal systems to detect potential money laundering.⁵ The United States' primary line of attack against

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¹ William F. Bruton, *Money Laundering: Is It Now a Corporate Problem?*, 17 *Dick. J. Int'l L.* 437.

² William C. Gilmore, *Dirty Money: The Evolution of Money Laundering Countermeasures*, 2d Ed., Council of Europe Publishing, 1999.

³ See James D. Harmon, Jr., *United States Money Laundering Laws: International Implications*, 9 *N.Y.L. SCH. J. INT'L & COMP. L.* 1, 2 (1988).

⁴ Kirk McCormick and Brian Stekloff, *Money Laundering*, 37 *Am. Crim. L. Rev.* 729, (2000).

domestic and international drug and other money launderers has been and continues to focus on denying our financial system to money launderers through the implementation of the Money Laundering Control Act⁶ and the Bank Secrecy Act⁷. This core group of statutory tools were enacted by Congress in order to meet the threats posed by domestic and transnational organized crime and to enhance law enforcement's ability to succeed in disrupting and dismantling the business of organized crime.

II. OVERVIEW OF MONEY LAUNDERING STATUTES

A. Background

The United States criminalized money laundering on October 27, 1986. These statutes are found at 18 U.S.C. §§ 1956 and 1957. See Money Laundering Control Act of 1986, Pub. L. 99-570. These statutes fully criminalized money laundering, with penalties of up to 20 years and fines of up to \$500,000 for each count. Highlights of the Act include:

- (i) extended criminality to persons knowingly conducting or attempting to conduct financial transactions with proceeds generated by certain specified crimes, as well as to persons who are "willfully blind to" such unlawful activity;
- (ii) extended extraterritorial jurisdiction over the conduct prohibited by the statutes;

- (iii) extended civil and criminal forfeiture to commissions received for conducting a money laundering transaction, (18 U.S.C. §§ 981 and 982);
- (iv) outlawed structuring or "smurfing" operations to avoid the Bank Secrecy Act (BSA) reporting requirements (31 U.S.C. § 5324); and
- (v) mandated compliance procedures to be required of banks; (the procedures were created by 1987 regulations issued by the Secretary of the Treasury).

Over the years, emerging money laundering typologies, international requirements, prosecutorial experiences, and case law interpretations have indicated the need for legislative changes to the money laundering statutes. The changes have increased the number of crimes which can generate proceeds for the money laundering laws to approximately 170 criminal offenses. The following is a brief summary of the legislative amendments to the money laundering laws:

- (i) The *Anti-Drug Abuse Act of 1988*, effective on November 18, 1988, further criminalized money laundering to include financial transactions conducted with illegal proceeds with the intent to commit tax evasion and extended criminality to persons who conduct transactions involving property "represented by a law enforcement officer to be the proceeds of specified unlawful activity" (SUA). The Act also increased the civil and criminal forfeiture statutes to include forfeiture of any property or assets involved in an illegal financial transaction related to money laundering. The Act also

5 The National Money Laundering Strategy Act for 2000.

6 Pub. L. 99-570, Title XIII (October 27, 1986), as amended, codified at 18 U.S.C. § 1956 and § 1957.

7 Pub. L. 91-508 (October 26, 1970), as amended, codified at 12 U.S.C. § 1829b, 12 U.S.C. §§ 1951-59, and 31 U.S.C. §§ 5311-5330.

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- added a number of criminal offenses to be included in the term "SUA," such as smuggling of goods into the United States, copyright infringement, and violations of the Arms Control Act.
- (ii) The *Annunzio-Wylie Anti-Money Laundering Act of 1992*, which became effective on October 28, 1992, enlarged the definitions of "transaction" and "financial transaction" to include the use of a safe-deposit box and the transfer of title to any real property, vehicle, vessel or aircraft. The Act also enlarged "SUA" to include offenses against a foreign nation involving kidnaping, robbery, extortion, or fraud against a foreign bank, and several other criminal offenses, including food stamp fraud. Additionally, the Act extended the criminal penalties of §§ 1956 and 1957 to a conspiracy to violate the money laundering statutes.
- (iii) The *Money Laundering Suppression Act of 1994*, effective September 23, 1994, incorporated both substantive and technical amendments to Titles 18 and 31 (BSA). Of particular importance were the following changes: (1) a requirement that Treasury issue new regulations implementing a new BSA provision, 31 U.S.C. § 5330, requiring any person who owns or controls a money transmitter business to register with the Secretary of the Treasury; (2) an amendment to 31 U.S.C. § 5324 which legislatively overturned the January 1994 Supreme Court decision (*Ratzlaf v. United States*) concerning the proof required to establish a 31 U.S.C. § 5324(a)(3) structuring violation; and (3) the requirement of additional record keeping and reporting of negotiable instruments drawn on foreign financial institutions.
- (iv) The *Terrorism Prevention Act*, passed by Congress on April 24, 1996, added approximately 20 new crimes to the list of "SUAs" in section 1956. The *Health Insurance Portability and Accountability Act of 1996*, Pub. L. 104-191, 110 Stat. 1936, effective August 21, 1996, added certain health care offenses to the list of predicates for money laundering violations, and the new immigration law signed by the President on September 30, 1996, added certain immigration offenses, such as alien smuggling, to the list of RICO predicates, thus making them predicate offenses under the money laundering statutes.

B. 18 United States Code, Section 1956

Section 1956, "laundering of monetary instruments," is divided into subsections (a) through (h). The substantive provision, subsection 1956(a), is divided into three subsections dealing with domestic financial transactions, international transportation of monetary instruments or funds, and sting operations, respectively. Subsection 1956(b) provides a civil penalty for violations of the first two provisions of subsection (a). Subsection 1956(c) defines most of the terms used in § 1956 (as well as in § 1957). Subsections 1956(d), (e), and (f) discuss the relationship of § 1956 to other federal statutes, agency investigative responsibilities, and extraterritorial jurisdiction, respectively. Subsection (g) requires the Attorney General to inform the appropriate regulating agency of any conviction under 18 U.S.C. §§ 1956, 1957, 1960 or 31 U.S.C. § 5322 of a financial institution or any officer, director, or

employee of a financial institution. Subsection (h) raises the penalties for conspiracies to violate § 1956 and § 1957 to the level of the substantive offense. The focus of this discussion is on the elements of the crimes set forth in § 1956(a), with reference to the definitions set forth in subsection (c) where appropriate.

As stated above, section 1956(a) is divided into three parts. Subsection 1956(a)(1) primarily addresses domestic money laundering and prohibits the knowing participation in financial transactions with criminal proceeds. Subsection 1956(a)(2) addresses international money laundering and prohibits the knowing transportation or transfer of criminally derived monetary instruments in foreign commerce. Subsection 1956(a)(3) explicitly authorizes the use of government undercover “sting” operations to expose money laundering.

C. Essential Elements of Section 1956(a)(1)

The elements of an offense under Section 1956(a)(1) are: (1) that the defendant conducts or attempts to conduct a financial transaction; (2) that the defendant knew that the property involved in the financial transaction represents the proceeds of some form of unlawful activity; (3) that the financial transaction in fact involves the proceeds of specified unlawful activity; and (4) that the defendant conducted the financial transaction with one of four purposes: (i) with the intent to promote the carrying on of specified unlawful activity; (ii) with the intent to evade taxes; (iii) knowing that the transaction was designed in whole or in part to disguise the nature, location, source, ownership, or control of the proceeds of the specified unlawful activity or (iv) to avoid a transaction reporting requirement under State or Federal law. *United States v. Awan*, 966 F.2d 1415 (11th Cir. 1992); *United States*

v. Posters ‘N’ Things, 969 F.2d 652, (8th Cir. 1992), cert. granted, 113 S.Ct. 1410 (1993); *United States v. Brown*, 944 F.2d 1377, 1387 (7th Cir. 1991); *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991); *United States v. Blackman*, 904 F.2d 1250 (8th Cir. 1990); *United States v. Massac*, 867 F.2d 174 (3rd Cir. 1989).

1. A Financial Transaction

Subsection 1956(c)(4) defines a “financial transaction” as either:

- (A) a transaction⁸ (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or
- (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

The statute defines “financial transaction” very broadly. See S.Rep. No. 433, 99th Cong. 2d Sess. 12-13 (1986). The statute contains four alternative definitions of “financial transaction” presented in subsection 1956(c)(4): (i) the movement of funds by wire or other means; (ii) the use of a monetary instrument; (iii) the use of a financial institution; and (iv) the transfer of title to any real property vehicle, vessel, or aircraft, which in any way or degree affects interstate or foreign commerce.

⁸ As defined in subsection 1956(c)(3), the term “transaction” includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

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(i) The Movement of Funds by Wire or Other Means

The word “funds” is not defined in the statute. Moreover, there is no legislative history to explain its meaning. This subdefinition apparently includes all forms of wire or electronic funds transfer that affect interstate or foreign commerce. Thus, if an individual wire transfers the proceeds of criminal activity, he or she will have engaged in a financial transaction. United States v. Herron, 97 F.3d 234, 237 (8th Cir. 1996). The language of the statute is not so limited, however. The word “funds” has been defined as “available money” or “money available for use”. Thus, in a broader sense, one who transfers funds by other means could also be said to have engaged in a financial transaction as defined in this subdefinition. Included in the “transfer of funds” could be debit card transfers and barter exchanges. Therefore, if an individual exchanged the proceeds of a crime for a work of art as a means of laundering money, such an exchange could fall within the ambit of this subdefinition.

Generally, courts have interpreted “funds movement” broadly. Included within this subdefinition is the transfer of cashier’s checks, United States v. Arditti, 955 F.2d 231 (5th Cir. 1992) (noting that § 1956(c)(5) defines “bank checks” but not cashier’s checks as monetary instruments), as well as the mere transfer of illegal proceeds from one person to another, United States v. Reed, 77 F.3d. 139 (6th Cir. 1996) (giving drug proceeds to a courier involves the movement of funds by means of the courier).

(ii) The Use of a Monetary Instrument⁹

Under this subdefinition, the term “financial transaction” includes the purchase, sale or disposition of any kind of property as long as the disposition involves a monetary instrument. United States v. Blackman, 904 F.2d at 1257. As an

example, an individual who transfers any “monetary instrument” to another, whether or not that instrument ever finds its way into a financial institution, has engaged in a “financial transaction.” See United States v. Gallo, 927 F.2d 815 (5th Cir. 1991)(transfer of a box of currency from one individual to another is a financial transaction); United States v. Hamilton, 931 F.2d 1046 (5th Cir. 1991)(the mailing of the proceeds of drug transactions to another is a financial transaction); United States v. Castano-Martinez, 859 F.2d 925 (11th Cir. 1988)(financial transactions included various “transfers” of currency from the defendant’s house to vehicles parked outside).

(iii) Use of a Financial Institution

This definition cross references the term “financial institution” which is defined at subsection 1956(c)(6) by further cross reference to 31 U.S.C. § 5312(a)(2) and its implementing regulations.¹⁰ The most common transactions involving banks and similar institutions are covered by this definition. The writing of a check drawn

⁹ Monetary instrument is defined in subsection 1956(c)(5) as: (i) coin or currency of the United States or of any other country, traveler’s checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments in bearer form or otherwise in such form that title passes upon delivery.

¹⁰ 31 U.S.C. § 5312(a)(2) includes within the meaning of “financial institutions” such entities as banks; thrift institutions; securities brokers and dealers; investment bankers or companies; currency exchanges; issuers, redeemers, or cashiers of travelers’ checks, checks, or money orders; credit card companies; insurance companies; travel agencies; licensed senders of money; telegraph companies; vehicle dealers; realtors; the United Postal Service; government agencies involved in the aforementioned activities; and, other businesses as designated by the Secretary of the Treasury.

on an account maintained in such a financial institution, whether for cash or to a vendor who has provided services, clearly falls within the definition of a financial transaction contained in § 1956(c)(4)(B). United States v. Jackson, 935 F.2d at 841. See also S.Rep. No. 433, 99th Cong. 2d Sess. 12-13 (1986); United States v. Martin, 933 F.2d 609 (8th Cir. 1991), and United States v. Blackman, 904 F.2d at 1257.

(iv) The Transfer of Title

This subdefinition includes any transfer of title to real estate, vehicles, vessels or aircraft. United States v. Kaufmann, 985 F.2d 884 (7th Cir. 1993) (sale of car for cash is a financial transaction.) This subdefinition was added in 1992 to close a loophole in the definition of “financial transaction” under §§ 1956 and 1957 where a transfer involved neither a monetary instrument, a transfer of funds, nor a financial institution.¹¹

(v) Affects Interstate or Foreign Commerce

All the subdefinitions of “financial transaction” contained in subsection 1956(c)(4) require that the transaction “affect interstate or foreign commerce” or be conducted through or by a financial institution which engaged in or the activities of which affect interstate or foreign commerce “in any way or degree.” The term “affect commerce in any way or degree” is derived from the *Hobbs Act*, 18 U.S.C. § 1951, and is intended to reflect the full exercise of Congress’ powers under

the Commerce Clause of the Constitution. United States v. Gallo, 927 F.2d at 823. The broad language of the Hobbs Act manifests an intention “to use all the constitutional power Congress has to punish interference with interstate commerce ...” United States v. Eaves, 877 F.2d 943 (11th Cir. 1989) cert. denied 493 U.S. 1977 (1990), quoting Stirone v. United States, 361 U.S. 212, 215 (1960). The appropriate inquiry is whether a defendant’s conduct constitutes a sufficient threat to interstate commerce so as to implicate an area of federal concern sufficient to give rise to federal jurisdiction. United States v. Jannotti, 673 F.2d 578 (3rd Cir.), cert. denied 457 U.S. 1106 (1982). The purpose of the interstate commerce nexus in the money laundering statute is to provide a predicate for federal legislative jurisdiction. United States v. Koller, 956 F.2d 1408 (7th Cir. 1992). See United States v. Kelley, 929 F.2d 582 (10th Cir.) cert. denied 112 S.Ct. 341 (1991). There is substantial agreement that the “in or affecting interstate commerce” requirement is broadly construed and a “minimal effect” on interstate commerce is sufficient to establish federal jurisdiction. Id. at 586; United States v. Eaves, 877 F.2d at 946. See, e.g., United States v. Lucas, 932 F.2d 1210 (8th Cir.) cert. denied 112 S.Ct. 399 (1991); United States v. Tuchow, 768 F.2d 855, 870 (7th Cir. 1985); United States v. Robinson, 763 F.2d 778, 781 (6th Cir. 1985); United States v. Sorrow, 732 F.2d 176, 189 (11th Cir. 1984).

2. Knowing That the Property Represents the Proceeds of Some Form of Unlawful Activity

The government must establish, with direct or circumstantial evidence, that the defendant actually or constructively knew that the property involved in the financial transaction was the proceeds of some state, federal, or foreign felonious activity.¹² This knowledge element is separate and distinct from the specified unlawful activity

¹¹ See § 1527 of the Annunzio-Wylie Anti-Money Laundering Act of 1992. Even before the amendment, there was case law supporting this proposition. See United States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990)(transfer of title on defendant’s truck qualified as “financial transaction”).

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element. The defendant need not know that the property was in fact proceeds of specified unlawful activity. Rather, it is sufficient if he knows the property to be the proceeds of some form of felonious conduct under state, federal or foreign law. *United States v. Campbell*, 977 F.2d 854, 858 (4th Cir. 1992); *United States v. Awan*, 966 F.2d at 1424-1425; *United States v. Jackson*, 935 F.2d at 838; *United States v. Sutera*, 933 F.2d 641, 644-646; *United States v. Ortiz*, 738 F. Supp. 1394, 1399 (S.D.Fla. 1990); S. Rep. No. 433, 99th Cong., 2d Sess. 12 (1986).

The knowledge element can be met in several ways. The defendant's knowledge may be either actual, constructive, or deemed by operation of the defendant's willful blindness to the facts. *Id.* at 9-10; *United States v. Campbell*, 977 F.2d at 857-59; *United States v. Ortiz*, 738 F. Supp. at 1400, n. 3. See also *United States v. Giovannetti*, 919 F.2d 1223 (7th Cir. 1990); *United States v. Nersesian*, 834 F.2d 1294 (2nd Cir. 1987); *United States v. Jewel*, 532 F. 2d 697 (9th Cir. 1976), cert. denied, 426 U.S. 951 (1976). Circumstantial evidence will suffice to establish the requisite knowledge. See *United States v. Campbell*, 977 F.2d at 859 (evidence of drug dealer's lifestyle, defendant's statement that the money "might have been drug money," and the fraudulent nature of the transaction in which the defendant participated sufficient

to allow jury to find that defendant was willfully blind as to the source of the money); *United States v. Atterson*, 926 F.2d 649, 656 (7th Cir.) cert. denied, 111 S.Ct 2909 (1991) (jury may conclude that defendant who wires cash for drug dealing boyfriend knew the cash was the proceeds of unlawful activity); *United States v. Gallo*, 927 F.2d at 822 (jury may conclude that defendant who meets a drug dealer in a parking lot and receives a box of currency wrapped in aluminum foil packets from him knew that the cash was the proceeds of unlawful activity); *United States v. Isabel*, 945 F.2d 1193 (1st Cir. 1991) (jury may conclude that defendant knew the cash was the proceeds of unlawful activity when the defendant receives cash from an individual with no legitimate source of income and had previously been arrested on drug charges); *United States v. Brown*, 944 F.2d 1377, 1387 (7th Cir. 1991) (defendant received over \$70,000 through a number of "elaborate and time-consuming transfers," carefully engineered to avoid the reporting requirements and he knew that the individuals had access to large amounts of marijuana).

3. Proceeds of Specified Unlawful Activity

This element requires proof that the property involved in the transaction was, in fact, the "proceeds of specified unlawful activity," as defined in § 1956(c)(7). While the government must only establish that a defendant knew that the property was derived from "some" form of felonious activity under state, federal or foreign law, the government must prove that the proceeds were in fact derived from "specified unlawful activity." However, the government is not required to trace the proceeds back to a particular offense. *United States v. Blackman*, 904 F.2d at 1257. Frequently, defendants will commingle the proceeds of specified unlawful activity with legally derived funds. In *United States v. Jackson*, the

¹² The term "knowing that the property involved in the financial transaction represents the proceeds of some form of unlawful activity" is defined in § 1956(c)(1) to mean that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7). Paragraph (7) defines the term "specified unlawful activity."

court addressed this issue and stated,

§1956(a)(1)(B)(i) require[s] only that a transaction “involve[]” the proceeds of an activity which the participant knows is unlawful, and which in fact “involves” the proceeds of one of the types of criminal conduct identified in § 1956(c)(7). We do not read Congress’ use of the word “involve” as imposing the requirement that the government trace the origin of all the funds deposited into a bank account to determine exactly which funds were used for what transaction. Moreover, we cannot believe that Congress intended that participants in unlawful activities could prevent their own convictions under the money laundering statute simply by commingling funds derived from both “specified unlawful activity” and other activities.

935 F.2d at 840. See also *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992); *United States v. Poster ‘N’ Things*, 969 F.2d 652 (8th Cir. 1992).

4. Specific Intent - Intent to Promote Specified Unlawful Activity

This element requires the government to prove that the defendant conducted or attempted to conduct a financial transaction with the intent to promote a specified unlawful activity. Courts have found that the reinvesting of illegal proceeds into an illegal enterprise are the types of activities which can show an intent to promote a specified unlawful activity. *United States v. Hildebrand*, 152 F.3d 756, 762 (8th Cir. 1998) (payments for office supplies, secretarial services and staff wages constitute transactions with intent to promote an on-going fraud scheme); *United States v. Mirabella*, 73 F.3d 1508 (9th Cir. 1996) (using fraud proceeds to pay commissions to persons who brought in

more victims promoted specified unlawful activity); *Unites States v. Munoz-Romo*, 947 F.2d 170 (5th Cir. 1991) (purchase of house in which cash from drug sales were hidden, and purchase of cars used to drive to sites of drug sales are transactions that promote specified unlawful activity). Additionally, where a defendant distributes the proceeds to other co-conspirators or uses the proceeds to keep the scheme ongoing are instances which the courts have found to promote the specified unlawful activity. *United States v. Coscarelli*, 105 F.3d 984, 990 (5th Cir. 1997), *aff’d en banc*, 149 F.3d 342 (5th Cir. 1998) (using proceeds of telemarketing fraud to pay co-conspirators and overhead expenses promote the fraud scheme); *United States v. Masden*, 170 F.3d 790 (7th Cir. 1999) (using money from new investors to pay off earlier investors - as in a classic Ponzi scheme - promotes the scheme because it foster good will and nurtures false impression that investors who want their money back will be paid).

5. Specific Intent - Intent to Engage in a Violation of § 7201 or § 7206 of the Internal Revenue Code

This element requires the government to prove that the defendant conducted a financial transaction with the intent to evade Federal taxes. In an analysis explained by the chairman of the Senate Judiciary Committee:

[This provision] is vital to the effective use of the money laundering statute and would allow the Internal Revenue Service with its expertise in investigating financial transactions to participate in developing cases under §1956. Under this provision any person who conducts a financial transaction that in whole or in part involves property derived from unlawful activity, intending to engage in conduct that constitutes a violation of the tax laws, would be guilty of a

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money laundering offense¹³

The scope of subsection (a)(1)(A)(ii) is controlled to a large extent by the reach of §§ 7201 and 7206 of the Internal Revenue Code of 1986. Consequently, in seeking to determine whether a defendant has acted with intent to violate § 7201 or § 7206, those sections must be consulted. In general, § 7201 covers attempted tax evasion (willfully attempt in any manner to evade or defeat any tax or the payment thereof) and § 7206 covers the preparation and filing of false tax returns and other false documents. The subsection, therefore, essentially extends to a person who engages in a financial transaction involving proceeds derived from specified unlawful activity with the intent to evade the payment of taxes or with the intent to submit a materially false tax return or document to the IRS. Conduct evidencing this type of intent has been found where the defendant failed to report the laundered funds as income or disguise the transfer of illegal proceeds as a loan payment. *United States v. Suba*, 131 F.3d 662 (11th Cir. 1998) (defendant's failure to report three checks on him income tax return is evidence that he laundered them with intent to evade taxes); *United States v. Zanghi*, 189 F.3d 71 (1st Cir. 1999) (transferring fraud proceeds in a manner designed to make it appear to be a loan payment instead of income violates the tax laws and is sufficient to show an intent to evade taxes). This intent element is rarely charged by prosecutors because of the necessity of obtaining approval by the Tax Division of the U.S. Department of Justice.

6. Specific Intent - Intent to Conceal or Disguise the Nature, Location, Source, Ownership, or Control of Proceeds of Unlawful Activity

This element requires the government to prove that the defendant conducted or attempted to conduct a financial transaction knowing that the transaction was designed, in whole or in part, to conceal the nature, the location, source, ownership or control of the proceeds of specified unlawful activity. The Tenth Circuit in *United States v. Sanders*, 929 F.2d 1466, 1470-1473 (10th Cir.), cert. denied, 112 S.Ct. 143 (1991), explored the requirements of this element. In reversing the money laundering convictions of the defendants who had used drug proceeds to purchase automobiles, the court noted that merely spending the proceeds of illegal activities did not violate the money laundering statute. The court further stated that,

the purpose of the money laundering statute is to reach commercial transactions intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities.

Id. In reversing the conviction, the court emphasized that no third-parties were involved and no effort was made to conceal the identity of the defendants as the purchasers. *Id.*

The Tenth Circuit further clarified its holding concerning this issue in *United States v. Edgmon*, 952 F.2d 1206 (10th Cir. 1992), cert. denied, 1992 WL 127032 (1992), and *United States v. Lovett*, 964 F.2d 1029 (10th Cir. 1992). In *Edgmon*, the court upheld the defendant's money laundering conviction where the factual circumstances suggested a complicated scheme which used a third-party to conceal

¹³ 134 Cong. Rec. S17367 (daily ed. November 10, 1988) (statement of Sen. Biden).

the true ownership of the proceeds. The court stated, “The involved transactions, unlike the simple automobile purchases in Sanders, certainly support a finding under the money laundering statute of intent to conceal the origin or nature of the proceeds of unlawful activity.” *United States v. Edgmon*, 952 F.2d at 1211. In *Lovett*, the defendant was charged, among other things, with four counts of money laundering under § 1956(a)(1)(B)(i). The court applied the standards relied on in *Sanders* to each of the four counts. The court upheld *Lovett*’s convictions on two counts where he instructed his brother not to tell the victim about the purchase of the pick-up truck and where he gave a number of conflicting statements regarding the source of the cash used in the purchase of a home. The court reversed the remaining two counts, where the defendant had purchased a car for his own use and a diamond ring for his wife, by concluding that the government had failed to introduce any direct evidence supporting the defendant’s intent to conceal or disguise the origin of the proceeds used in those transactions. The court found, however, that neither the money laundering statute nor its holding in *Sanders* created a requirement that “every money laundering conviction must be supported by evidence of intent to conceal the identity of the participants of the transaction.” *United States v. Lovett*, 964 F.2d at 1034. The court further stated,

To find that the money laundering statute is aimed solely at those transactions designed to conceal the identity of the participants to the transaction is to ignore the broad language of the statute. We see no reason why the concealment requirement may not be met by other affirmative acts related to the commercial transaction — acts designed to quell the suspicions of

third parties regarding the nature, location, source, ownership or control of the proceeds of the defendant’s unlawful activity. . . [T]he statute is aimed broadly at transactions designed in whole or in part to conceal or disguise in any manner the nature, location, source, ownership or control of the proceeds of unlawful activity.

Id. at 1034, n. 3.

The Seventh Circuit, while endorsing the court’s reasoning in *Sanders*, upheld the money laundering conviction of the defendant in *United States v. Jackson*, 935 F.2d at 841, where the defendant commingled the proceeds of his drug distribution operation with the “legitimate” funds deposited in the business accounts. The court found that the very act of commingling the funds was itself suggestive of a design to hide the source of ill-gotten gains. *Id.* at 840. The court further explained that:

[t] he conversion of cash into goods and services as a way of concealing or disguising the wellspring of the cash is a central concern of the money laundering statute... To convict under § 1956(a)(1)(B)(i) the government must prove not just that the defendant spent ill-gotten gains, but that the expenditures were designed to hide the provenance of the funds involved.

Id. at 841-842. See also *United States v. Posters ‘N’ Things*, 969 F.2d 652 (defendant’s commingling in one account of legitimate business receipts and illegitimate receipts was evidence of defendant’s intent to disguise the nature or source of the proceeds from her unlawful business); *United States v. Beddow*, 957 F.2d 1330, 1335 (6th Cir. 1992) (evidence of defendant’s convoluted financial dealings with his banks and his charter boat

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business supported a conclusion that he intended to disguise the illegal source of his money); *United States v. Isabel*, 945 F.2d 1193 (1st Cir. 1991) (receiving cash from drug dealer with no legitimate source of income and issuing false payroll check in return is evidence of intent to conceal the illegal source of the money); *United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (defendant deposited illegal gambling proceeds into business account which he used to pay personal bills and gambling expenses; while the money could have been better hidden, a reasonable jury could find that the defendant had the intent to hide the gambling proceeds); *United States v. Martin*, 933 F.2d 609 (8th Cir. 1991) (evidence which showed the purchase of stock with drug proceeds and the issuance of the stock certificates in the name of a third party instead of the purchaser was sufficient to prove defendant's intent to conceal or disguise); *United States v. Massac*, 867 F.2d 174, 178 (3d Cir. 1989) (intent to conceal found where defendant, a drug dealer, used a cash transmitting business, rather than a bank, to transfer \$22,000 in cash to Haiti over a five month period). Cf. *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 925-926 (5th Cir. 1992) (no evidence of concealment found where defendant readily cooperated with law enforcement officers, voluntarily disclosing her possession of the cash and turning it over to the agents for counting, and she made no false exculpatory statements to the agents).

7 Specific Intent - Intent to Avoid a Federal or State Reporting Requirement

This element requires the government to prove that the defendant conducted or attempted to conduct a financial transaction knowing that the transaction was designed, in whole or in part, to avoid a federal or state reporting requirement. In this context, the federal or state

reporting requirements include all the federal and state currency transaction reports as well as state campaign finance reporting laws. Most cases in which the courts have found evidence of this intent involve instances where the defendant "structured" deposits or payments under the \$10,000 reporting threshold. See *United States v. Morales*, 108 F.3d 1213 (10th Cir. 1997) (purchase of bar with 50 payments under \$10,000 evidenced intent to avoid a reporting requirement); *United States v. Griffin* 84 F.3d 912 (7th Cir. 1996) (converting \$99,810 in drug proceeds to cashier's checks in amounts under \$10,000 is a violation of this element); *United States v. Patino-Reyes*, 974 F.2d 94 (8th Cir. 1992) (defendant buys two cashier's checks in amounts under \$10,000, evading CTR requirement, and uses checks to buy boat, evading Form 8300, reporting requirement).

D. Elements of Section 1956(a)(2)

Subsection 1956(a)(2) provides that 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... [is guilty of an offense].

Unlike § 1956(a)(1), which has three elements common to all of its subdivisions, the elements of this statute differ from subdivision to subdivision. Only the “transportation, transmission, or transfer” element, which corresponds to the “financial transaction” element of § 1956(a)(1), is common to all parts of the statute.

1. Transportation, Transmission, or Transfer

Prior to the 1988 amendments, subsection 1956(a)(2) prohibited “monetary transportation” offenses using the operative term “transports or attempts to transport.” The term “transport” was undefined and the Department of Justice concluded that the term encompassed all means of transporting funds or monetary instruments, including wire transmissions, electronic fund transfers, etc. This conclusion was reinforced by the fact that the statute proscribed the transportation of “funds” in addition to “monetary instruments” and left the term “funds” undefined. Thus, the transportation of “funds” arguably included electronic fund transfers and other forms of non-paper financial transfers.

Subsection 6471(b) of the Anti-Drug Abuse Act of 1988 amended the statute to replace the phrase “transports or attempts to transport” with the phrase “transports, transmits, or transfers, or attempts to transport, transmit, or transfer.” The legislative history indicates that by adding the terms “transmit” and “transfer,” Congress intended only to clarify the scope of activities that it thought was already embraced within the term “transport.”¹⁴ Section 1531 of the Annunzio-Wylie Anti-Money Laundering Act of 1992 replaced the term “transportation,” as it appeared in §

1956 (a)(2) and (b), with “transportation, transmission, or transfer.”

All of the subdivisions of subsection 1956(a)(2) apply to situations in which a person transports or attempts to transport “monetary instruments” (as defined in subsection 1956(c)(5)) or funds into or out of the United States for certain illicit purposes. Which of the other elements apply depends on which of the specific intent alternatives is alleged.

2. With the Intent to Promote the Carrying on of Specified Unlawful Activity

The offense described in § 1956(a)(2)(A) requires that the transportation, transmission, or transfer, or attempted transportation, transmission, or transfer be carried out “with the intent to promote the carrying on of specified unlawful activity.” Unlike the corresponding provision in subsection 1956(a)(1)(A)(i), there is no requirement in this subsection that the monetary instrument or funds be the product of specified unlawful activity.¹⁵ Nor is there any “knowledge” requirement. Prosecutors must only establish that the defendant transported, transmitted, or transferred, or attempted to transport, transmit, or transfer the monetary

¹⁴ See 134 Congressional Record, S17360 (daily ed., November 10, 1988) (statement of Sen. Biden).

¹⁵ See United States v. Piervinazi et al., Nos. 92-1473,1474 (2nd Cir. May 2, 1994)(Noting the distinction between § 1956(a)(1), 1957 and 1956(a)(2) with respect to the element of proceeds). It is important to note that the absence of a requirement that the monetary instruments or funds be the proceeds of unlawful activity would allow for the use of government funds in “sting” and other types of operations where government agents provide the instruments or funds to be laundered. Thus, if an individual or domestic money laundering organization was willing to launder its money through outbound currency transportation, the use of government funds would not preclude an otherwise viable subsection

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instrument or funds with the “intent to promote the carrying on of specified unlawful activity.

In a Second Circuit case, *United States v. Piervinazi et al.*, 23 F.3d 670 (2d Cir. 1994), the court was called upon to examine the promotion intent prong in a § 1956(a)(2) context. In this case, defendant argued that the overseas transmission or attempt must accomplish some “secondary” criminal purpose separate and apart from the particular activity generating the proceeds in order to promote some future criminal activity. The court there held that the intent to promote in an (a)(2)(A) context was satisfied by finding that the purpose of the international transportation, or transmission, or attempt, was to promote the very activity underlying the transfer, and did not require proof that “the laundering would promote subsequent criminal activity.” Thus, assuming the purpose of the transfer were proven to have been to promote an ongoing bank or wire fraud, then § 1956(a)(2)(A)’s requirements were satisfied.

3. With the Intent to Conceal or Disguise the Nature, Source, etc., of the Proceeds of Specified Unlawful Activity

This subsection adds two or three elements of proof to a subsection 1956(a)(2) prosecution. First, like subsection 1956(a)(1)(B)(i), it requires that the defendant know that the monetary instrument or funds involved in the transportation or attempted transportation

represent the proceeds of some form of unlawful activity. The analysis applicable to subsection 1956(a)(1) in regard to this element is applicable to subsection 1956(a)(2)(B)(i) prosecutions.

Second, like subsection 1956(a)(1)(B)(i), this subsection requires proof that the transportation was designed in whole or part “to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.”¹⁶

Third, there is at least an implication that the transportation, transmission or transfer must involve the proceeds of specified unlawful activity. The statute is ambiguous in this regard. On the one hand, as mentioned above, § (a)(2), unlike subsection (a)(1), contains no generally applicable proceeds requirement.¹⁷ On the other hand, Congress included a reference to “the proceeds of specified unlawful activity” in subparagraph (a)(2)(B)(i), suggesting that for the purposes of this provision only, a violation of § 1956(a)(2) occurs only when the proceeds of specified unlawful activity are involved.

Section 108 of the Crime Control Act of 1990 eases the government’s burden of proof with respect to both of the knowledge requirements in 18 U.S.C. § 1956(a)(2)(B). The amendment specifically makes it possible to satisfy these requirements by having an undercover agent or confidential informant make representations to the defendant concerning the source of the money and the purpose of the transaction. Thus, in a case under § (a)(2)(B), the

1956(a)(2)(A) prosecution if it could be established that the purpose of the transportation was to promote the carrying on of specified unlawful activity (§ 1956 (c)(7)). The absence of a requirement that the monetary instruments or funds be the proceeds of unlawful activity would also be useful in a circumstance where legitimate funds are transferred to influence participation in a specified unlawful activity.

¹⁶ The legislative history of this section is Sec. 510 of S.1970; and Sec. 1410 of S. 1972, 101st Cong. See 135 Congressional Record, S16760 (daily ed., November 21, 1989).

¹⁷ See *United States v. Hamilton*, 931 F.2d 1046, 1052 (5th Cir. 1991).

government could satisfy the knowledge requirements by having a confidential informant, working under the direction of a federal agent, tell the defendant that the property being sent into or out of the was to disguise the ownership of the property.

4. With the Intent to Avoid a Transaction Reporting Requirement under State or Federal Law

This element, like subsection (B)(i) above, requires proof that the defendant knew that the monetary instruments or funds involved in the transportation, transmission, or transfer or attempted transportation, transmission, or transfer represent the proceeds of some form of unlawful activity. But this provision already does not require the government to prove that the property was, in fact, the proceeds of specified unlawful activity. In addition, subsection (a)(2)(B)(ii) adds the element of proof that such transportation be designed in whole or part “to avoid a transportation reporting requirement under State or Federal law.” Thus, all that has to be proven in addition to the transportation element is that: (1) the defendant knew the funds to be the product of some kind of unlawful activity; and (2) the defendant knew that the purpose of the movement in or out of the country was to avoid a reporting requirement. Both of these elements may, after the 1990 amendments, be established with evidence of a proper representation by a law enforcement officer, and evidence that the defendant believed the law enforcement officer’s representation to be true.

In *United States v. Ortiz*, 738 F.Supp. 1394, 1398-1400 (S.D. Fla. 1990), the portion of § 1956(a)(2) that requires the government to prove that the defendant dealt with proceeds “knowing” the proceeds were criminally derived was challenged as ambiguous. In *Ortiz*, the defendant was charged with attempting to transport

\$497,000 in U.S. currency from Miami to a place outside the United States knowing that the money was the proceeds of some unlawful activity and knowing that the movement of the funds was designed to avoid the transaction reporting requirement. The court found no ambiguity. Citing § 1956(c)(1)’s definition of “knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity,” the court said the following: “This definition suggests that the statute is applicable to the transportation of the proceeds of any felonious activity where the defendant has knowledge that the proceeds are derived from felonious activity”. See also *United States v. Levine*, 750 F. Supp. 1433 (D. Colo. 1990) (language in indictment charging defendant acted “knowing that the transactions were designed ... to conceal or disguise the nature ... of the proceeds of these specified unlawful activities” is a sufficient charge that the defendant also knew that transactions involved illegal proceeds); *United States v. Lizotte*, 856 F.2d 341 (1st Cir. 1988).

E. Elements of Subsection 1956(a)(3) - Undercover “Sting” Operations

In 1988, § 6465 of the Anti Drug Abuse Act created an entirely new money laundering offense that may be committed as a result of a government “sting” operation. 18 U.S.C. § 1956(a)(3)¹⁸ states: Whoever, with the intent (A) to promote the carrying on of specified unlawful activity; (B) to conceal or disguise the nature, location, source, ownership or control of property believed to be the proceeds of specified unlawful activity; or (C) to avoid a transaction reporting requirement under State or Federal law conducts or attempts

¹⁸ Enacted by § 6465 of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4375, eff. Nov. 18, 1988.

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to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both.

The term “represented” is defined in this subsection as meaning any representation made by either a law enforcement officer or by another person at the direction of, or with the approval of, a federal official authorized to investigate or prosecute violations of 18 U.S.C. § 1956. Subsection 1956(a)(3) was added to the statute expressly to permit prosecution where the defendant believed the proceeds were derived from specified unlawful activity because of a representation made by a law enforcement officer or an informant working under the officer’s control. In his analysis of § 6465 of the *Anti-Drug Abuse Act of 1988*,¹⁹ which added subsection (a)(3) to 18 U.S.C. § 1956, Senator Joseph R. Biden, Jr., Chairman of the Senate Judiciary Committee, said the following:

This amendment to the money laundering statute, 18 U.S.C. § 1956, would permit undercover law enforcement officers to pose as drug traffickers in order to obtain evidence necessary to convict money launderers. The present statute does not provide for such operations because it permits a conviction only where the laundered money “in fact involves the proceeds of specified unlawful activity.” 18 U.S.C. § 1956(a)(1). Since money provided by an undercover officer posing as a drug trafficker does not “in fact” involve drug money, the laundering of such money is not presently an offense under the statute.²⁰

¹⁹ Pub. L. 100-690, 102 Stat. 4375.

1. The Representation Clause

As amended in 1992,²¹ the representation clause of § 1956(a)(3) reads as follows:

“... involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity ...” Thus, it is an offense under § 1956(a)(3) if a law enforcement officer says, “this is drug money” and the defendant uses the money (or attempts to use the money) to conduct a financial transaction with one of the alternative intents specified in subparagraphs (A), (B) or (C), i.e., to promote future specified unlawful activity (such as buying an airplane to be used for drug smuggling); to conceal or disguise the ownership of the money (such as by wiring it to an account held by a fictitious corporation); or to violate a currency reporting requirement (such as by engaging in structured deposits). It is also an offense under § (a)(3) if the officer says, “this is an airplane/firearm/farm used to facilitate drug trafficking” and the defendant then engages in a financial transaction involving that property with one of the specific intents.

Congress saw the elimination of the knowledge and proceeds requirements as justified only because the representation requirement was to be added. The legislative history makes clear that the representation element was seen as an

²⁰ 134 Cong. Rec. S17365 (daily ed. November 10, 1988). Section 6465 was derived from § 2353 of S.2852, 100th Cong., 2d Sess., the Senate version of what became the Anti-Drug Abuse Act of 1988. The original Senate language of the provision appears at 134 Cong. Rec. S14335 (daily ed. October 3, 1988). An analysis of that language appears, id. at pp. S14072 and S14096.

²¹ See § 1531 of the Annunzio-Wylie Anti-Money Laundering Act of 1992.

essential element of the new statute. Thus the proper reading of the representation clause is that, whereas a representation is essential, the officer or other authorized individual may make either of two kinds of representations: 1) that the property is the proceeds of criminal activity, or 2) that the property was used to conduct or facilitate criminal activity.

The representation need not be explicit. Ambiguous statements concerning the illegal derivation of the funds are sufficient to satisfy the representation element as long as the agent suggests that he is involved in an illegal activity. In *United States v. Breque*, 964 F.2d 381 (5th Cir.), cert. denied, 113 S.Ct. 1253 (1993), for example, the undercover IRS agent never explicitly told the defendant that the money he was laundering through his currency exchange business was drug money. However, based on the defendant's responses to the agent's veiled references to drug dealing, including a suggestion to his co-conspirator that they charge a higher commission because of the dangers involved in dealing with drug traffickers, the court held that a jury could infer that the defendant knew that the money had been represented as drug money. Similarly, in *United States v. Kaufmann*, 985 F.2d 884 (7th Cir. 1993), a government agent buying a Porsche automobile from the defendant never explicitly stated that the \$40,000 in cash he was using was drug proceeds. The court held that the government need not prove that the agent expressly indicated the source of the cash to the defendant, but rather "[i]t is enough that the government prove that an enforcement officer or authorized person made the defendant aware of circumstances from which a reasonable person would infer that the property was drug proceeds." *Id.* at 893. In addition, there is no requirement that agents in sting operations "recite the alleged source" of the represented tainted

funds at each transaction during the course of a sting operation. According to the Fifth Circuit, doing so would place an unnecessary burden on the government's ability to carry out credible sting operations. See *United States v. Arditti*, 955 F.2d 331, 339 (5th Cir. 1992).

2. Differences in Intent Requirements in (a)(1) and (a)(3)

Congress recognized that the substitution of the representation requirement in (a)(3) for the knowledge and proceeds requirements in (a)(1) was imperfect: a knowledge requirement applies to all defendants; to be convicted of an offense under (a)(1), even an aider and abetter has to know that the property was derived from some form of unlawful activity. The representation requirement, however, is not part of the mens rea of the offense. To compensate for the elimination of the knowledge requirement from the mens rea, Congress made the intent requirement in (a)(3) stricter than it is in (a)(1). Senator Biden addressed this point as follows:

While this [the fact that the representation requirement is not part of the mens rea] would mean that everyone involved in the financial transaction would be guilty of this offense whether he was aware of the law enforcement officer's representation or not, the strengthened specific intent requirement would guard against innocent persons being prosecuted.²²

The reference to the "strengthened specific intent requirement" is to differentiate between the language in §§ 1956(a)(1)(B)(i) and (ii) and the language in §§ 1956(a)(3)(B) and (C). While the three alternative intent elements of subsection (a)(3) are very similar to the three corresponding elements in the original

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version of subsection (a)(1), they are not identical. The second and third alternatives in (a)(3) require proof of specific intent “to conceal or disguise the nature, location, source, ownership, or control” of the criminal proceeds, § 1956(a)(3)(B), or “to avoid a transaction reporting requirement,” § 1956(a)(3)(C). In contrast, subsection (a)(1)(B) requires only proof that the defendant had knowledge that the purpose of the transaction was “to conceal or disguise the nature, location, source, ownership, or control” of the criminal proceeds, § 1956(a)(1)(B)(i), or “to avoid a transaction reporting requirement,” § 1956(a)(1)(B)(ii). The legislative history suggests that the “had knowledge” requirement of (a)(1) is a weaker standard than the specific intent requirement of (a)(3).²³

**F. 18 United States Code Section
1957 - Engaging in Monetary
Transactions in Property Derived
from Specified Unlawful Activity**

Section 1957 contains an offense entitled, “Engaging in monetary transactions in property derived from specified unlawful activity.” In essence, subsection 1957(a) proscribes the knowing disbursement or receipt of over \$10,000 of criminally derived funds if a financial institution is utilized at some point. The statute does not require that these funds be used for any additional criminal purpose nor that the defendant engaged in the transaction with any specific intent. For example, assuming more than \$10,000 was involved, the deposit in a bank of the proceeds of a house sale by a seller who knows that these proceeds were funds derived from drug dealing would constitute a violation of this statute. Thus, § 1957 is

the equivalent of a financial transaction offense under § 1956(a)(1) with the specific intent requirements replaced by the requirement that the transaction involve \$10,000 and a financial institution.

1. Essential Elements

The elements of § 1957 are: (1) an individual must engage or attempt to engage in a “monetary transaction”;²⁴ (2) the defendant must know that the property involved in the transaction is criminally derived; and (3) the property must in fact be derived from “specified unlawful activity.”²⁵

²⁴ The term “monetary transaction”, as originally defined in Subsection 1957(f)(1), included: the deposit, withdrawal, transfer or exchange, in or affecting interstate or foreign commerce, of funds or monetary instrument . . . by, through, or to a financial institution (as defined in 31 U.S.C. § 5312(a)(2)). Additional language was added in 1988 to state that the term “monetary transaction” . . . does not include any transaction necessary to preserve a person’s right to representation as guaranteed by the Sixth Amendment to the Constitution. . . .” The term “monetary instrument” in § 1957 as originally enacted was given the same definition as under 31 U.S.C. § 5312(a)(3) and 31 C.F.R. § 103.11(k). This definition includes U.S. currency and all negotiable instruments that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes immediately upon delivery.

Effective November 18, 1988, § 6184 of the ADAA amended 18 U.S.C. § 1957(f)(1) to specify that the term “monetary instrument” was to have the same definition as in 18 U.S.C. § 1956(c)(5), which is as follows:

1. coin or currency of the United States or of any other country, travelers’ checks, personal checks, bank checks, money orders, or
2. investment securities or negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery.

²² 134 Cong. Rec. S14072, S14096 (daily ed., October 3, 1988).

²³ 134 Cong. Rec. S14072, S14096 (daily ed., October 3, 1988).

(a) Monetary Transaction

The term “monetary transaction” is narrower than the term “financial transaction” as used in § 1956 in that it requires that a financial institution and at least \$10,000 be involved in the transaction. This is the only substantive provision of either § 1956 or § 1957 that requires that a financial institution participate or otherwise be connected to the transaction in order for that transaction to be criminal money laundering. But the definition of “financial institution” in § 5312 of Title 31 is extremely broad. Thus, for example, a transaction occurring at a car dealership or a jewelry store is a “monetary transaction” under § 1957.

A defendant may violate § 1957 simply through the deposit of proceeds from an underlying offense. In *United States v. Griffith*, 17 F.3d 865 (1994), the Court affirmed the § 1957 conviction of the defendant who deposited proceeds received from the transfer of fraudulently procured camera equipment. In *United States v. Lovett*, 964 F.2d 1029 (10th Cir.), the defendant embezzled funds from his grandmother’s bank accounts, and used the money as collateral for a loan. The Tenth Circuit held that each time the defendant deposited loan proceeds, which he had divided into six separate checks, he violated § 1957. Similarly, in *United States v. Hollis*, 971 F.2d 1141 (10th Cir. 1992), the defendant was convicted under § 1957 for depositing checks from a completed wire fraud scheme. One court has even held that simply spending proceeds will violate § 1957. See *United States v. Kelley*, 929 F.2d 582, 585 (10th Cir.), cert. denied, 112 S.Ct. 341 (1991)(defendant used proceeds of fraudulently obtained loan to buy a car).

²⁵ Subsection 1957(f)(3) defines “specified unlawful activity” in accordance with the definition contained in subsection 1956(c)(7).

(b) Knowledge and Proceeds

The knowledge requirement contained in § 1957 is only that the individual know that the monies involved are derived from some kind of criminal activity. There is no requirement of knowledge that the funds be derived from any particular kind of crime or, indeed, that the funds were derived from a felony rather than a misdemeanor. The proceeds requirement is identical to the analogous provision in § 1956(a)(1). Thus the knowledge and proceeds elements of a § 1957 offense are not unlike the same elements under § 1956, and the same case law is applicable to both.

III. RECENT DEVELOPMENTS IN THE U.S. STRATEGY AGAINST MONEY LAUNDERING

On October 15, 1998, Congress passed the Money Laundering and Financial Crimes Strategy Act of 1998. The Act, which was introduced by Congresswoman Nydia Velazquez of New York and signed into law by President Clinton, called upon the President, acting through the Secretary of the Treasury and in consultation with the Attorney General, to develop a national strategy for combating money laundering and related financial crimes. The Act called for the first national strategy to be sent to Congress in 1999, and updated annually for the following four consecutive years. The first annual strategy was released on September 23, 1999. The National Money Laundering Strategy for 2000 was released on March 8, 2000, at a press conference co-chaired by Deputy Attorney General Eric Holder and Deputy Treasury Secretary Stuart Eizenstat.

The 2000 Strategy is organized according to four overarching goals:

- (1) to strengthen domestic enforcement in order to disrupt the flow of illegal money;

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- (2) to enhance regulatory and cooperative public-private efforts to prevent money laundering;
- (3) to strengthen partnerships with state and local governments to fight money laundering throughout the United States; and
- (4) to strengthen international cooperation in order to disrupt the global flow of illicit money.

These four goals are supported by identified objectives which, in turn, are to be accomplished through approximately 65 specific action items set out in the strategy. The following are summaries of the most significant action items:

A. Designation of High Intensity Financial Crime Areas (HIFCAs)

The designation of HIFCAs was mandated by the 1998 legislation and was the first action item in the 1999 Strategy. HIFCAs are defined as special, high-risk areas or sectors where law enforcement will concentrate its resources and energy to combat money laundering. The Justice and Treasury Departments led a process to identify and designate the first HIFCAs. As part of this process, the two departments convened an interagency HIFCA Working Group to collect and analyze relevant information and make recommendations to the Deputy Attorney General and the Deputy Treasury Secretary for the HIFCA designations. The 2000 Strategy designated the first HIFCAs: (1) the New York City/Northern New Jersey area; (2) the Los Angeles, California, metropolitan area; (3) San Juan, Puerto Rico; and (4) a "systems" HIFCA to focus and enhance current efforts addressing the problem of cross-border currency smuggling/movements between Mexico and Texas and Arizona.

The HIFCA programme is intended to concentrate law enforcement efforts at the

federal, state, and local levels to combat money laundering in the designated high-intensity money laundering zones. In order to implement this goal, money laundering action teams have been created or identified within each HIFCA to spearhead a coordinated federal, state, and local anti-money laundering effort. Future HIFCAs will be selected from applications received from prospective areas or from candidates proposed by the Secretary of the Treasury or the Attorney General.

B. Financial Crime-Free Communities Support Programme (C-FIC)

The 2000 Strategy announces the launching of the C-FIC programme. The C-FIC programme is also the result of a legislative mandate which calls for the establishment of a federal grant programme to provide seed capital for emerging state and local counter-money laundering enforcement efforts. The Bureau of Justice Assistance (BJA) is assisting the Treasury Department in administering this grant programme. Congress appropriated \$2.9 million in fiscal year 2000 for the commencement of this programme. The first nine recipients for C-FIC grants were announced in September 2000 and included a variety of programs proposed by state and local law enforcement agencies in New York, Illinois, Arizona, Florida, Texas and California.

C. Money Service Business Suspicious Activity Report (SAR) Reporting

In conjunction with the release of the strategy, the Treasury Department announced the issuance of final regulations, effective December 31, 2001, mandating that money transmitters, issuers, sellers, and redeemers of money orders and traveler's checks must report suspicious transactions to the Treasury Department.

D. Financial Crime Havens

The 1999 Strategy called for the formation of an interagency working group to explore whether measures should be adopted to restrict financial institutions in the United States from opening or maintaining correspondent banking accounts for foreign banks that are organized in “lax” offshore jurisdictions. This initiative was pursued in conjunction with the Financial Action Task Force’s initiative which resulted in the naming of fifteen Non-cooperative Countries and Jurisdictions in June 2000. The issuance of this list was followed by the issuance of FinCEN Advisories to United States financial institutions concerning the fifteen designated jurisdictions.

E. “Gatekeepers”

Pursuant to the 1999 Strategy, an interagency working group was created to examine the responsibilities of professionals, such as lawyers and accountants, with regard to money laundering. The 2000 Strategy directed the working group to continue its review and “to make recommendations - ranging from enhanced professional education, standards or rules, to legislation - as might be needed.” In April 2000, a meeting of representatives from the G-7 countries was convened in Washington, D.C. to discuss this issue. Because of the difficult legal and policy issues involved when considering the responsibilities of lawyers and accountants in this area, the working group will continue to study this issue and prepare recommendations for the Steering Committee in 2001.

F. Proposed Legislation

The Treasury Department announced that, in conjunction with the 2000 Strategy, the administration was sending new anti-money laundering legislation to Congress. The International Counter-Money Laundering Act of 2000 offered critically

needed new authority to take calibrated action against foreign financial crime havens. In addition to seeking enactment of the Treasury bill, the 2000 Strategy called for the administration to seek enactment of the Justice Department’s Money Laundering Act of 2000, which was submitted to Congress on November 10, 1999. This bill contained numerous provisions which would enhance the effectiveness of the money laundering statutes. However, neither of these bills was enacted in 2000. It is expected that these bills will be re-submitted to Congress in 2001.

In conjunction with the announcement of the 2000 Strategy, on March 7, 2000, the Attorney General and the Secretary of the Treasury issued a joint memorandum to all U.S. Attorneys (USAs) and the heads of all of the federal law enforcement agencies, which emphasized the importance of anti-money laundering enforcement and requested the implementation of several action items recommended in the 1999 Strategy. Specifically, the memorandum urged the USAs and the law enforcement agencies:

- (i) to encourage below-threshold investigations and prosecutions that potentially have a systemic or financial sector-wide effect on money laundering;
- (ii) to establish SAR review teams;
- (iii) to ensure that all informants and cooperating witnesses are debriefed with respect to money laundering methods and their knowledge of money laundering techniques;
- (iv) to increase the use of electronic surveillance in appropriate money laundering cases;
- (v) to enhance the support and analysis of multi-district money laundering investigations;

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- (vi) to increase training for financial investigations; and
- (vii) to increase the strategic use of asset forfeiture in money laundering cases.

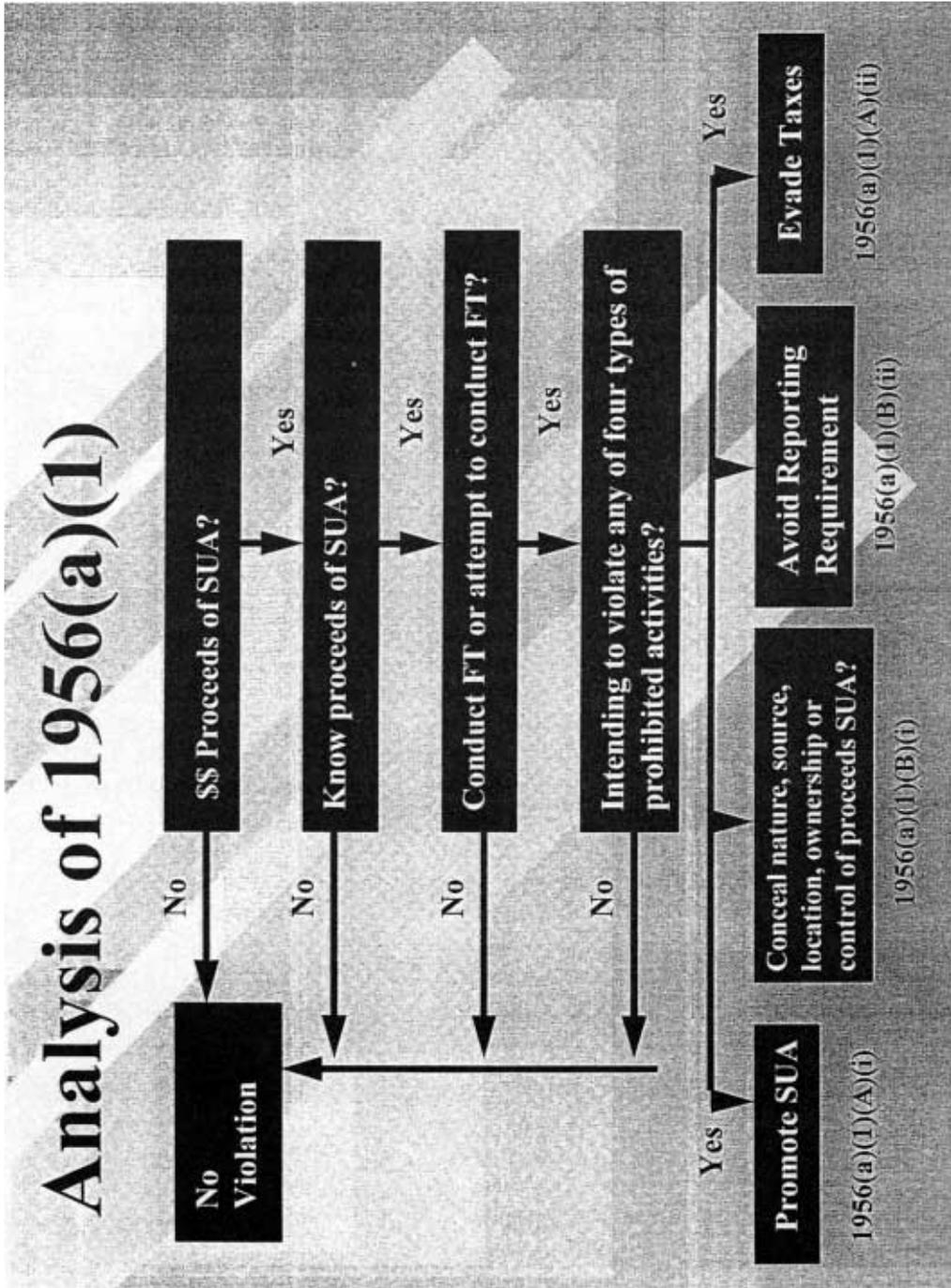
The 2000 Strategy set out a far-reaching and highly ambitious regimen of action items and milestones to be addressed and accomplished during 2000. The implementation of the Money Laundering Strategy was being guided by an interagency Steering Committee co-chaired by the Deputy Secretary of the Treasury and the Deputy Attorney General, with the participation of relevant departments and agencies. The Steering Committee has the responsibility of tracking and identifying progress toward fulfillment of the goals and objectives identified in the 2000 Strategy and this progress will be reported in the 2001 Strategy.

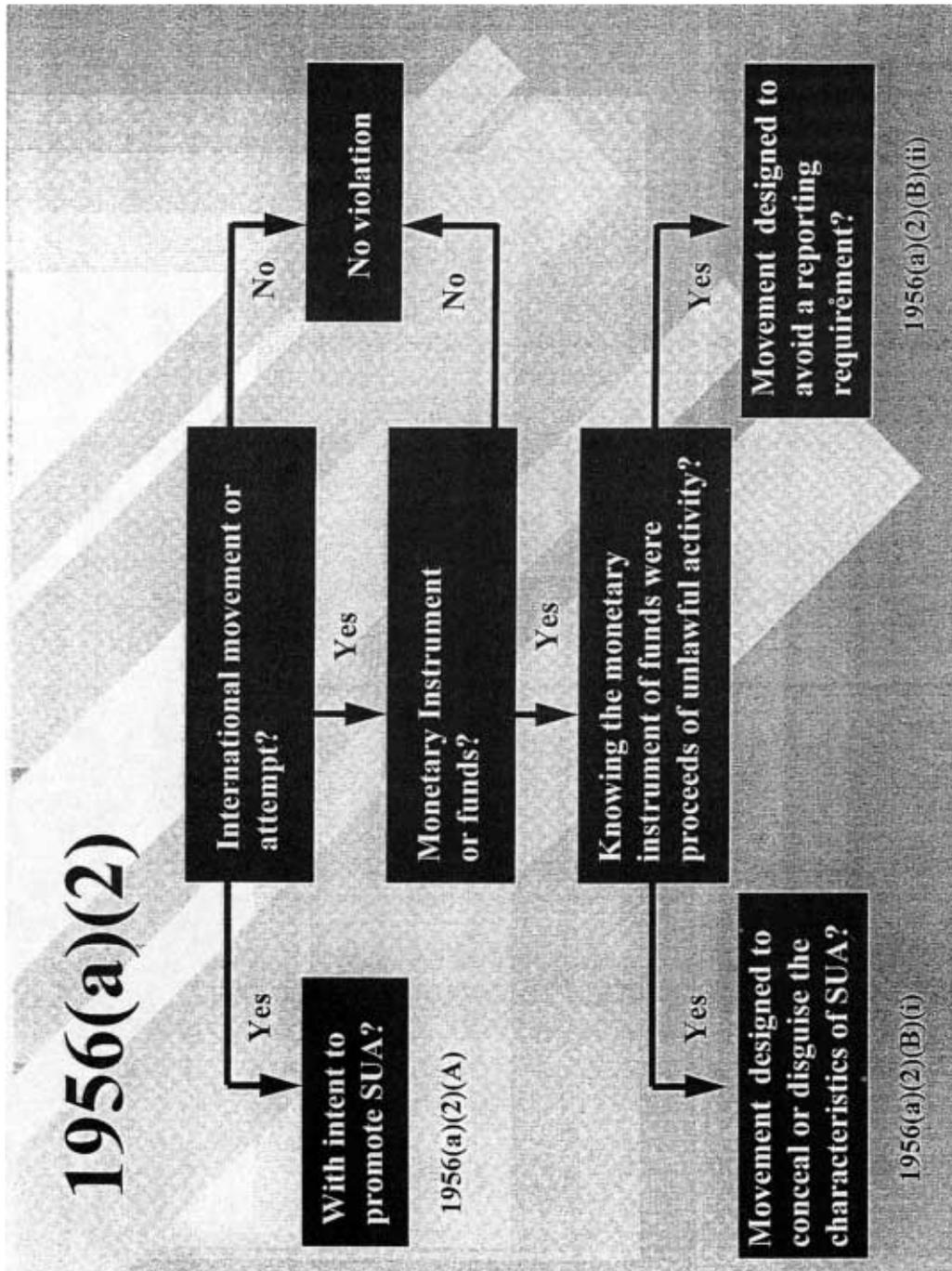
IV. CONCLUSION

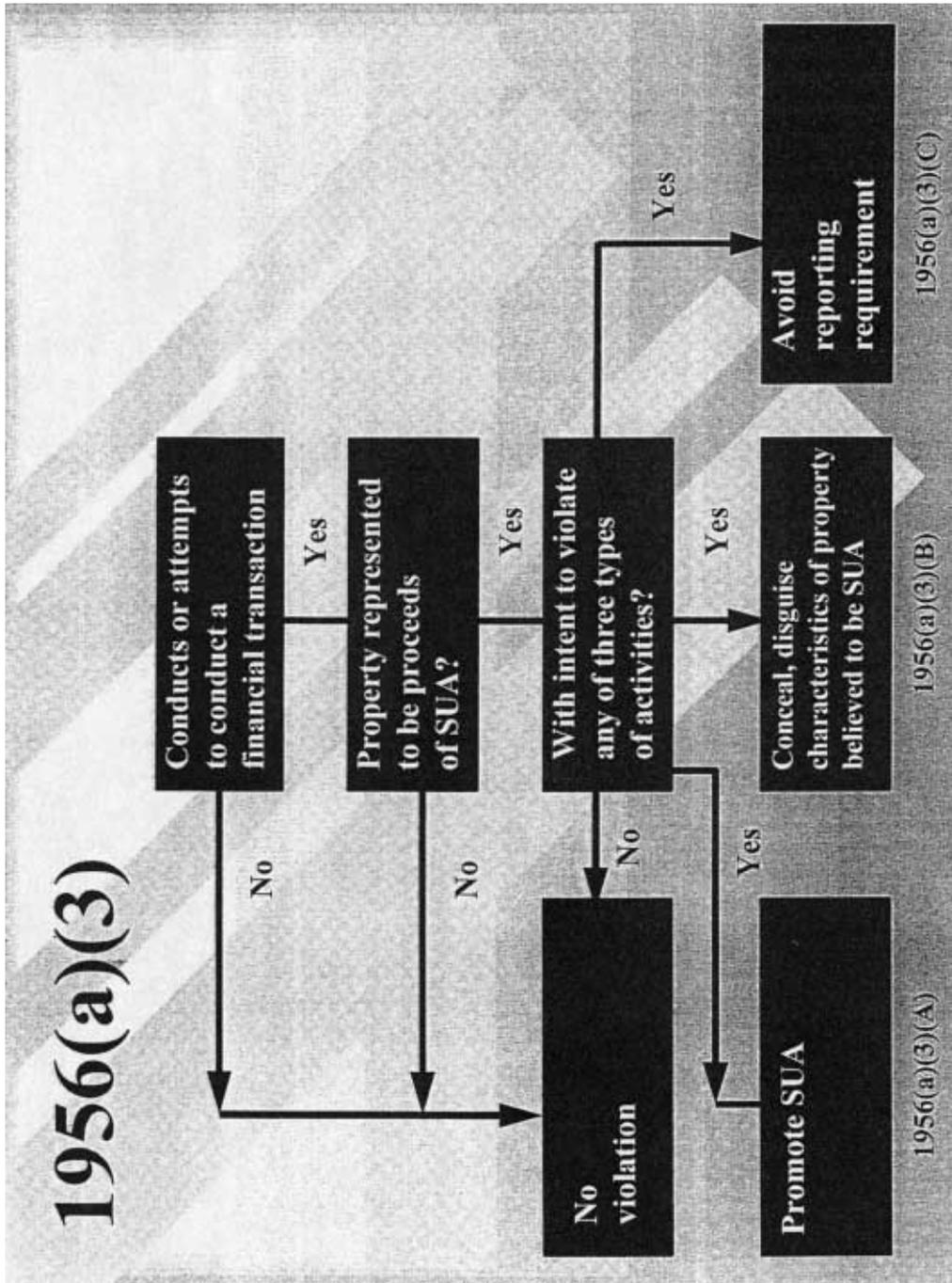
Today, more than ever before, money laundering is a world-wide phenomenon and an international challenge. While no hard numbers exist on the amount of worldwide money laundering, former IMF Managing Director Michel Camdessus has estimated the global volume between two and five per cent of the world's gross domestic product. Even at the low end of that range, the amount of proceeds from narcotics trafficking, arms trafficking, bank and securities fraud, and other similar crimes laundered worldwide each year amounts to almost \$600 billion. In light of American financial institutions' prominent role in the international financial system, it is likely that a substantial portion of that \$600 billion will be laundered through the United States. The basic anti-money laundering objective of the United States must be, and is currently, to identify and prevent the initial placement of illicit proceeds into our

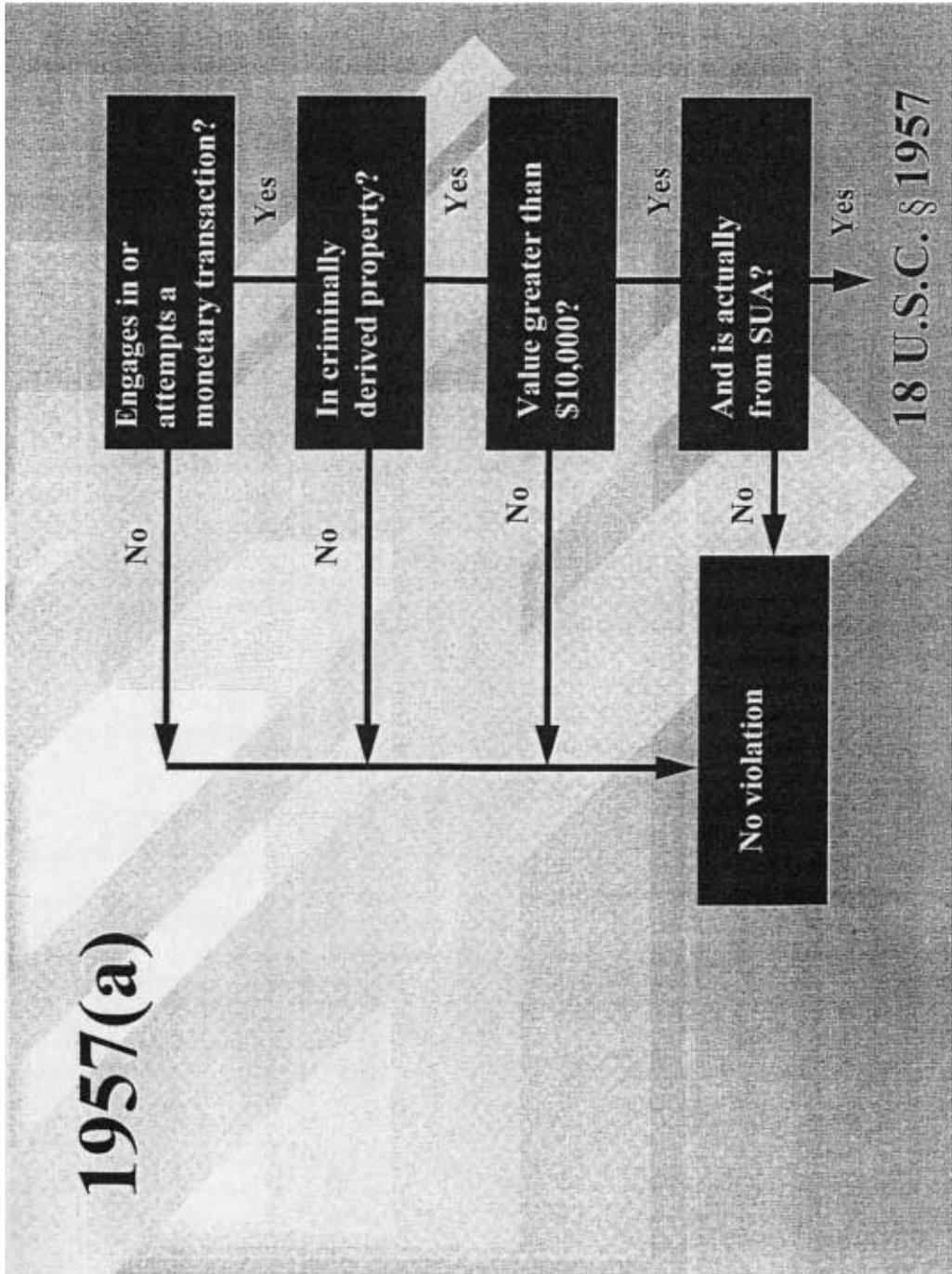
nation's financial system. It is at this stage that the launderers of illicit money are most vulnerable to detection and prosecution, and their illicit proceeds are most vulnerable to identification, seizure and forfeiture. Although the United States has aggressively pursued the investigation and prosecution of those laundering illicit funds, prosecuting approximately 2000 defendants per year, its objectives and strategy must not remain static but must continue to strengthen federal enforcement of the money laundering laws and to intensify its law enforcement efforts to identify money launderers and disrupt the flow of illicit money in the United States. Additionally, the United States must continue to work closely with its international partners in bilateral and multilateral contexts to take coordinated action against the financial power of drug trafficking and other criminal organizations. While this action will not eradicate international drug trafficking or transnational organized crime, it will create an increasingly hostile environment for the money launderer and afford new elements of protection to economic and political systems.²⁶

²⁶ William C. Gilmore, *Dirty Money: The Evolution of Money Laundering Countermeasures*, 2d Ed., Council of Europe Publishing, 1999.









CURRENT SITUATION AND COUNTERMEASURES AGAINST MONEY LAUNDERING: FOCUSING ON THE EXPERIENCE AND LEGAL POLICIES OF THE REPUBLIC OF KOREA

*Chae, Jung-Sug **

I. INTRODUCTION

Since late in the 20th century, people have enjoyed the benefits of industrialization and globalization that the development of transportation and communication technology has brought to the world. At the same time, this economic and social change has also brought about changes to the form, technique, and scope of crime. The consequences are that criminals are crossing borders with an ease unknown in the past and are expanding the area of their activity, and that they are becoming ever more intelligent and specialized.

The expansion of the influence of organized crime has reached such point that it poses great threat to the safety of international community. According to the recent statistics, crime groups are committing trafficking in drugs and illicit firearms, and counterfeiting of currency and credit card, which involve dirty money totaling 3000 billion US dollars. The international community has come to recognize that corruption serve as the soil for the growth of organized crime. And the anti-corruption round initiated with this recognition has become an eloquent international movement.

It is difficult to give a uniform explanation about the purpose of organized crime and corruption, but the most

important purpose and motivation is financial profits. Therefore, in order to combat organized crime and corruption effectively, we need to deprive offenders of their financial gains. To attack them financially is to cut off the Achilles tendon of organized crime groups.¹ But, criminals are cutting off the link between crimes and criminally-derived money, by laundering dirty money taking advantage of all methods and mechanisms imaginable.

We call the series of transactions turning dirty money into clean money, money laundering. In the following, I'll first look into what money laundering is, and the current situation of money laundering in the international community.

II. DEFINITION OF MONEY LAUNDERING AND THE CURRENT SITUATION

A. Definition of Money Laundering

Money laundering is the process by which one conceals the existence, the illegal source, or illegal application of income, and then disguises that income to appear legitimate.² In other words, money

¹ R. Peter, Money Laundering and Its Current Status in Switzerland: New Disincentive for Financial Tourism, 11 Northwestern Journal of International Law & Business 104(1990), p. 108

² The President's Commission on Organized Crime, Interim Report to the President and Attorney General, The Cash Connection: Organized Crime, Financial Institutions and Money, 1984. 10.

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laundering refer to a series of transactions transforming criminally-derived funds into legitimate funds through financial institutions, for the purpose of concealing the illicit nature and origin of the property from government authorities.

Money laundering negatively impacts economic growth and society at large. It distorts economic order, shields criminal activities, which are associated with crime proceeds, from exposure, and corrupts public officials and our society on the whole.

B. Characteristics of Money Laundering

Money laundering is performed systematically and secretly, making it difficult to identify exactly how much money is laundered and what methods are employed. And, it is difficult to criminalize, regulate or crackdown on money laundering with the traditional legal notion and system.

Criminologically, money laundering can be characterized as borderless economic crime or organized crime. Recently, with the rapid development of internet and communication technology, crime proceeds can be moved from one country to another in a matter of hours, by using wire transfers. These factors make the regulation of money laundering more difficult.

C. Current Situation of Money Laundering Worldwide

As pointed out, the exact amounts of laundered money are so difficult to assess. However, we can give a rough estimate, by synthesizing various informations. According to Financial Action Task Force (FATF), it is estimated that the amounts of money laundered annually worldwide from the illicit drug trade alone range between 300 billion US dollars and 500 billion US dollars in 1998. Since this

estimate only regards the amount associated with exposed drug crimes, the amounts of illicit money actually laundered worldwide could be five or six times larger.

There have been a number of money laundering cases worldwide. The most famous one is "The Pizza Connection" case. And, one of the most well known money laundering cases that are not associated with drug crime is "Bank of Credit and Commerce International (BCCI)" case. These two cases revealed that money laundering is performed comprehensively, systematically, professionally, diversely³ and without the check of national borders.

In "The Pizza Connection" case, we could see how various crime groups in different parts of the world formed a network associated with major banks of the United States and Switzerland, and see the linkage between poppy fields of Southeast Asia and the Pizza parlours of the United States. In "BCCI" case, it was revealed that financial experts were deeply involved in money laundering, taking advantage of their expert knowledge, discrepancy between financial systems of individual countries, and financial secrecy protection system. From this case, it was reaffirmed how difficult it is to investigate and regulate money laundering.

³ The Canadian police authorities, after examining 150 cases of money laundering, concluded that there are various methods used to launder money from very simple ones to elaborate ones, and that the limit of these methods are only set by the capacity of criminal group's imagination. (Margaret E. Beare & Stephen Schneider, Trading of Illicit Funds: Money Laundering in Canada, Working Paper No.1990-5, Ministry of the Solicitor General, p.XI)

III. CURRENT SITUATION OF MONEY LAUNDERING REGULATION

A. International Efforts

In early 1980's, the international community formed a consensus that a priority should be given to the regulation of money laundering. The efforts of the international community were exerted through the United Nations and other international organizations, and on regional and national level.

1. Before the Conclusion of the 1988 Vienna Convention

It was the Committee of Ministers of the Council of Europe⁴ of June 27, 1980 that money laundering problem was first discussed on international dimension. The Committee of Ministers adopted the recommendation (R 80/10) regarding Measures Against the Transfer of Safekeeping of Funds of Criminal Origin, urging European countries to take interest in the regulation of money laundering.

After that, the United States and the United Kingdom established domestic laws making money laundering criminal offense. The United Nations adopted the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances on December 19, 1988. As Spain ratified the Convention on August 13, 1990, becoming the 20th country to ratify it, the Convention came into force on November 11, 1990.⁵

The Convention provides the conversion and transfer of crime proceeds and the concealment and disguise of the nature or origin of crime proceeds as criminal offense

⁴ It is a European inter-governmental organization, with 26 member states. It has adopted many conventions in the area of international criminal justice.

in Article 3, Paragraph 1(b). And, the Convention provides obtaining, possessing or using of crime proceeds with knowledge as criminal offense in Article 3 Paragraph 1(c). The Convention requires that State Parties must implement Article 3 Paragraph 1(b) and that regarding Article 3 Paragraph (c), State Parties should take measures to criminalize it under the domestic law to the extent that it complies with the principles of the Constitution and the basic concepts of the legal system. This Convention has a historic meaning in that it criminalizes money laundering activity. I will go on to the international efforts after this Convention.

2. After the Conclusion of the 1988 Convention

On November 18, 1990, the Council of Europe adopted the Convention on Laundering, Search and Confiscation of the Proceeds from Crime. This Convention aimed at strengthening international cooperation in investigation, search and seizure of proceeds derived from major crimes (felony) such as drug crimes and terrorism which are known to yield large profits. As the finance market of EC (European Community) countries took the course for unification, efforts to counter money laundering through the authority of EC arose in Europe. And as a part of this effort, EC enacted the Council Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering on June 10, 1991.

The prevention of money laundering was also discussed at the summits of G7 countries. At the Toronto summit in 1988, G7 declared the necessity of regulating money laundering.⁶ At the Arshur summit in 1989, they made a declaration, inviting

⁵ The Republic of Korea deposited the instrument of ratification of the Convention on December 28, 1998.

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all countries to join G7's cooperative efforts to combat drug trafficking and laundering the proceeds⁷ and resolved to establish the Financial Action Task Force (FATF).

The FATF was participated by 16 countries and organizations including the G7, the council of European Community and Sweden, etc. The first report of the FATF was made on February 2, 1990, and was released in each participating country on April 19 of the same year. The report is made up of three parts, the first part about the scale and the mechanism of money laundering, the second part about the measures made to counter money laundering, and the third part, including recommendations. The forty recommendations of the third part presented a comprehensive blueprint for the international community in preventing money laundering, having a continuous influence in the international effort to counter money laundering.

The FATF went on to enhance its activities as more countries and organizations joined it. The forty recommendations are being modified continuously. Since OECD functions as the secretariat of FATEF, it has also transformed into a gathering of expert groups independent from other international organizations, and has played a very important role in countering money laundering.

There have been many efforts on regional level as well. The Organization of American States (OAS), which had discussed measures against drug problems, adopted the Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and Related Offences at the 11th meeting of Inter-American Drug

Abuse Control Commission (CICAD) on March 10, 1992. Through this, it was affirmed that in order to combat drug crime which is one of the most formidable problem in American continent, regulation of the proceeds and instrumentality should be conducted in parallel. In Asia, the Asia/Pacific Group on Money Laundering (APG) was established in February 1997. The APG works to enhance cooperation in the region, by conducting studies about the prevention of money laundering in Asia/Pacific region, and issuing evaluations on anti-money laundering measures of Asia/Pacific countries.

On the level of the United Nations, the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba in August and September 1990 adopted "Basic Rules for the Control and Prevention of Organized Crime". On December 14, 1990, the General Assembly, through two Resolutions⁸, urged states for their actions to facilitate seizure and confiscation of crime proceeds and to develop effective measures to counter money laundering.

In this atmosphere, the 1st session of Commission on Crime Prevention and Criminal Justice (CCPCJ) was held in April 1992 in Vienna. At the 1st session of CCPCJ, the participating countries recognized that the regulation of money laundering and flow of crime proceeds is more important than anything to counter crime and that the CCPCJ should place its priority on the discussion of strategy to counter money laundering.⁹ In July 1992, the United Nations Economic and Social Council, accepting the recommendation of the CCPCJ, set countering money laundering as the priority of the work of

⁶ Political Declaration, paragraph 16

⁷ Economic Declaration, paragraph 52

⁸ United Nations General Assembly Resolutions 45/107, 45/123

⁹ Resolution 1/2

CCPCJ and the UN Crime Prevention and Criminal Justice Programme for four consecutive years.¹⁰ As a consequence, the CCPCJ has had uninterrupted discussion of the prevention of money laundering and flow of crime proceeds since the 2nd session of Commission in 1993 and made reports of the result of the discussions, urging the criminalization and strong regulation of money laundering.

On December 4, 1994, the General Assembly adopted a Model Treaty on Mutual Assistance in Criminal Matters. At that time, the General Assembly also adopted the Protocol to the Model Treaty on Mutual Assistance in Criminal Matters concerning the Proceeds of Crime, which provides the framework for the international cooperation in the confiscation and forfeiture of crime proceeds.

3. Conclusion of the Convention Against Transnational Organized Crime

In an effort to combat transnational organized crime which poses threat to the safety of the international community, the United Nations held the Ministerial Conference on Organized Transnational Crime in November 1994 in Naples of Italy. This conference adopted an international document entitled the Naples Political Declaration and Global Action Plan against Organized Transnational Crime. The Naples Political Declaration called on the CCPCJ to collect opinions from individual governments regarding the content and the effect of a convention against transnational organized crime. The United Nations General Assembly urged each state party to promptly implement the Naples Political Declaration and Global Action Plan.¹¹

In December 1996, the General Assembly, taking notice of a draft convention against transnational organized crime proposed by Poland, called upon the CCPCJ to give priority to the consideration of the finalization of the draft convention.¹² In December 1997, the General Assembly decided to establish an open-ended meeting for the inter-governmental expert group for the draft of a comprehensive international convention against transnational organized crime.¹³ In December 1998, the General Assembly called for the establishment of the Ad Hoc Committee to take over the achievement made regarding the draft convention and to finish the project.¹⁴

The Ad Hoc Committee, after having the informal preparatory meeting in September 1998 in Buenos Aires, held the first session in January 1999. Through ten sessions of meetings, the Convention against Transnational Organized Crime was adopted in September 2000. Among the three supplementary protocols being discussed, the “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children”, and the “Protocol against the Smuggling of Migrants by Land, Sea and Air” were approved at the 11th session held in October 2000. The approval of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition was reserved for more discussions on some issues which have not been agreed on.

At the back of the UN’s positive actions and achievements, there were regional conferences and declarations. They are the Buenos Aires declaration, the Dakar declaration and the Manila declaration.

¹⁰ Resolution 45/107, 45/123

¹¹ United Nations General Assembly Resolution of December 23, 1994 49/159

¹² Resolution 51/120

¹³ Resolution 52/85

¹⁴ Resolution 53/111

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The Buenos Aires declaration was adopted at the regional ministerial workshop of November 1995 which was a follow-up meeting to the Naples Political Declaration and Global Action Plan. The Dakar declaration was adopted at African regional ministerial workshop held in July 1997 in Dakar of Senegal. The Manila declaration was adopted at Asian regional ministerial workshop regarding transnational organized crime and corruption, held in March 1998 in Manila, the Philippines.

Since the contents of this Convention are those that have recently been discussed and agreed on by the international community, they include relatively strong measures to combat money laundering. Article 6 of the Convention criminalizes a wide range of activities related with money laundering, and requires state parties to include all major crimes provided in the Convention as the predicate offense. This is a step forward from the 1988 Convention which provided for the punishment of money laundering only in case it is associated with drug crimes. Article 7 provides diverse and systematic measures to regulate money laundering, including reporting of suspicious transaction. Article 13 also touches upon the efforts to enhance international and regional cooperation among justice, enforcement and regulation agencies of state parties, to implement these measures. Article 12 of the Convention provides confiscation of crime proceeds, usage of records including bank records for the confiscation of crime proceeds, and power to freeze or seizure proceeds. Article 13 provides for international cooperation for confiscation, and Article 14 provides for the disposal of confiscated assets.

4. Conclusion of Convention on Combating Bribery of Foreign Public Officials in International Business Transaction

At the outset, money laundering problem was discussed in association with drug crimes. The discussion about money laundering was developed in such direction that countering money laundering is important to counter not only drug crimes but also organized crimes, especially transnational organized crimes. Recently, the international community perceives that the predicate offenses for the regulation of money laundering should not be restricted to drug crimes and organized crimes, but should be extended to corruption crimes as well. Corruption crimes are not a domestic problem of an individual country. It undermines fair competition of enterprises in the global market place, and provides soil for the growth of transnational organized crimes. The international community has begun its work to combat corruption.

With this background, OECD finalized the Convention on Combating Bribery of Foreign Public Officials in International Business Transaction. This Convention requires state parties to take legislative measures to criminally punish the act of offering bribes to foreign public officials, and to give assistance to each other in investigation and extradition associated with such case. This Convention was adopted at OECD in November 1997, was signed by 34 countries in December 1997, and came into force on February 15, 1999.

In the process of the discussion of this Convention, there was a consensus of opinion that prevention of money laundering and control of crime proceeds is essential for countering corruption. Article 7 of the Convention provides that each state party which has made bribery of its own public official a predicate offense

for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred. Article 8 of the Convention provides that state party shall take measures regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, and shall provide civil, administrative or criminal penalties.

B. Efforts Made by Individual Countries

Countries worldwide have devoted efforts to respond to money laundering problem voluntarily or as they were encouraged by the aforementioned international conventions. They established domestic laws to make money laundering criminal offense, to confiscate proceeds associated with money laundering, and to require financial institutions to report cash transactions over a certain sum. This move was led by common law countries, at the head of which was the United States.

The United States enacted and enforced the Bank Secrecy Act of 1970¹⁵ as early as 1970. In the same year, the United States established the Racketeering Influenced and Corrupt Organizations Act of 1970 (RICO Act) and the Controlled Substances Act of 1970, providing measures to confiscate certain illicit assets or proceeds. In 1986, the Money Laundering Act of 1986¹⁶ was established.

In 1986, the United Kingdom established the Drug Trafficking Offences Act of 1986, providing for the confiscation of certain illicit proceeds, and criminalizing money laundering activities. The United Kingdom is continuing its work to strengthen related laws. Australia established the Proceeds of Crime Act in 1987, criminalizing money laundering and providing for the confiscation of criminally derived assets. In 1988, Australia enacted the Cash Transaction Reports Act of 1988.

Civil law countries were slower than common law countries in coming up with measures to counter money laundering. Japan ratified the 1988 Vienna Convention in 1989 and enacted the implementing laws in 1991, which came into force in 1992. These implementing laws are “Law Concerning Special Provisions for the Narcotics and Psychotropics Control Law, etc. and Other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances through International Cooperation”(the so-called New Drug Law or Anti-Drug Special Law) and “Act Revising Parts of the Hemp Control Act, the Stimulant Control Act and the Opium Act”. The New Drug Act criminalizes money laundering, and provides for the confiscation and forfeiture of illicit proceeds, freezing procedure, international assistance, and reporting of suspicious transactions. However, this Act, which punishes money laundering associated with only drug-related crimes, could not be an effective medium to respond to organized crimes.

With this recognition, Japan established, in 1999, the “Law Concerning the Punishment of Organized Crime and the Control of the Proceeds of Crime (so called Anti-Organized Crime Act)”. This Act provides for stronger punishment of organized crime, and provides for extended

¹⁵ Pub. L. No. 91-508, 401(a), 84 Stat.1114(1970)

¹⁶ Pub. L. No.99-570, 1351-1367, 100 Stat. 3207-3208. This Act is a part of the Anti-Drug Abuse Act of 1986, and is provided in 18 U.S.C. and 33 U.S.C.

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control of money laundering. Under this Act, the predicate offenses for money laundering regulation include drug-related crimes, major crimes (felony) which carry a certain degree of statutory penalty, which are likely to produce large illicit proceeds, and include crimes like prostitution and possession of deadly weapons though they carry lower statutory penalty. The Act also provides punishment for the behavior aimed at managing the business of a corporation by using illicit proceeds derived from the above predicate offenses, and the conduct of disguising, concealing and obtaining the proceeds of crime. The Act also provides measures for the confiscation and forfeiture of the proceeds of crime. The Act requires banks and other financial institutions to report to relevant authorities, suspicious transactions if they are suspected of being derived from illicit proceeds. The Act aims at increasing the efficacy of the control of money laundering by providing mechanisms for international assistance process regarding confiscation and forfeiture.

In Germany, the discussion of money laundering problem began in early 1990's. In 1992, the offense of money laundering was newly included in the criminal law. And an organized crime act called Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität (OrgKG, vom 15.7.1992) was established to make money laundering activities associated with organized crimes and drug crimes, a criminal offense.

Switzerland was rather late in criminalizing money laundering due to its long-standing policy of giving strong protection to bank secrecy. However, Switzerland underwent a series of major drug-related cases including the Turkey-Lebanon connection case in 1987, and was pressured by the United States and the

European Community to take measures against money laundering. In 1990, Switzerland revised its criminal law to criminalize money laundering.

In 1987, France provided the punishment of money laundering activity (blanchiment de capitaux) in its public sanitation law called le code de la sant publique. Italy had controlled money laundering activity as a part of the control of organized crimes, but did not have legal provisions directly setting out the punishment of money laundering. Money laundering was controlled through the major crime (felony) prevention law of 1978, but this was an indirect way. After ratifying the 1988 Vienna Convention, Italy established the Act against Mafian Organized Crime in March 1990, which provides improved measures against money laundering.

In the past, Hong Kong did not have a central bank, and a policy controlling the exchange of currency. Besides, Hong Kong adopted a complete bank secrecy protection system. For these reasons, Hong Kong was criticized for providing a financial haven for the laundering of drug money. In 1989, however, Hong Kong established the Drug Trafficking (Recovery of Proceeds) Ordinance, and has become active in cracking down on drug crimes and controlling money laundering.

IV. CURRENT STATUS OF MONEY LAUNDERING IN THE REPUBLIC OF KOREA

A. The Characteristics of Money Laundering in the Republic of Korea

The economic development and the method of financial transactions in Korea differ from the West and the early developed nations, which are societies that conduct business based on credit.

Therefore, the investigation authorities and tax authorities in Korea are faced with cases of money laundering activity that are different to what foreign authorities face. In general, foreign investigation authorities in the West handle money-laundering cases that involve the smuggling of drug and weapons. In contrast, Korean investigation authorities mostly investigate money-laundering activities that involve bribery of government officials and politicians, embezzlement or breach of trust in the big companies and public funds, and corrupt financial dealings. The investigations revolve around the issues concerning how the funds were transferred to one account to another or how the illicit funds were laundered.

In bribery cases, the people who bribe the officials are usually corporate executives, and the source of the illicit funds is the company's slush funds. Thus, the creation of illicit funds is orchestrated between a company and a financial institution, which make the investigations very difficult. Furthermore, the people who are bribed are mostly politicians or high-ranking government officials who use their power to ensure that the funds are transferred in great secrecy. This also hampers the investigation.

Recently, money laundering techniques have become more sophisticated and operate on an international scale due to active economic trade, massive capital investments from abroad, widespread use of electronic money transfers, international travel, and the liberalization of the foreign exchange market. The sophisticated techniques used by money launderers aggravate the difficult situation.

B. The Real Name Financial Transaction System and Money Laundering

Money laundering in Korea is connected to the enforcement of the Real Name Financial Transaction System in August 12, 1993. Before the enforcement of the Real Name Financial Transaction System, most criminals were able to open a bank account under an anonymous name and use that bank account for money laundering activities. After the money is laundered, the bank account is discarded. But after the Real Name Financial Transaction System (hereafter referred to as the "system") was enforced, criminals were no longer able to open bank accounts under anonymous names. Thus, fake bank accounts were not used for money laundering activities anymore. But, there have been instances where criminals were able to open accounts using the identities of his or her relatives or co-workers in order to launder money through these bank accounts. In other cases, criminals laundered money by making bank accounts using forged identities by enlisting the help of directors or employees who worked at financial institutions.

Although this may sound paradoxical, the investigation authorities have faced more difficulty in tracking money-laundering activities due to this system. Before, most money laundering was centered on bank accounts registered under a fake name. Now, money laundering has taken on a new form, where money is delivered in cash or bank accounts are registered under the criminal's relative or the real identity of an accomplice. Because these types of transactions are legal and do not appear as irregular financial dealings on paper, the money laundering goes unnoticed and the bank accounts are more difficult to trace.

C. The Size of the Underground Economy and Illegal Funds in the Republic of Korea

The size of the underground economy in Korea is very difficult to measure. No official government institution has ever announced an official estimate of the size of the underground economy. However, several private research institutions have attempted to estimate the size of the underground economy by using several economic indicators and data.

The Korea Development Institute has estimated that the underground economy in Korea accounts for 15% of the nation's GNP.¹⁷ This estimate was based on analyzing annual household spending in 1994. This analysis was conducted after the enforcement of the Real Name Financial Transaction System. The Korean Tax Research Institute and Korea University's Economic Research Institute were contracted by the Korean government to analyze the size of the underground economy in March 1995. The two organizations estimated that the size of the underground economy during 1993 was about 22% of the nation's GNP. And the Korea Development Institute and other organizations estimated that the

underground economy was closer to 37%~42% of the GNP in 1993. These estimates suggest that the size of the Korean underground economy was between \$56.25 billion¹⁸ and \$138.75 billion in 1993.

The Korea Institute for International Economic Policy said in a recent report that the size of the underground economy accounts for 11%~33% (\$39.8 billion ~ \$121.8 billion) of the nation's GNP in 1998. The dollar/won exchange rate on December 31, 1998 was 1 U.S. Dollar per 1207 Korean Won.

How much money is needed to support the activities in the underground economy of this size? Since the Real Name Transaction System took effect across the nation on August 12, 1993, every citizen was required by law to use their real names for opening a bank account. Between August 13, 1993 and October 12, 1993, all Korean citizens were given a time period to transfer their money to real name bank accounts. Bank accounts opened under fake names were forbidden. Citizens and employees of financial institutions, who did not comply with the laws were fined and penalized. Thus, it was natural that irregularities and misuse of bank accounts surfaced.

Table 1 shows that 31,000 bank accounts which were opened under fake names and had deposits that totaled \$53.8 million remained without transference to real name accounts, while 26 million bank accounts which were opened under real

¹⁷ As for the United States, many experts have estimated that the underground economy in the United States accounts for 10~15% of the nation's GNP. According to the material submitted to the House of Representatives Committee on Appropriations in May 1995, 83% of overall people voluntarily reported their income taxes, whereas only 36% of small business owners did so. Even less, 11 % of small business owners who mainly use cash transactions (the so-called informal traders) voluntarily report their income taxes. It is also estimated that the yearly revenue of prostitution business in the United States amount to 1.2 billion US dollars. This is more than the trading profits of Toyota. The underground economy in Italy is estimated to account for 30% of the nation's GNP.

¹⁸ The exchange rate was 794 won to the dollar as of January 3, 1993 and 808 won as of December 31, 1993. For the sake of convenience in calculation, the rate of 800 won to the dollar is applied to the rest of the text if not specified otherwise. <cf. \$1: 788 won as of 1994. 12. 31., \$1:744 won as of 1995. 12. 31.\$1:844won as of 1996.12.31>

names and had total deposits of \$11.38 billion also remained without reconfirmation by real name in June 1995. The owners of the 31,000 bank accounts opened under fake names were never identified and the money remains in the banks. There were also strong suspicion that the money transferred from fake name bank accounts to real name bank accounts

was illicit money. Thus, experts estimated that the amount of the illicit funds range from \$11.43 billion(C+E) to \$19.37 billion(B+C+D+E). This estimate does not include the amount of cash that the citizens possess in their homes. Taking into consideration that Koreans yet prefer to store cash in their homes instead of saving it in the bank, the amount of illicit money is probably far larger than the official estimate.

**Table 1 Current Status of The Real Name Financial Transaction Act
(Dated on June 30, 1995)**

(Unit: US dollars)

Real Name Bank Accounts	Total amount in bank accounts	506.8 billion (175 million bank accounts)
	Real Name Bank Accounts	491 billion (146 million bank accounts)
	Bank Accounts opened under another person's name	4.38 billion (2,969,000 bank accounts)
	Bank Accounts without an owner	11.38 billion (26 million bank accounts)
Fake Name Bank Accounts	Total amount in bank accounts	3.54 billion (631,000 bank accounts)
	Transferred to Real Name Bank Account	3.49 billion (600,000 bank accounts)
	Bank accounts that were not transferred	53.8 million (31,000 bank accounts)

V. EFFORTS TO COMBAT MONEY LAUNDERING IN THE REPUBLIC OF KOREA

A. General Outlook

Until recently, the Republic of Korea did not possess any direct restrictions that punished criminals engaging in money laundering activities. However, the need for measures to identify money-laundering activity came to light during the process of investigating financial crimes, bribery, drugs, and organized crime. These investigations involved the tracking down of illicit funds.

In other words, until recently, proof of money laundering was used as court evidence to convict the criminal of a felony. The money-laundering evidence was not used to confiscate the proceeds of crimes and the criminal assets or to impose a fine. Therefore, unless the criminal broke any banking laws during the money laundering process, he or she could not be pressed with criminal charges for money laundering. In addition, the illicit money could not be confiscated or be used as criminal evidence to impose a fine except the money which was directly offered to the criminals.

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But after the signing of the 1988 Vienna Convention, which spread awareness of money laundering activity, the international community gradually realized that seizure of illicit profits from criminal activity was necessary in order to prevent the spread of crime. These events coincided with Korea's campaign against abuse of power and graft. On January 5, 1995, the Special Act on Confiscation related with Crimes of Public Officials was enacted. If a public official is found to have accepted bribes, his or her profits and assets attained from the illicit dealings shall be confiscated by this law. Furthermore, any money or assets received in exchange for special favors shall also be confiscated. This special law was a progressive development but since it did not punish criminals engaged only in money laundering and not in other criminal activities, it had severe limitations.

After the 1988 Vienna Convention took effect, the Republic of Korea accepted the provisions in the convention and enacted the Special Act on the Prevention of Illegal Trafficking in Narcotics, Psychotropic Substances and Hemp on December 6, 1995 and included the provision allowing the persecution of criminals engaging in money laundering activity.¹⁹ This special law fully followed the agreements in the 1988 Vienna Convention. Yet, this special law also had limitations. Only criminals engaging in money laundering activities that are connected to drug trafficking (psychotropic drugs, other illegal drugs) could be punished.

Through administrative efforts after the enforcement of the Real Name Financial Transaction System, the Bank Supervisory Agency ordered²⁰ the directors or presidents of all Korean financial institutions that any employee caught engaging in any kind of money laundering directly or indirectly will be discharged and punished severely.²¹

As a person in charge of criminal investigations, I would like to shed light on the problems we face. Although the Real Name Financial Transaction System prevent money laundering, the system has strengthened the protection of bank secrecy and has made the investigation of illicit funds more difficult. Before the enforcement of the system, it has been relatively easy to trace bank account records with the support of the Bank Supervisory Agency or the submission of official administration documents to all financial institutions. But now, the possession of official administration documents, only allows us to confirm the existence of a specific bank account. Without a warrant, we cannot investigate the bank transaction statement and bank-related documents, nor can we trace the bank accounts related to the suspicious account or bank checks.

In the next section, I would like to explain the legislation activities surrounding the direct restriction on money laundering.

¹⁹ Korea enacted the Special Act on the Prevention of Illegal Trafficking in Narcotics, Psychotropic Substances and Hemp in January 1995. Korea ratified the 1988 Vienna Convention years later in 1998, due to controversy over some provisions of the Convention, relating to international assistance.

²⁰ Bank Supervisory Agency, Guideline for the Prevention of Financial Accident, Article 7

²¹ Bank Supervisory Agency, Internal Regulation of Financial Institutions, Article 9

B. Legislations for Directly Restricting Money Laundering

As the investigation of money laundering is more closely linked to financial crimes and abuse of power and graft rather than drug-related crimes in Korea, legislation activity has focused on passing a comprehensive money laundering prevention law that will directly restrict money-laundering activity. These efforts have paid off through the selection of the “Act on the Reporting and Usage of Specific Financial Transaction Information” and the “Act on the Regulation and Punishment of Concealing Crime Proceeds” as government bills that were submitted to the regular session of the National Assembly for approval on November 21, 2000. Unfortunately, the bills were not reviewed during the regular session of the National Assembly, but the chances of passing the bill in early 2000 is favorable.

The legislation process for stronger money laundering laws was expedited by the request from abroad, that is, the pressure from the United Nations and OECD, domestic policies focused exposing abuse of power and graft, and opening of the foreign exchange market that allowed inflows of illicit funds and capital flight overseas. The following paragraphs briefly outline the major provisions of the proposed bill.

1. Act on the Regulation and Punishment of Concealing Crime Proceeds

First, let us examine the “Act on the Regulation and Punishment of Concealing Crime Proceeds”. This law was established to eliminate financial funds that support criminal activities and to maintain public order. This law restricts money laundering of illicit profits gained from criminal activity and allows special power of law to confiscate and trace illicit profits.²²

This law applies broadly to certain criminal activities which are broadly selected as it follows the FATF recommendations substantially.²³ The predicate offenses of this law are certain crimes that involve smuggling, bribery, illegal capital flight and criminal activities that are antisocial in nature and are major crimes (felonies). (Crimes related to drugs are covered by the Special Act on the Prevention of Illegal Trafficking in Narcotics, Psychotropic Substances and Hemp)

FATF Recommendation [4] : Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each county would determine which serious crimes would be designated as money laundering predicate offences.

There are generally two approaches in the way to categorize the predicate offenses of money laundering offense. In England, Germany, and France a “lump sum” approach is used to broadly categorize predicate offenses according to the length and severity of the statutory penalty. In the United States, Japan, Singapore, and other countries, predicate offenses are categorized according to a “case-by-case” approach. The lump sum approach has shortcomings because it is prone to include too many crimes as predicate offenses. Therefore, the “case-by-case” approach was adopted for this law.

²² Article 1, Act on the Regulation and Punishment of Concealing Crime Proceeds

²³ Article 2 Paragraph 1 of the Act on the Regulation and Punishment of Concealing Crime Proceeds

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The statutory penalty of money laundering crimes is a 5-year prison sentence or less. After selecting major crimes (felonies) that carry a maximum 5-year prison sentence or more, life sentence or death penalty, these felonies were rated according to the severity of the crime, involvement of organized crimes, probability of large illicit profiteering, need for international cooperation, and the impact on the national economy. Crimes that carry a maximum 5-year prison sentence or less but fund organized crime activities was included in this rating. 35 predicate offenses were selected as a result.

The 35 kinds of predicate offenses are divided into five categories.

- (i) Felonies: Manslaughter, Theft and Burglary, Organized crime member (Criminal Law Act, Article 114, Paragraph 1), etc.
- (ii) Crimes that involved organize crime on a professional or repeated basis: Blackmail, Violence, Smuggling (import tax evasion exceeding the amount of US \$41,700)²⁴, etc.
- (iii) Illicit profiteering of a large amount of money around legal business activities: Violating the Act on the Aggravated Punishment of Certain Economic Crimes. (Article 3: Illicit profits that exceed US \$416,700; fraud, blackmail, breach of trust) and violation of the Securities Exchange Law, etc.
- (iv) Crimes related to money laundering and crimes listed on International Treaties: Bribery of government officials, forgery and alteration of currency, forgery and alteration of official documents, forgery and alteration of securities,

- (v) bribing foreign public officials, etc. Illegal capital and asset flight with specific focus on taking advantage of the liberalization of the foreign exchange market: Violating the Act on the Aggravated Punishment of Certain Economic Crimes. (Article 4: Assets and capital flight to foreign country), Violation of the Foreign Trade Law (Article 54: Manipulation of import price), etc.
- (vi) Crimes that carry a maximum 5-year prison sentence or less but fund organized crime activities: Gambling, Prostitution, Violation of the the Customs Act (Article 179, Paragraph 3: Smuggling activities), etc.

Especially, the details of sub-paragraph (vi) is shown in Table 2.

²⁴ As of December 2000, won is traded at the exchange of 1,200 won to the dollar.

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Table 2 Predicate Offenses Which Carry a Statutory Penalty (of Under) Five-Year Prison Sentence

Designation of the offense	Provision	Penalty
Advance acceptance of bribe	Article 129(2) of the Criminal Code	3 years and below
Acceptance of bribe in return for mediation	Article 132 of the Criminal Code	3 years and below
Preparation/conspiracy of counterfeiting of valuable securities, etc.	Article 224 of the Criminal Code	2 years and below
Making false medical certificate	Article 233 of the Criminal Code	3 years and below
Habitual gambling	Article 246(2) of the Criminal Code	3 years and below
Opening gambling place	Article 247 of the Criminal Code	3 years and below
Interference with an auction or a bid	Article 315 of the Criminal Code	2 years and below
Smuggling goods abroad	Article 179(3) of the Customs Law	3 years and below
Prohibition of similar activities (Opening of racing track without permit)	Article 24 of the Bicycle and Motorboat Racing Act	3 years and below
Operating business without permission	Article 30(1) of the Special Act on the Regulation and Punishment of Speculative Acts, etc.	3 years and below
Prohibition of similar activities (Opening of racing track without permit)	Article 50 of the Korean Horse Racing Association Act	3 years and below
Circulation of funds by disguising sales	Article 70(2)(3) of the Specialized Credit Financial Business Act	3 years and below

For details of the predicate offenses, please refer to Appendix A and Appendix B.

In the course of selecting the predicate offenses, inclusion of some offenses was a controversial issue. First, some suggested the exclusion of Article 8 [tax evasion exceeding 200 million won (US \$ 167,000) a year] of the Act on Aggravated Punishment of Certain Offenses from the

predicate offenses. However, it was included in the predicate offenses as the offense of tax evasion of huge sum is a serious crime and considering that it was a predicate offense in the government's draft of 1997 for an anti-money laundering act.

Secondly, whether to include Article 30 [illicit fund raising] of the Political Fund Act was a problem. With regard to this,

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various elements like the essential purpose of the Act on the Regulation and Punishment of Concealing Crime Proceeds, the examples of foreign legislation, and the standard for the scope of predicate offenses were considered. Moreover, there were concerns that inclusion of Article 30 of the Political Fund Act would undermine the political neutrality of the financial intelligence organization. And the Political Fund Act itself contains provisions setting out the acceptance of unauthorized political fund as criminal offense, and the mandatory confiscation of the illicit proceeds. For these reasons, Article 30 was not included in the scope of predicate offenses. However, this issue could give rise to heated arguments as the eradication of political corruption is an important assignment for the anti-corruption round.

Thirdly, there were suggestions to include foreign aggression, insurrection, violation of the National Security Act and violation of the Military Secret Protection Act in the scope of predicate offenses. However, this was not accepted, considering the essential purpose of the Act on the Regulation and Punishment of Concealing Crime Proceeds and the examples of foreign laws.

Fourthly, it was suggested that all of the offenses of embezzlement, breach of trust and fraud be included in the predicate offenses. Considering that this could excessively curb economic activities, economic offenses exceeding 500 million won (US \$ 416,700) were included in the predicate offenses. This limit was set to prevent economic activities from being overly restricted, while at the same time to ensure the achievement of the essential purpose of the Act on the Regulation and Punishment of Concealing Crime Proceeds. The discussion left a room for considering the extension of the scope of economic offenses to be included in the predicate

offenses in the future.

In the following, I would like to explain some provisions characteristic of this Act. When a predicate offense and another offense which is not a predicate offense are committed concurrently, the law provides that the latter offense is included in the scope of predicate offenses as well. It is because in such a case as this, it is very difficult to identify the exact origin of the crime proceeds. It was noticed that the law could be construed as being incapable of punishing money laundering activities or confiscating proceeds of crime, when the offense which is associated with money laundering and crime proceeds is not identified for reasons of conflict with another offense not covered by the law. (The Special Act on the Prevention of Illegal Trafficking in Narcotics, Psychotropic Substances and Hemp has a similar provision in Article 2 Paragraph 2.)

The law also criminalizes the act of laundering the proceeds of crime in Korea, which originated from the criminal activities committed by foreigners outside Korea.²⁵ This is aimed at preventing Korea from becoming a financial haven for criminal organizations, and to join the international effort to counter and prevent money laundering. The law clearly sets out that although a criminal activity which is included in the predicate offenses was initiated in a foreign country, it is covered by the law when it is included in the predicate offenses if it is occasioned in Korea and when it is also a criminal offense in the foreign country.

Globalization of international finance and crime has facilitated the movement of illegal funds from country to country. In such circumstance, if Korea implements its

²⁵ Article 2 Paragraph 1, Act on the Regulation and Punishment of Concealing Crime Proceeds

second phase plan for liberalizing restrictions on foreign exchange market without measures to prevent the flow of illegal funds into the country, Korea could become a financial haven for money launderers. In order to prevent this, Korea has worked to create a financial intelligence unit which would check the flow of illegal funds in and out of the country, and made the Act on the Regulation and Punishment of Concealing Crime Proceeds to cover offenses committed by foreigners outside Korea.²⁶

But, the law requires dual criminality for its application to crimes committed outside the country, in order to ensure legal stability for nationals of foreign countries. It would be unreasonable if a foreigner is punished under a Korean law for laundering funds derived from an activity committed in another country where that activity does not constitute a criminal offense.

In the following, I will explain what is punishable under the Act on the Regulation and Punishment of Concealing Crime Proceeds, and the penalty provided by the Act.

Under the Act, a person who disguises the fact that he or she obtained or disposed of the proceeds of crime, conceals the proceeds of crime or disguises the facts regarding the origin and cause of the proceeds of crime shall be punishable with imprisonment of five years and below or a fine not exceeding 30 million won (US \$25,000).²⁷ A person who knowingly accepts or receives the proceeds of crime shall be punishable with imprisonment of not more than three years, and a fine not exceeding

20 million won (US \$16,700).²⁸

Under this Act, the proceeds of crime include assets derived from the commission of predicate offenses, or assets obtained as the remuneration for the commission of such offenses, funds or assets associated with offenses listed in Appendix B like flight of assets out of the country, assets derived from the proceeds of crime, and assets which is a mixture of the preceding assets and other assets mingled together. Assets derived from the proceeds of crime include assets obtained as the fruit derived from the proceeds of crime, assets obtained at the price of the proceeds of crime, assets obtained at the price of the preceding assets, and other assets obtained through the possession or disposal of the proceeds of crime.²⁹ For example, they include money obtained by renting the land received as remuneration for the murder for hire (an example of the fruit derived from the proceeds of crime), money earned by selling the land (an example of the assets obtained at the price of the proceeds of crime), stocks purchased with the money received by selling the land (an example of the assets obtained at the price of the preceding assets), and money earned by selling the stocks (other assets obtained through the possession or disposal of the proceeds of crime).

The Act on the Regulation and Punishment of Concealing Crime Proceeds requires certain employees of financial institutions to report suspicious financial transactions. Employees of financial institutions as set out under the Act on the Reporting and Usage of Specific Financial Transaction Information, which will be

²⁶ The United Kingdom, Australia, Canada and Japan have similar provisions.

²⁷ Article 3 Paragraph 1, Act on the Regulation and Punishment of Concealing Crime Proceeds

²⁸ Article 4, Act on the Regulation and Punishment of Concealing Crime Proceeds

²⁹ Article 2 Sub-paragraph 2, 3 and 4, Act on the Regulation and Punishment of Concealing Crime Proceeds

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explained in the next section, should immediately report to the competent investigative authorities when they come by the fact that assets received through financial transactions are the proceeds of crime, or the fact that their clients are concealing or disguising the proceeds of crime. The employees should not disclose to the clients or other persons associated with the suspicious financial transactions, the fact that they made such reporting to the investigative authorities. Any employee who violated these obligations is punishable by imprisonment of not more than two years, or a fine not exceeding 10 million won (US \$8,300).³⁰

In many cases, money laundering is performed by legal persons including corporations, or by agents. Regarding those cases where a representative of a legal person, or an agent, employee or servant of a legal person or an individual violates its provisions in relation to the business of that legal person or individual, the Act provides fines for that legal person or individual as well as punishment for the actual performer of the offense.

The Act also provides an exception to Article 48 of the Criminal Code regarding the confiscation of the proceeds of crime.³¹ Whereas the Criminal Code limits the scope of the proceeds of crime subject to confiscation to original articles, the Act on the Regulation and Punishment of Concealing Crime Proceeds expands the scope to the proceeds of crime and assets derived from the proceeds of crime. Under this Act, the property subject to confiscation includes not only corporeal property such as immovable and movable property but also all profits that are generally accepted

as economically valuable. If the property obtained from the commission of offense is converted, it is still confiscable as long as it could be identified and traced.

This Act provides for discretionary confiscation as does Article 48 of the Criminal Code. Whether to confiscate or not is determined by the judgment of the court. Whereas the Special Act on the Prevention of Illegal Trafficking in Narcotics, Psychotropic Substances and Hemp adopts mandatory confiscation for reasons of the pressing necessity for the prevention of drug-related crime and for the international cooperation, and the probability of the reinvestment of the illicit proceeds into crimes, this Act adopts discretionary confiscation as the predicate offenses of this Act embrace various kinds of offenses. It would be reasonable to determine on whether to confiscate or not regarding specific cases.

And this Act provides another exception, other than the provision on confiscation system, to the Criminal Code. The Act provides discretionary collection of the corresponding value to be confiscated.³² Under the Criminal Code, the collection of the corresponding value is allowed only when the article subject to confiscation cannot be confiscated. This Act provides additional circumstances in which the collection of the corresponding value can be conducted. Those circumstances are those when it is determined unreasonable to confiscate certain asset considering the nature of the asset, the situation of its usage, and the existence of the conflicting rights over the asset.

This Act also contains special provisions on the international cooperation. This Act provides the requirements and restriction

³⁰ Article 5, Act on the Regulation and Punishment of Concealing Crime Proceeds

³¹ Article 8, Act on the Regulation and Punishment of Concealing Crime Proceeds

³² Article 10, Act on the Regulation and Punishment of Concealing Crime Proceeds

on the international assistance given by Korea regarding the execution of a final judgment on confiscation and the freezing of assets for confiscation at the instance of a request made by a foreign country.³³ Unlike the Special Act on the Prevention of Illegal Trafficking in Narcotics, Psychotropic Substances and Hemp which requires the relevant treaty to give such international assistance (Article 64 Paragraph 1), this Act allows international assistance provided on the assurance of reciprocity, concerning the predicate offenses listed in the Act and the offenses provided under Article 3 and 4 of the Act. It should be noticed that the Special Act on the Prevention of Illegal Trafficking in Narcotics, Psychotropic Substances and Hemp is Korea's implementing law for the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, where as the Act on the Regulation and Punishment of Concealing Crime Proceeds is not. The need to promote international cooperation was considered in this Act.

In the next section, I will explain the Act on the Reporting and Usage of Specific Financial Transaction Information.

2. Act on the Reporting and Usage of Specific Financial Transaction Information

This Act is aimed at providing the legal framework for the reporting and usage of information on financial transactions, which are necessary for the prevention of money laundering activities through financial transactions, thereby deferring crimes and establishing transparent financial order.³⁴

This Act provides the establishment of the Financial Intelligence Unit (FIU) under the Minister of Finance and Economy.³⁵ Under this Act, the FIU is authorized to deal with the following tasks:

- (i) Arrangement, and analysis of information reported by financial institutions, and provision of such information
- (ii) Regulation and inspection of businesses performed by financial institutions
- (iii) Cooperation and exchange of information with foreign FIUs
- (iv) Other related tasks as designated by the presidential decree

The Act requires certain financial institutions to immediately report to the head of the FIU in the following circumstances.³⁶

- (i) If there is sufficient reason to believe that the financial asset obtained in relation to a financial transaction is illegal asset, or that the client of the financial transaction is performing money laundering activity, and if the sum of the financial transaction in question is above certain amount (to be designated by the presidential decree)
- (ii) If there is sufficient reason to believe that the client is dividing up the financial transaction in order to avoid the application of the above provision, and if the total sum of the divided financial transactions amount to a certain amount (to be designated by the presidential decree)
- (iii) If it made a report concerning a financial transaction to the

³³ Article 11, Act on the Regulation and Punishment of Concealing Crime Proceeds

³⁴ Article 1, Act on the Reporting and Usage of Specific Financial Transaction Information

³⁵ Article 34, Act on the Reporting and Usage of Specific Financial Transaction Information

³⁶ Article 4, Act on the Reporting and Usage of Specific Financial Transaction Information

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competent investigative authority under the Act on the Regulation and Punishment of Concealing Crime Proceeds (Article 5 Paragraph 1)

Furthermore, the Act on the Reporting and Usage of Specific Financial Transaction Information ensures the confidentiality of financial information, by prohibiting the employees of financial institutions and the officials of the investigative authorities from leaking the secrets concerning financial transactions, and from using the information for purposes other than the ones provided under the law.³⁷ The Act also places the FIU under the obligation to provide relevant information to law enforcement authorities including the Prosecutor General, the Commissioner of the National Tax Service, the Commissioner of the Customs Service, the Financial Supervisory Commission, and the Head of the National Police Agency.³⁸

**VI. AN EXAMPLE OF KOREA'S
MONEY LAUNDERING CASE:
INVESTIGATION OF SECRET FUND
OF EX-PRESIDENT ROH TAE WOO**

The following is a description of Former President Roh Tae Woo's secret fund case which is one of the most well-known successes in money laundering investigation in Korea.

A. Background to the Launch of the Investigation

After the Real Name Financial Transaction System came into effect in Korea on August 12, 1993, there was a rumor going around that an enormous

amount of secret funds in the stock market and private financial businesses needed to be transferred to real name, and that a great deal of money was used to lobby politicians and high-ranking public officials in relation to the secret funds. And the Korean prosecutors' office had kept its eye on this report.

In August 1995, the then Minister of Government Administration accidentally mentioned that he had been contacted by the ex president's people, who asked him to transfer the secret funds totaling 400 billion won (500 million US dollars) to real names. On October 19 of that year, a congressman of the opposition party disclosed at a National Assembly session that Former President Roh Tae Woo's secret fund totaling 400 billion won (500 million US dollars) was broken up into portions and deposited in several different bank accounts under various borrowed names. The evidence produced to back the claim was a bank record of a Shinhan Bank (Seosomun Branch Office) account under the name of Wooil Corporation, in which 10 billion won (12.5 million US dollars) was deposited. On that date, the Director of Loan Department of the Shinhan Bank confirmed that Seosomun Branch Office of his bank held three accounts under borrowed names including the account in Wooil's name and that a total of 30 billion won (37.5 million US dollars) were deposited in these accounts.

The Korean prosecutors' office immediately initiated the investigation into this case with recognition that this case is an unprecedented incident associated with corrupt accumulation of wealth by an ex president. The Korean prosecutors' office was determined to conduct thorough and strict investigation into this case, and to bring the ex president to justice for any corruption substantiated by the investigation, in order to ensure

³⁷ Article 9 Paragraph 1, Act on the Reporting and Usage of Specific Financial Transaction Information

³⁸ Article 7, Act on the Reporting and Usage of Specific Financial Transaction Information

social justice and to cut off the corrupt tie between the politicians and the businesses.

B. Outline of the Investigation

On October 20, 1995, the Central Investigation Department of the Supreme Prosecutors' Office obtained the warrants of seizure regarding the suspected bank accounts, and began the tracing of funds. The Korean Supreme Prosecutors' Office interrogated the Director of the Presidential Security Service and the person who took charge of the Financial Division under the President Security Service when Mr. Roh Tae Woo was in office. They stated that Mr. Roh raised and used secret funds while in office and that as he retired from his office, the left-over of the funds was deposited into the accounts opened in the borrowed names. A total of 74 billion won (92.5 million US dollars) had been deposited into these accounts, and the remaining sum at the time was 36.5 billion won (45.63 million US dollars).

The investigation was extended to additional accounts of borrowed names opened in four banks (including the Commercial Bank) for the same purpose. Through the investigation of the bank officials, and the track of funds by the warrants of seizure regarding the accounts, the Prosecutors' Office identified 37 accounts in which Mr. Roh's secret funds were deposited. It also disclosed that as many as 500 bank accounts were involved in this case, as means to launder the funds. Parts of the funds were given as loans to the involved corporations and to purchase real estates.

On November 16 of the same year, Mr. Roh was placed under detention for charges of bribery (the violation of the Act on Aggravated Punishment of Certain Offenses). The former Director of the Presidential Security Service was arrested

for complicity in the crime. Since then, the Prosecutors' Office also investigated as many as 60 persons associated in this case, including the incumbent and former members of the National Assembly, the former Head Secretary for Economy in the Presidential Office, the officials of banks and the persons who lent their names to be used in opening the bank accounts.

On December 7, the Prosecutors' Office began investigation regarding 200 persons including the leaders and officials of corporations such as Samsung, Hyundai, Jinro, LG, and Daewoo, for having offered bribe to Mr. Roh. Regarding the money laundering activities in this case, the Prosecutors' Office investigated 200 persons including the Chairman of Dongbang Oil Corporation and Mr. Roh's brother.

92 public officials including prosecutors, investigators, and the officials of the National Tax Service and the Financial Supervisory Service were put into the investigation of this case.

C. Outcome of the Investigation

1. Size of the Secret Funds

Judging from the investigation of Mr. Roh and other persons involved, the actual sum of the secret fund raised through the contribution of corporations is believed to amount to as much as 460 billion won (575 million US dollars). However, the sum of the secret funds substantiated or proved by the Prosecutors' Office was 283.8 billion won (354.9 million US dollars). Mr. Roh was indicted for receiving, from the leaders of 35 corporations, bribes ranging from 500 million won (625,000 US dollars) to 25 billion won (31.25 million US dollars), totaling 283.8 billion won (354.9 million US dollars).

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2. How the Fund was Raised

Mr. Roh was the President of Korea for five years from February 25, 1988 to February 24, 1993. As the President, empowered to establish and implement governmental policies, and direct and supervise the head of governmental ministries, he was able to influence the activities of corporations in relation to the selection of the provider of government-run services, the licensing of important businesses, financial assistance, and taxation. He had private meetings with the chairmen or presidents of corporations pretending as if he was interested in the briefing of the operation of the corporations and in hearing the opinion of the business leaders. He received enormous amount of money from these corporations, by hinting that he might exercise his powers to influence their business.

The followings are some of the examples of the way how he collected the funds from the corporations.

- (i) In May 1991, the then President Roh received 10 billion won (12.5 million US dollars) from Chairman Kim of Daewoo Corporation, at his presidential office. He received a total of 24 billion won (30 million US dollars) from Chairman Kim through seven transactions. The money was given to President Roh in return for his influence in awarding the contract for the construction of Jinhae Navy Submarine Base to Daewoo Corporation, and with request for his influence in another bidding for the construction of Wolsung Atomic Power Plant III and IV.
- (ii) In August 1991, President Roh received 10 billion won (12.5 million US dollars) from Chairman Choi of Dongah Corporation, at an office in his presidential house. He received a total of 23 billion won

(28.75 million US dollars) from Chairman Choi through six transactions. The money was given to Mr. Roh in return for awarding the contract for the construction of Asan Bay Navy Base, and with request for his influence on another bidding for the construction of Uljin Atomic Power Plant III and IV.

- (iii) In late November 1990, President Roh received 10 billion won (12.5 million US dollars) from Chairman Chung of Hanbo Corporation, at a secret place near his presidential house. He received a total of 15 billion won (18.75 million US dollars) from Chairman Chung through four transactions. The money was given to Mr. Roh with request for his influence on their Suseo apartment-construction business.
- (iv) President Roh also received a total of 25 billion won (31.25 million US dollars) from Chairman Lee of Samsung Corporation in return for his influence in Samsung's auto manufacturing business, construction business and others. He also received 25 billion won (31.25 million US dollars) from Hyundai Corporation and 21 billion won (26.25 million US dollars) from LG Corporation, by hinting, at private meeting with the leaders of these corporations, that he could give favorable or unfavorable consideration about their businesses.

3. Management of the Fund and Money Laundering

Mr. Roh made Director Lee of the Presidential Security Service to supervise the overall management of the secret fund,

and made the Director of the Financial Division of the Presidential Security Service to directly manage the deposit into and withdrawal from the accounts.

(i) *Money Laundering Through Financial Institutions*

The fund was either deposited into the bank accounts opened under borrowed names or used to purchase the certificate of deposit (CD) in order to conceal the origin or the actual owner of the fund. A total of 37 accounts were opened under borrowed names in 8 branch offices of 5 banks. 12 other accounts under borrowed names were used to move and launder the funds. They purchased the certificates of deposit worth 118.3 billion won (147.88 million US dollars). They were re-sold between December 1992 and February 1993 and deposited into six bank accounts opened under the borrowed names.

While, in October 1993 when the Real Name Financial Transaction System was in force, they opened a real name account, using the identity of an owner of a dormant account in collaboration with a manager of a branch office of a bank. 520 million won (650,000 US dollars) was deposited into this account, and then was withdrawn from it.

(ii) *Money Laundering by Purchasing Real Estates*

They also employed the method of purchasing real estates to launder the funds. Parts of Mr. Roh's secret funds were used to purchase real estates in the name of his relatives. 23 billion won (28.75 million US dollars) was given to the Chairman of Dongbang Oil Corporation (father-in-law of his son) to purchase a building in downtown Seoul and to construct a new building. 12.979 billion won (16.22 million US dollars) was used by his brother in purchasing a building in Seoul and a house in the city of Daegu. 2.35 billion won (2.94 million US dollars) was

used to purchase luxurious mansions in Seoul, which was registered under the name of a third person.

(iii) *Lending Funds to Corporations*

Mr. Roh faced difficulties in using and managing his secret funds deposited at financial institutions, as the Real Name Financial Transaction System became effective. He made his brother-in-law, Keum Jin Ho (former Minister of Commerce and Industry) to launder the funds as follows.

- (a) In September 1993, he lent 60.62 billion won (75.78 million US dollars) to Chairman Chung of Hanbo Corporation at the yearly interest of 8.5% to be repaid after 5 years. This fund had been deposited in six accounts opened at Kookmin Bank. Chairman Chung pretended as if he was the owner of the fund, and deposited the fund into accounts opened under his real name.
- (b) In October of the same year, he laundered 36.28 billion won (45.35 million US dollars) through Chairman Lee of Daewoo Corporation. The fund had been deposited in twelve fake name accounts opened at Seosomun Branch of Shinhan Bank. Daewoo Corporation transferred this fund to accounts opened under its real name, pretending as if it was the true owner of the fund. Mr. Roh lent this fund to Daewoo Corporation.

The bank officials conspired with Mr. Roh or remained silent in this process.

(iv) *Concealing of The Fund in Foreign Country*

The Korean Prosecutors' Office investigated into the allegation that Mr. Roh collected a great sum of secret fund through Yulgok project (an armament build-up project) and concealed the fund by

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depositing at the Bank of Switzerland. In February 1990, it was exposed that Mr. Roh's daughter and son-in-law managed several accounts (each holding 10,000 US dollars or below) at various banks, totaling 200,000 US dollars. The Prosecutors' Office investigated the suspicion that the fund managed by Roh's daughter was a portion of his secret fund.

On November 4, 1995, Korea made a request to the U.S. authorities for provision of information regarding the flow or origin of the above fund managed by Roh's daughter. Two days later, Korea requested the Swiss government to officially confirm whether Mr. Roh's family or relatives held bank accounts at the banks in Switzerland. Because of the limitation of international assistance in criminal investigation, and the difficulty of obtaining evidence in such case as this, the investigation regarding whether Mr. Roh concealed his fund in foreign countries did not yield concrete evidence.

4. How the involved persons were processed

On December 5, 1995, Mr. Roh, the former director of the Presidential Security Service, and the former director of the financial division of the PSS were indicted and placed under detention. The Prosecutors' Office also indicted 12 persons including leaders of corporations. 3 bank officials were prosecuted for summary proceedings.

The prosecution claimed that Mr. Roh should be subjected to life imprisonment and confiscation totaling 283.896 billion won (354.87 million US dollars) for charges of bribery and insurrection. According to the Special Act on Confiscation related with Crimes of Public Officials, the prosecution requested for the freezing of Mr. Roh's entire assets for the purpose of executing confiscation.

On April 17, 1997, after two appeals trials, Mr. Roh was finally sentenced to imprisonment of 17 years and confiscation or collection of 262.896 billion won (328.62 million US dollars) by the Supreme Court.

5. Secret fund of Ex President Chun Doo Hwan

After the investigation was initiated regarding Mr. Roh's secret funds, it was exposed that another former President, Chun Doo Hwan, who held the office from February 25, 1981 through February 24, 1988, had secretly collected funds through similar methods as Mr. Roh used.

At the result of the investigation by the Prosecutors' Office, Mr. Chun was finally sentenced to life imprisonment and confiscation or collection of 220.5 billion won (275.63 billion US dollars) for charges of bribery and insurrection on April 17, 1997 by the Supreme Court.

**VII. CONCLUSION:
COUNTERMEASURES IN THE
FUTURE**

A. Providing Legal Framework

As crime becomes more organized, globalized, and specialized, it is no longer a domestic problem within an individual country, but it is becoming a serious threat to the safety of the international community, perhaps the human race. The most effective countermeasure against these crimes is depriving the perpetrators of the crimes of all economic profits.

To make it possible, we need the legal framework to criminalize money laundering, and to confiscate illicit proceeds as thoroughly as possible. There are several approaches for providing such legal framework: 1) adding the provision in the criminal code, 2) including the provision in a special law such as a drug-

related special law, 3) including the provisions both in the criminal code and a special law, and 4) enacting a comprehensive money laundering controlling law. Each individual country would choose a pattern based on its legal circumstances.

In order for strong control of money laundering activities, the law should cover a wide scope of predicate offenses, allow extensive confiscation and provide measures to freeze the assets subject to confiscation. The law should provide for strict regulation of financial institutions and should invite their voluntary cooperation. It should also include specific provisions for international cooperation (such as extradition and mutual assistance in criminal matters). If we take these into account, the enactment of a comprehensive money laundering law is the most desirable way.

B. Efforts of Law Enforcement Authorities to Strengthen Criminal Punishment

The enactment of law alone does not ensure the eradication of money laundering. Only when the prosecutors, police officers, tax officials and other law enforcement officials commit themselves to thorough tracking down the flow of illicit proceeds and the perpetrators, the efforts to provide legal framework would lead to successful suppression of crime.

However, the law enforcement authorities are facing increased difficulties in tracing the flow of illicit proceeds for various reasons. The financial institutions are strengthening the protection of bank secrecy. The businesses that the financial institutions deal with are becoming more complex and multifold. The computerization also becomes the cause for increased difficulty in obtaining evidence. And electronic trading and cash-less

transactions, and the liberalization of financial policy have increased the movement of enormous sum of money from country to country.

To effectively cope with this situation, more persons and resources should be put into the law enforcement authorities, for employment and training of experts and development of scientific investigative techniques. The budget for the suppression of crime should be considered as an investment for social welfare.

C. Establishment of Credit-based Society, Development of New Taxation Techniques and Increase of Public Awareness

Money laundering would not be fully controlled only through the judicial and administrative regulation. We need to fundamentally eradicate money laundering by establishing a credit-based society where dirty money is not tolerated.

We need to develop taxation techniques to prevent the evasion of tax. And at the same time, credit dealings should be more widely accepted than cash transactions. Especially, in developing countries, efforts should be made to increase public awareness regarding the tax evasion.

In Korea, the use of credit card has increased dramatically in recent years, and credit dealing is being accepted as an effective means for trade. Korea is planning to implement a comprehensive taxation system for financial income starting from February 1, 2001. When this system is applied in Korea, it will contribute greatly to preventing transactions made under the borrowed or stolen names, which are universally used as a method of laundering money.

D. Strengthening International Cooperation

Illegal proceeds tend to flow from a strictly controlled place to a place with less regulation. Therefore, the efforts of one or two countries cannot sufficiently address money laundering problem. We need to conclude multilateral and bilateral treaties to facilitate international cooperation in criminal matters, and make domestic law to back up these treaties.

And domestic laws to implement multilateral conventions should be monitored. The monitoring team should be enabled to urge a state party to faithfully implement the convention by making reports on the result of the monitoring. The monitoring on the implementation of OECD anti-bribery convention is a good example of such monitoring.

Furthermore, the international community including the United Nations should continue to make efforts to stop the exploitation of tax haven and offshore banking centers or states.³⁹

In this regard, I believe that UNAFEI's recent seminars and studies regarding

money laundering are very timely and desirable. I believe that its work will contribute to the establishment of a safe global community through the suppression of crime not only in Asia region but also in the whole world.

Appendix A

Major Crimes (regarding Article 2 Paragraph 1)

1. The offenses provided in the following provisions of the Criminal Code
 - (a) Article 114 Paragraph 1, Part II Chapter 5 Crimes injurious to public security
 - (b) Article 129 through Article 132, Part II Chapter 7 Crimes concerning the duties of public officials
 - (c) Article 207, Article 208, Article 212 (attempts to commit the crimes specified only in Article 207 and 208) and Article 213, Part II Chapter 18 Crimes concerning currency
 - (d) Article 214 through Article 217, Article 223 (attempts to commit the crimes specified only in Articles 214 through 217) and Article 224 (preparation and conspiracies with intent to commit the crime only in Articles 214 and 215), Part II Chapter 19 Crimes concerning valuable securities and postage and revenue stamps
 - (e) Article 225 through Article 227-2, Article 228(1), Article 229 (excluding Article 228 Paragraph 2), Articles 231 through 234 and Article 235 [attempts to commit the crimes specified only in Articles 225 through 227-2, Article 228(1), Article 229 (excluding Article 228 Paragraph 2), Articles 231 through 234], Part II Chapter 20 Crimes

³⁹ They include Bahamas, Bermuda, Channel Islands, Gibraltar, Panamas, British Virgin Islands, Lebanon, Lichtenstein and others. (Ingo Walter, *The Secret Money Market*, New York: Harper Business, 1990, pp. 210)

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- concerning documents
- (f) Article 246 Paragraph 2 and Article 247, Part II Chapter 23 Crimes concerning gambling and lotteries
- (g) Article 250, Article 254 (attempts to commit the crimes specified only in Article 250) and Article 255 (preparation and conspiracies with intent to commit the crime only in Article 250), Part II Chapter 24 Crimes of homicide
- (h) Article 314 and Article 315, Part II Chapter 34 Crimes against credit, business and auction
- (i) Articles 323 through 324-5, Article 325 and Article 326, Part II Chapter 37 Crimes of obstructing another from exercising his right
- (j) Articles 329 through 331, Articles 333 through 340, Article 342 (excluding attempts to commit the crimes specified in Article 331-2, Article 332 and Article 341) and Article 343, Part II Chapter 38 Crimes of larceny and robbery
- (k) Article 350 and Article 352 (attempts to commit the crime specified only in Article 350), Part II Chapter 39 Crimes of fraud and extortion
- (l) Article 355 [provided that this article was violated by a person provided in Article 2 Sub-paragraphs 1, 2 and 4 (only including those persons who assist the persons provided under Sub-paragraphs 1 and 2 and deal with a part of that persons' task) of the Act on the Responsibility of Accounting Employees, in relation to his duties and task, knowing that the national treasury or a local government would sustain loss as a result of that violation], Part II Chapter 40 Crimes of embezzlement and breach of trust
- (m) Article 362, Part II Chapter 41 Crimes concerning stolen property
2. Articles 23, 24 26 and 27 of the Bicycle and Motorboat Racing Act
 3. Article 179 and Article 182 Paragraph 2 (attempts to commit the crime specified only in Article 179) of the Customs Act
 4. Article 54 Sub-paragraph 3 of the Foreign Trade Act
 5. Article 111 of the Lawyers Act
 6. Article 5 of the Illegal Check Control Act
 7. Article 30 Paragraph 1 of the Special Act on the Regulation and Punishment of Speculative Act, etc.
 8. Article 622 and 624 (attempts to commit the crime specified only in Article 622) of the Commercial Code
 9. Article 93 of the Trademark Act
 10. Article 95-8 of the Futures Trading Act
 11. Article 40 Sub-paragraph 1 and Article 42 of the Child Welfare Act
 12. Article 70 Paragraph 1, Paragraph 2 (3) and Paragraph 5 of the Specialized Credit Financial Business Act
 13. Article 24, and Article 25 Paragraph 1 Sub-paragraphs 1 and 2 of the Prevention of Prostitution Act
 14. Article 29 Paragraph 1 of the Sound Records, Video Products and Games Act
 15. Article 207-2 of the Securities Transaction Act
 16. Article 46 and Article 47 Sub-paragraph 1 of the Employment Security Act
 17. Article 70 of the Act on the Control of Firearms, Swords, Explosives, etc.
 18. Article 3, 5 and 7 of the Act on the Aggravated Punishment of Certain

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Economic Crimes

19. Articles 2, 3, 5, 5-2, 5-4, 6 and 8 of the Act on the Aggravated Punishment of Certain Crimes
20. Articles 366, 368 and 370 of the Bankruptcy Act
21. Articles 2 through 4, Article 5 (1) and Article 6 [attempts to commit the crimes specified only in Article 2, Article 3, Article 4 Paragraph 2 (excluding the crimes specified in Article 136, 255, 314, 315, 335, 337 (the latter part), 340 Paragraph 2 (the latter part) and 343 of the Criminal Code) and Article 5 Paragraph 1] of the Act on the Punishment of Violence, etc.
22. Articles 50, 51, 53, 54, 58 and 60 of the Korean Horse Racing Association Act

Appendix B

Predicate Offenses under Article 2
Sub-paragraph 2 (B)

- Article 25 Paragraph 1(3) of the Prevention of the Prostitution Act
- Article 5 Paragraph 2 and Article 6 of the Act on the Punishment of Violence, etc.
- Article 3 Paragraph 1 of the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions
- Article 4 of the Act on the Aggravated Punishment of Certain Economic Crimes

CURRENT SITUATION AND COUNTERMEASURES AGAINST MONEY LAUNDERING: HONG KONG

*Sin Kam-wah **

I. INTRODUCTION

Money laundering is one of, if not the biggest, transnational crime facing us all today. Ever since the mid to late 1980s, it was accepted that to effectively fight the world drug trade, law enforcement needed not only to get culprits sentenced to long periods of imprisonment but also to confiscate their assets and proceeds of crime. With emphasis placed on taking their money the criminal has had to resort to laundering to hide it away or disguise its origin.

Given the ease with which money and assets can be moved around the world it is impossible for any one jurisdiction to effectively fight this battle on their own. Effective laws and co-operation amongst jurisdictions are a necessity for any successful action to be taken against the launderers and their activities. Hong Kong has been quick to recognise their responsibility in this regard and we joined the Financial Action Task Force (FATF) when it was first established in 1989. Subsequently we joined the Asian Pacific Group against Money Laundering (APG) when it was established in 1997.

The People's Republic of China is not a member of FATF but is a member of the APG. After the handover in 1997 when Hong Kong became a Special Administrative Region of the Mainland,

Hong Kong continued its membership of FATF, despite the mainland not being a member. Indeed in June 2001 Hong Kong will take up the Presidency of FATF for the one year term of office. This will be an important time for the organisation as it is planned to review the 40 recommendations.

This paper draws heavily on the experience of the Hong Kong Police, and will address the following areas:

- (i) The Current Laws in Hong Kong and their use
- (ii) Co-operation by banks and other sectors, including obstacles and the overcoming of them through legislation, education and regulation
- (iii) The functions and activities of the Joint Financial Intelligence Unit in Hong Kong
- (iv) Asset confiscation
- (v) Case examples
- (vi) International co-operation

II. THE MAGNITUDE OF MONEY LAUNDERING

It is almost impossible to put an accurate figure on the amount of money being laundered each year; criminals, after all, do not publish accounts. Estimates of the revenue generated from narcotics trafficking in the USA alone range from US\$40 billion to US\$100 billion¹.

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The Financial Action Task Force (FATF) estimates that narcotics trafficking is the single largest source of criminal proceeds, followed by the various types of fraud². Smuggling, gambling and, increasingly nowadays, trafficking in human beings also generate significant amounts of criminal proceeds. Often overlooked, however, is the huge amounts of money generated by tax evasion. Many people do not think of tax evasion as being a source of criminal proceeds; indeed, in some jurisdictions tax evasion is not a crime per se. However one only has to consider the huge industry which has grown up around so called tax havens, or off-shore financial centres, to realise that tax evasion - and its legally ambiguous sibling, tax avoidance - is big business.

In summary, therefore, whilst it is not possible to accurately quantify the amount of money laundering going on in any one country or region, it is possible to conclude that the amount of money being laundered is huge.

III. THE CURRENT LAWS IN HONG KONG AND THEIR USE

A. Criminalisation of Money Laundering

For historical reasons, Hong Kong's money laundering laws are in two Ordinances. Firstly in 1989 came the Drug Trafficking (Recovery of Proceeds) Ordinance, Cap 405. Under section 25 the following offence was introduced :

“Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part,

directly or indirectly represents any person's proceeds of drug trafficking, he deals with that property.”

The main points to note are “Knowing or reasonable belief.” Obviously knowledge is a fairly straight forward concept, but it is difficult to prove other than through say - admissions, undercover officers, accomplices or technical assistance. Reasonable belief is however a much more difficult concept to show and it was considered by the Court of Appeal in HKSAR and SHING SIU MING and two others (CA415/97). SHING was a major drug trafficker between Hong Kong and Australia and he was sentenced to 30 years for trafficking and money laundering and the two others involved were also sentenced to 7 years each for money laundering. The two others were his wife and sister and the prosecution relied on reasonable belief. The Court of Appeal said :

“Knowledge if proved would simply resolve the matter. Difficulty, however, arises from the use of the words “having reasonable grounds to believe.” This phrase we are satisfied, contains subjective and objective elements. In our view it requires proof that there were grounds that a common sense, right-thinking member of the community would consider were sufficient to lead a person to believe that the person being assisted was a drug trafficker or had benefited therefrom. That is the objective element. It must also be proved that those grounds were known to the defendant. That is the subjective element.”

The Court of Appeal also later said :

“Here the judge was wrong as he was directing that it was incumbent upon the prosecution to prove either

¹ Financial Action Task Force Annual Report 1999-2000

² Financial Action Task Force Annual Report 1999-2000

knowledge or belief, which he characterized as “something less than knowledge”, in the minds of the defendants. The test is, in fact, not so high. The prosecution has to prove knowledge of trafficking or that a defendant had reasonable grounds to believe that there was trafficking. The prosecution is not called upon to prove actual belief. It would be sufficient to prove reasonable grounds for such a belief and that the defendant knew of those grounds.”

In this case the prosecution could prove huge sums of money coming from Australia to the relatives’ bank accounts which SHING told them to set up and that they withdrew the money in cash and gave it to SHING. They believed SHING was unemployed, they knew he had previously been convicted of drug offences and had visited him in prison. The prosecution could show they opened accounts for an unemployed person with previous drug convictions which received huge sums of money (HK\$47 million) which they withdrew in cash and gave to him and they knew all the above facts. A right-thinking member of society using common sense should have believed the money was from drugs. The applications were dismissed.

Similarly, - “Any property” is very wide and includes, everything you can think of such as cash, flats, jewellery, cars, stocks, shares etc, etc. “Represents any person’s proceeds” means if the criminal gets cash from trafficking and then buys a house with the cash and then sells the house and buys shares; the cash, house and shares all represent the proceeds. Also one should note it refers to “any person’s” which means that one can also launder one’s own proceeds of crime and be charged with both the substantive offence and money laundering, as Happened in SHING’s Case Mentioned Earlier.

“Drug Trafficking” under the law includes many serious drug offences such as manufacturing, importing, exporting etc. “Deals” is defined as :

- (a) Receiving or acquiring the property;
- (b) Concealing or disguising the property (whether by concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it or otherwise);
- (c) Disposing of or converting the property;
- (d) Bringing the property into or removing from H.K.;
- (e) Using the property to borrow money, or as a security (whether by way of charge, mortgage or pledge or otherwise).

The maximum sentence is 14 years and a \$5 million fine on Indictment and 3 years and \$1/2 million fine on summary conviction.

When FATF extended the money laundering recommendations to cover organized and serious crimes, Hong Kong introduced the Organized and Serious Crimes Ordinance, (OSCO), Cap 455 in late 1994 and it came into effect in mid 1995. Also at section 25, the money laundering offence is the same as the DT (ROP) offence except that it applies to proceeds of an indictable offence, rather than proceeds of drug trafficking. Basically all offences in Hong Kong are indictable, which means we have few problems over worrying whether the proceeds of crime are from a predicate offence or not, as in some other jurisdictions.

An interesting part of the OSCO offence is section 25(4), which reads:

“In this section and section 25A, references to an indictable offence

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include a reference to conduct which would constitute an indictable offence if it had occurred in Hong Kong.”

This means that the proceeds of crime from overseas are not welcome in Hong Kong and any attempt to bring them to Hong Kong constitutes an offence in the territory. For example a robber in Japan deposits the proceeds into a Hong Kong bank account in his own or another's name, he or the other persons are laundering in Hong Kong. Although with the other persons one would have to prove the knowledge or reasonable belief. However if someone remits money out of Japan through a remittance agent he commits an offence against the Japanese Banking Act, but there is no similar offence in Hong Kong and consequently dealing in the proceeds of that Japanese offence in Hong Kong is not money laundering.

It is of interest to note that tax evasion is an indictable offence in Hong Kong and therefore dealing in both local and overseas proceeds of tax evasion is an offence in Hong Kong.

To summarise, our laws in Hong Kong are far reaching in that it is an offence to launder the proceeds of nearly all offences, one can launder one's own proceeds and it does not matter if the predicate offence happened outside our jurisdiction.

B. Money Laundering Cases

The Hong Kong experience suggests that it is very hard to show “knowledge” or “reasonable belief” in money laundering offences. Consequently there is currently an amendment before our legislature to lower the mental element to “suspect”. Proving someone should have suspected property dealt with by them is the proceeds of crime will be easier.

Another problem with the HK legislation is showing that the property which was the subject of the transaction was, as a matter of fact, the proceeds of crime. This is often not easy, but it should be borne in mind that through the use of circumstantial evidence the Courts can be asked to conclude that the property must be the proceeds of crime.

Circumstantial evidence derives its main force from the fact that it usually consists of a number of items pointing in the same direction :

“It has been said that circumstantial evidence is to be considered a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link break, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three standard together may be of quite sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”

[R v. Exall (1866) 4 F&F 922]

Examples of the type of circumstantial evidence one can use are :

- (a) Expert Evidence
- (b) Audit Trails
- (c) Unlikelihood of Legitimate Origin
- (d) Absence of Commercial or Domestic Logic
- (e) Evidence of Bad Character
- (f) Contamination of cash
- (g) Packaging of Proceeds
- (h) Denomination of Banknotes

- (i) Lies by the Defendant
- (j) Inferences from Silence
- (k) Surveillance
- (l) False identities, addresses and documentation
- (m) Overall Criminal Enterprise
- (n) Accomplices Evidence
- (o) Admission regarding the suspicious and unusual circumstances in respect of the property in issue.

Hong Kong has become aggressive in seeking the use of circumstantial evidence to prove crime proceeds.

IV. THE INVOLVEMENT OF OTHER SECTORS IN THE FIGHT AGAINST MONEY LAUNDERING

As must be apparent when looking at the way proceeds are laundered law enforcement cannot hope to achieve any real success on their own. If one has a certain type of crime one can try and follow the proceeds and hope to identify the criminal and/or launderer, but the chances of success in this way is very limited. If one has a suspect or target one can look at his bank accounts, businesses etc. and try and identify the source, but one is starting at the integration stage and working backwards, consequently if the criminal has laundered his proceeds well it is difficult to get anywhere. Also this is time consuming and resource intensive.

However if the professionals along the way such as the bankers, accountants, lawyers, money changers, remittance agents, stockbrokers, estate agents, high value retailers etc. are helping the law enforcement agencies by reporting suspicious transactions then the task becomes much easier.

Consequently an important part of any successful money laundering regime is to get these sectors to help. Unfortunately

none of these sectors are going to help willingly for a number of reasons. The main obstacles to assisting and reporting to police that have been identified in Hong Kong through discussion with the various sectors are :

- (a) Client confidentiality
- (b) Distrust of the Police
- (c) Possible loss of business
- (d) Breach of restriction under law or otherwise
- (e) Fear of damages or liability for loss
- (f) Not knowing what to do or who to report to
- (g) Fear of the fact a disclosure was made will get out leading to a fear of retribution from the criminal, loss of business etc.
- (h) Discouraged by low level of police success and lack of feedback
- (i) Lack of awareness
- (j) Aware of the low risk of prosecution if they do not comply
- (k) Insufficient resources
- (l) High cost and lack of rewards
- (m) Belief that no or little laundering occurs in their sector

The obstacles have been overcome in a number of ways but primarily through the legislation, education and regulation.

1. Legislation

Section 25A of OSCO and DT(ROP) are basically the same, but Section 25A(1) of OSCO says:

“Where a person knows or suspects that any property -

- (a) in whole or in part directly or indirectly represents any person's proceeds of;
- (b) was used in connection with; or
- (c) is intended to be used in connection with an indictable offence, he shall as soon as it is reasonable for him to do so disclose that

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knowledge, or suspicion, together with any matter on which that knowledge or suspicion is based to an authorised officer”.

The penalty for non-compliance is 3 months imprisonment and a fine of HK\$25,000 - \$50,000 but of course the real penalty is the stigma attached to a prosecution under this section and the damage to one's reputation. Many companies just would not deal with say a bank or accountants who have been convicted under this section.

Few points about this section are :

- (i) “Knows or suspects”, the requirement is suspects which is in legal terms low. One can assume the Courts will expect a level of professional standards from the person. That is to say it would be reasonable for a trained accountant to suspect something amiss having looked at the accounts but perhaps not reasonable for the account clerk.
- (ii) “is intended to be used in connection with”, this covers say the drug trafficker collecting money together to pay for his drugs before he receives them or say a rich businessman withdrawing cash from the bank to pay the kidnap ransom for the return of his son. In the latter example if the bank knew the money was being withdrawn by a victim to pay a ransom they clearly are under a duty to disclose.
- (iii) “soon as is reasonable” - would depend on all the circumstances, but a few days is not asking much.
- (iv) “an authorized officer” - this is defined in the Ordinance as any police officer, customs officer or anyone else authorised by the Secretary for Justice. In effect it

is JFIU - the Joint Financial Intelligence Unit. This is a unit in Narcotics Bureau manned by police and customs which will be covered in more detail later.

The bonus of the section is that if a person makes a disclosure in accordance with it, he cannot then be charged with Money Laundering. Section 25A(2) says that if the disclosure is made before any act in contravention of Section 25(1) and the disclosure relates to the act, one can still do the act with the consent of an authorised officer. Or if the disclosure follows the act providing the disclosure is made of his own initiative, as soon as it is reasonable to do so, then there is no offence against Section 25(1).

The key to Suspicious Transaction Reporting is ‘Know Your Customer’. If you know who you are dealing with then you can decide if it is suspicious or not. For example, if the managing director of a listed company puts HK\$5 million into his account then it is probably not suspicious, but if a building site labourer puts HK\$5 million in his account, it is definitely suspicious. Banks and other organisations need to know who their customer is, what he does, what his salary is, where he lives etc. For companies they need to know about the type of business, turnover etc. With this information they can identify suspicious or unusual transactions much more easily.

Most people disclose after the act and for them and those who disclose before, in 99.9% of the cases JFIU tell them that they can continue to deal with the account in question. Only very rarely will they be told that they cannot continue to deal. Such a notification effectively freezes the account and there are specific provisions to do this under the Restraint Provisions. Accordingly one is placing the person or

Institution in a difficult position by refusing and so it is rarely used.

In Section 25A(3), the law specifically says a disclosure shall not be treated as a breach of restriction imposed by contract, law etc. etc. It also says one cannot be liable for any damages which may result from having made the disclosure.

Section 25A(4) says that for people in employment providing they report to their compliance officer or supervisor they have fulfilled their duty and it is incumbent upon that person in accordance with the employer's procedures to make the disclosure. This effectively forces financial institutions and other such businesses to establish procedures and tell their staff. Section 25A(5) makes it an offence to tip the subject of the disclosure off. Section 26 also effectively restricts anyone, including the police, even during a trial, from revealing a disclosure has been made and by whom. This restriction is important if disclosure makers are to have any confidence in the system.

2. Education

As one can see through the legislation we have overcome a number of the obstacles. On the education front, Financial Intelligence Unit Officers and Investigators spend many hours giving presentations and lectures to people from different sectors and different levels - from bank tellers up to senior directors of stock brokering and accounting firms and even the law society as lawyers seem particularly ignorant of their responsibilities. This means that as a group money laundering investigators establish a very wide network of contacts in varied institutions and business.

In addition to direct education JFIU provide a series of regular feedback to institutions. Primarily to date we have

concentrated on the banks but we are slowly trying to involve other sectors. This feedback is considered very important by the banking sector. We tell them about money laundering methods and indicators we have come across and from these they can hopefully identify what is suspicious and what is not and educate their staff.

Additionally each disclosure maker is told of the result of every disclosure made which investigators classify in one of four ways:

- (a) positive
- (b) other crime
- (c) unresolved
- (d) no crime

Also when investigators do come across a money laundering case they review everything afterwards to see if anyone should have made a disclosure but failed to do so. They then discuss it with the Institution concerned. With the banks we are still very much at this stage rather than prosecution. Tied in with this the Financial Intelligence Unit has begun to examine banks' disclosures from both a quantitative and quality viewpoint. Based on this JFIU have been able to identify weaknesses in various banks compliance structures and encourage training of staff at appropriate levels on problem subjects.

3. Regulation

Regulation in this context means how various sectors can be pushed into complying. Probably the best example is the banks. The Hong Kong Monetary Authority (HKMA) have issued guidelines under Section 7(3) of the Banking Ordinance. These guidelines are not law but they do establish the minimum standards the HKMA expect licensed banks in Hong Kong to subscribe to. If local banks are found to be in breach of the guidelines the HKMA can order a Money Laundering Audit to examine the banks

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rules and compliance. If the HKMA were unhappy with the bank they could then withdraw its license until it complies with the guidelines. If we the police find banks in regular or deliberate breach of the guidelines we will involve the HKMA. If we go back to the background and history to this whole subject the HKMA must keep a strong grip on the banks on this issue as if it was felt that the Hong Kong banking system was being used for money laundering and banks were doing little to prevent it, Hong Kong would face international sanctions. Other sectors such as the Insurance Sector, Lawyers and Accountants also have their own guidelines.

One sector that was soon identified in Hong Kong as a problem and because it was unregulated was difficult to do anything about was Remittance Agents and Money Changers. There is a huge network of Remittance Agents working in Hong Kong. Some are run as actual businesses (like Western Union), while others operate as part of existing businesses, like goldsmith shops, apartment houses or whatever; whilst others operate out of peoples flats and homes. These agents have reciprocal agents, shops or relatives overseas. They will then arrange for the transfer of funds all over the world. Many of these agents use a counter-balance method and settle at irregular intervals so in many instances no money is actually sent. They often use cash courier, bank remittance and other methods that break the audit trail. All that is required to run such an Agency is a telephone, fax and bank account.

These remittance agents were clearly not keeping proper records, not identifying their customers and were totally unregulated and uncontrolled. They are particularly active in moving funds to and from China and are popular with launderers involved in drug activities,

human smuggling and fraud.

The police therefore decided they needed Regulating and earlier this year an amendment to OSCO was introduced. Unfortunately due to arguments over the cost of implementation and manpower Government eventually went for registration rather than licensing. It remains to be seen if this works. Anyway these remittance centres and money changers (not banks, who are governed by HKMA regulations) must now keep records for 6 years (just like the banks) and identify their customers and their transactions, over \$20,000HK. They must register with the Joint Financial Intelligence Unit and a copy of all registered money changers and remittance agents is now on the JFIU website (www.jfiuhk.com). The law came into effect on June 1st 2000 and there was a 3 month grace period. We are still trying to encourage people to register. Probably in the new year we will start charging people who are not complying. Obviously only time will tell how effective this will be in the fight against money laundering.

This threshold amount for remittance agents and money changers was to prevent money changers becoming bogged down with numerous records. It has led to some confusion about threshold reporting, but it is not a threshold reporting system, they merely have to keep records.

The legal requirements to make disclosures, obstacles to this and the involvement of other sectors are covered, but how are we doing? Disclosure figures by year are :

RESOURCE MATERIAL SERIES No. 58

Year	No. of Disclosures
1989	34
1990	125
1991	147
1992	267
1993	368
1994	550
1995	1,798
1996	4,141
1997	4,227
1998	5,570
1999	5,804
2000 (to 1/11/2000)	5,010

The disclosure figures by sector are:

Year	Banks	Law- yers	Account- ants	Financial Companies	Insurance Companies	Foreign Exchange Cos	Other	Total
1998	5524	1	4	24	8	5	4	5570
1999	5757	0	1	14	16	14	2	5804

Other than the retail banking sector it is quite true to say compliance in Hong Kong is not satisfactory. We are working hard to encourage greater response from other sectors, but probably only a few high profile prosecutions of lawyers and accountants will encourage these sectors to take the subject seriously. Currently police are heading a governmental committee to see what can be done to improve the situation in all sectors.

V. THE FINANCIAL INTELLIGENCE UNIT

In Hong Kong the FIU is manned by both Police and Customs Officers and is known as the Joint Financial Intelligence Unit. For historical reasons it is housed in our Narcotics Bureau. The primary role of the JFIU is the collection, collation and

dissemination of disclosures or suspicious transaction reports. The unit itself does not investigate any disclosures. They check the subjects against the Criminal and Intelligence Records as well as the previous disclosure history. Based on this the disclosures are distributed primarily to the Customs and Excise, Police Narcotics Bureau or the Organized Crime and Triad Bureau. If there are no indications as to who should investigate, the disclosure is allocated to any of the units so that each has roughly one third of all disclosures. If subsequent enquiries show another unit should be investigating the enquiry is passed across. From time to time some get passed to our Commercial Crime Bureau, Independent Commission against Corruption or Security Wing.

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Hong Kong are members of the Egmont Group and are committed to the exchange of information obtained through JFIU with overseas agencies. Any information obtained through disclosures can be passed overseas for intelligence purposes only. If the information is required for Court purposes then more formal channels, such as the MLA route needs to be followed, as the information needs to be obtained by a Production Order or Search Warrant.. By law we are not allowed to reveal to anyone, including the Courts that a disclosure has been made and by whom. Accordingly whilst information is supplied the source is always concealed. As far as HK is concerned enquiries can be made direct to the JFIU or through the normal Interpol channels.

As has been alluded to earlier in this paper an important part of the JFIU work also involves the provision of feedback and training to the disclosure makers. This is an often overlooked, but vital, part of an FIU duties. The effectiveness of a suspicious transaction reporting system relies on both the quantity and quality of the reports made. This in turn depends on how well staff of financial institutions (which in practice make the vast majority of reports) can identify transactions which are genuinely suspicious. Without proper training, both the quantity and quality of the reports will remain at a low level. Although banks and other financial institutions provide basic training to their staff, input from the FIU is vital if they are to be kept up to date on the latest trends and methodologies for laundering money. The following practices can be considered when planning training and feedback :

- (i) lectures to bank compliance officers and front line staff;
- (ii) provision of training material or vetting of a bank training material to ensure it is up to date and covers

- all relevant legislation;
- (iii) provision of real life sanitised cases to illustrate particular methods of money laundering and highlight suspicious activity indicators;
- (iv) working groups consisting of members of both financial institutions and the FIU to highlight best practices;
- (v) an FIU web site to increase public awareness of the legal requirements to report suspicious transactions;
- (vi) qualitative and quantitative analyses of suspicious transaction reports made by individual institutions.

In addition, makers of suspicious transaction reports should be informed, whenever practical, of the progress and ultimate outcome of the investigation generated by their report, particularly where the report has led to a successful case.

VI. RESTRAINT AND CONFISCATION

During this paper restraint and confiscation have been mentioned and after all this is the main reason why criminals have to launder their funds. Accordingly we will mention the law in this regard in Hong Kong and also see how we are doing.

Hong Kong restraint orders are made ex-parte and hence we are able to obtain them and serve them prior to arrest or subsequent to arrest without the defendant becoming aware of our intention beforehand. This is obviously important to prevent the proceeds from disappearing. There has been some problems over continuing a restraint order where the defendant is not charged straight away. An amendment to the law is before the legislature to overcome this allowing the

restraint of assets to continue for a “reasonable period” whilst police investigate prior to charging. The Courts will assess what is a reasonable period in all the circumstances of the particular case.

There are confiscation provisions in both DT (ROP) and OSCO. In DT (ROP) and OSCO investigators can seek confiscation of a person’s assets in three sets of circumstances :

- (a) upon conviction
- (b) upon death
- (c) has absconded

Normally it is upon conviction and so it will be covered from that perspective. Upon conviction in the District or High Court the prosecution will apply to confiscate the proceeds. Firstly the offence must be in Schedule 1 of DT(ROP) or Schedule 1 or 2 of OSCO. These schedules in fact include most major or serious crimes. The court must then determine if the person has benefitted from the crime and under OSCO the proceeds must be at least HK\$100,000. The court will then assess the extent of the person’s proceeds of crime. Under section 2 (6) of OSCO proceeds are defined as :

- (a) Any payments or other rewards received by him at any time in connection with the commission of the offence;
- (b) Any property derived or realised, directly or indirectly by him for any of the payments or other rewards; or
- (c) Any pecuniary advantage obtained in connection with the commission of that offence.

This means that in a loansharking case the proceeds include the initial deduction made by the loanshark and all subsequent repayments including the principal or actual loan. In drug cases the court can

assess the proceeds from the quantity of drugs involved and/or the amount passing through his accounts.

The police will put forward a statement to support their assessment of the proceeds for the court to consider and the court will then give a ruling on its assessment of the proceeds of crime.

When the case is an Organized Crime under section 9 of OSCO the police may ask the court to assume that any assets acquired in the last six years by the person are the proceeds of crime. It is incumbent upon the person to refute this and show the assets were lawfully obtained. If the court sides with the police, the value of the assets, so assessed, can be added to the value of the defendants proceeds of crime.

The next step is that the police will put forward details of the person’s assets, which have normally been restrained or charged (a restraint or charging order is used depending on the type of assets). There may be some debate here over say the spouse’s assets and whether they are entirely theirs. Anyway the court will then rule on the value of the person’s assets. *Note there is no need for any link between the Assets and the Proceeds.*

Finally the court will then make a confiscation order up to the value of the proceeds they have assessed, but it cannot be greater than the assets available. That is to say if the proceeds of a drug trafficker are assessed at HK\$10 million, but the police have only identified assets of HK\$5 million, then the order will be for \$5 million. If the police locate more assets in the next 6 years they can return to Court to seek an amendment of the confiscation order up to the assessed proceeds. If the defendants assets are held outside Hong Kong and he refuses to realise them and pay the confiscation order he can be given an extra

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sentence.

If the police cannot find any assets they can seek the confiscation of a nominal sum, say \$1 and then they have up to 6 years to find the assets and return to court to get the confiscation order varied.

To date \$461 million HK has been confiscated in Hong Kong, mostly drug money and a further \$163 million HK is under restraint. Concerning confiscation under OSCO, we have not had the success we hoped for. Why not? There are a number of reasons :

- (a) Some scheduled offences which should be included are not. Examples are :
 - (i) Aiding and Abetting Illegal Immigrants for human smuggling cases.
 - (ii) Carrying on the business of lending money without a licence.
 - (iii) Sale and Production of Pornographic material.
- (b) Many offences have victims where the prosecution have to step aside to allow compensation of the victim from the assets.
- (c) Persuading the prosecutors to put certain offences in higher courts. Traditionally bookmakers, illegal casino operators and loansharks have received relatively small sentences (under 3 years) and hence these case are heard in the Magistracy where it is not possible to seek confiscation. Prosecutors are proving very reluctant to put cases in higher courts merely so confiscation of assets can be sought. Dialogue between the police and the prosecutors is continuing on the subject.

Given the trans-national nature of organized crime criminals will often keep assets overseas. HK laws have provisions

to allow for the enforcement of overseas restraint and confiscation orders and sharing of confiscated assets. These will be touched upon again later.

VII. CASE EXAMPLES

Some case examples are now given to illustrate some of the points raised earlier and are considered useful experience to share:

(a) *US Fraud Case*

A small bank in the USA was defrauded of several million USD by the President (Mr.A) and Vice-President assisted by two other men, one of whom we will call Mr. B. The bank eventually went into liquidation and the four men were all tried and convicted.

Enquiries showed that Mr. A & B laundered much of their money through a solicitor in Hong Kong, Mr. C. Mr. C set up various companies and opened bank accounts for those companies, used his client account and also obtained a Belize passport for Mr. A in a false name.

Mr. A & B moved their proceeds into either Mr. C's client account in Hong Kong or into another Hong Kong account in the name of Co. K. Co. K was set up by Mr. C in Hong Kong for Mr. A & B. Mr. C opened the account in Hong Kong and Mr. B opened an account in Guernsey. Much of the money received into Co. K's HK account was by way of structured remittances (i.e. amounts less than \$10,000 in order to by-pass US reporting requirements). Money from Mr. C's client account was remitted to Co. K's account in Guernsey. Money from the two Co. K account's in Hong Kong and Guernsey was then remitted to another Guernsey account in the name of Co. L, a BVI Company set up by Mr. B. Mr. B then moved his share on to a Swiss Bank account, Mr. A moved

his share to Co. M's account in Guernsey. Co. M had been set up by the solicitor Mr. C in Hong Kong for Mr. A who used a false name - Mr. D. Mr. C also assisted Mr. A to get a Belize passport in this false name 'D'. Mr. C had also opened a bank account in Guernsey for the Company. Some of A's share was remitted back to C's client account. Some of this was further remitted to a Company N in Mexico and the remitter was shown as one of C's nominee companies he used in establishing companies for his clients. This was apparently done at D's request so that Company M's name was not shown on the remittance.

'C' was interviewed and claimed client privilege and refused to answer any questions. However he then decided after the police visit and on receiving correspondence from the US that 'A' had used a false identity and that 'A' & 'D' were in fact the same person and he 'co-operated' with police. He claimed not to have realised this up to that point. He denied knowing that the money from Company K which went to Co. L was the same money which then went to Co. M. As such he did not know Co. K & M were connected. He denied making the transactions from the Co. 'K' account in Guernsey to the Co. 'L' account. Unfortunately we have a chicken and egg case with the Channel Islands laws in that we are not allowed warrants to check the banking records unless we charge 'C'. We cannot charge 'C' unless we get these banking records or other evidence.

When asked about the movement between all the Companies and what was the point of them all, the solicitor said that it was common for him to do this for American clients. The US had a worldwide tax system and many Americans like to put a little nest egg away from the reach of the tax authorities. He did it all the time and what he meant but did not say was "and what is wrong with that". He spoke of

opening companies for one transaction and closing them out afterwards in order to make it more difficult to trace the flow of funds and claimed that was alright and that putting someone else's name on a remittance was acceptable. These are classic money laundering indicators and yet he spoke of them as normal business practice. Regarding the Belize passports for which he accepted a birth certificate as proof of identity from an American visiting Hong Kong he felt this was alright and saw no reason why he should have taken the passport.

'C' has not been charged as there were insufficient evidence to show he knew or should have reasonably believed the funds were the proceeds of crime.

Whether or not the solicitor was culpable in this case, a number of issues are raised:

- (a) C met A & B through an intermediary he trusted. Professionals must be wary of Intermediaries.
- (b) 'C' should have asked why the client wanted to open these accounts and move money around. 'C' possibly suspected tax evasion an indictable offence in Hong Kong, but chose not to do anything or he knew of the fraud.
- (c) If one operates a bank account for a company one has set up one must be aware of structuring and transaction reporting conditions in other countries.
- (d) Solicitors should not allow remittances to come through their client accounts when the client can move money in other ways, unless there is a very good reason to do so.

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(e) Solicitors should not hide the identity of a remitter for their client unless there is a very good reason to do so.

(f) If one is asking overseas clients for identification get their passports. Birth certificates which have no photograph do not prove someone's identity. It is in most countries easy to obtain a copy of anyone's birth certificate. The obvious identification to request is a passport.

Overseas people do use bank accounts in Hong Kong to do the following transactions, which without explanation should be regarded as suspicious :

- (i) 'U' Turn transactions - where money is say remitted from the USA to the account in Hong Kong and then remitted straight back to another person or US Company.
- (ii) Layering - a number of different transactions when one could have sufficed.
- (iii) Numerous transactions with countries known for drug or criminal activities.
- (iv) Transactions which are inconsistent with the clients background or profile.

As the operator of the account the lawyer should not wait for the banks to spot the suspicious transaction and disclose. The lawyer must monitor accounts he is responsible for and that includes his own client account (for large cash transactions) and disclose when he sees suspicious activities.

(b) *Operation Maltwine*

A character called Mr. 'A' was operating a legitimate money lending business called Co. X Ltd. This company had four offices around the territory and through newspaper adverts he attracted a steady stream of clients. These clients were required to complete an application form giving all their personal particulars. The application forms were then passed to the head office and only a very small percentage of applicants were ever successful in obtaining a loan.

Details of all the unsuccessful applicants were passed to the criminal side of the business and from a secret office within the head office cold calls were made to the unsuccessful applicants who were offered loans of \$2,000. The initial payment was only \$1,800, \$200 being deducted for a handling charge. Then \$400 interest had to be paid every 10 days until the principal of \$2,000 was paid in full. This works out to over 1,000% per annum.

This offer was made on a take it or leave it basis and many desperate people accepted. If it was agreed another gang member was contacted and told to pay the money direct into the debtors account and the application form and other details were then Faxed to a records office in Shenzhen, just across the border with China. Records in the Hong Kong office were then shredded.

The office in Shenzhen had all the records computerised. The debtors were told to repay money into various accounts which had been opened by debtors or drug addicts who had registered a number of different companies and opened a series of bank accounts for a small payment. 36 accounts were used in all. The office in Shenzhen monitored repayment into the different accounts. Non payers details were referred to another office in Shenzhen

which ran the debt collecting side of things.

From the debt collecting office a group of young triads were tasked daily to visit various addresses to either remind the debtors to repay or to splash paint all over their doors and leave threatening messages. It also transpired that the debt collecting office took orders from other syndicates to harass their debtors.

Meanwhile the money was withdrawn from the repayment accounts by bank cards or as there is a daily limit on withdrawals by using the Jockey Club. One can purchase betting vouchers for large amounts by using ones bank card and these were then cashed straight away. Some of the money was used to lend to new debtors and the rest, about HK\$2 million a month was remitted to Macau.

The money was later remitted back to another company, Co. Y, which pretended to be involved in trade, but in fact did none at all and from there it was used to run the operation or it was moved to Mr. X and his relatives who bought flats.

While some of the companies were in X's name, anything illegal was distanced from him and the only time he felt safe to actually get involved was in the Records Office in Shenzhen or with Co. Y.

Various police units had arrested a number of the young men causing criminal damage and the Organized Crime & Triad Bureau also identified the people operating the collection account and paying the debtors. This suggested a large syndicate was at work. Surveillance and investigation work led on to much of the rest of the operation, although everything was not really tied together until police went overt in April 2000. Anyway once it was realised that the gang were keeping records and directing things from China,

HK Police approached the Police Security Bureau who gave us very professional assistance, including surveillance. There were some problems at first in that loansharking is not an offence in the Mainland but these were overcome, thanks to a great spirit of co-operation.

In April 2000 joint raids in China and Hong Kong were carried out once Mr. X was seen at his records office in Shenzhen and everyone arrested. HK Police were allowed to be present in China, film the raid and seizing of exhibits which the PSB agreed to do in accordance with HK procedures, so that everything will be admissible in our Courts.

Mr. X's assets of about HK\$48 million have been restrained and enquiries were made with thousands of debtors and criminal damage victims. Mr. X and the five other Hong Kong citizens arrested in China were returned and charged. Mr. X and his main assistant are detained and the rest were given Court Bail. Of those arrested in Hong Kong some have been charged and some are on bail.

The money being laundered through Macau was an attempt to disguise its source and it was explained away as money coming out of China from trading deals through unofficial sources given China's tight currency control restrictions. Whilst the Macau police have been helpful and understanding their Judiciary has blocked our efforts to obtain warrants to see what was happening over there and how much money is still held there. HK Police are now trying a formal letter of request. However we have been able to link money going to Macau to money returning after one of those detained in China gave us permission to access his accounts in Macau.

Mr. X had been running this operation for about 8 years and keeping his records

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and involvement outside of Hong Kong where the group was operating, made him feel secure. In Hong Kong the only thing that ties him to the syndicate is the money and it is to hope we not only convict him, but we also confiscate his assets.

(c) *Tax Evasion*

An appeal case HKSAR and LI CHING (CA 436/97) is an important case for money laundering investigators. LI opened a bank account for a group involved in a deception which duly came off and \$2.8 million HK was deposited into the account and withdrawn by LI. On arrest LI claimed to know nothing about the deception and that he was given \$50,000 only and the rest of the cash he gave to Ah Keung. He claimed he thought Ah Keung was using the account to put some tax evasion money from China through. The Appeal Court held that his belief was that he dealt in the proceeds of tax evasion from China. Tax evasion was an offence in China, it was indictable in Hong Kong and therefore he was guilty of money laundering. His appeal was dismissed. This ruling emphasised that investigators did not have to prove the actual offence, merely that the defendant believed the proceeds was from an offence.

(d) *Bookmaking Cases*

The following have been noted as strong indicators that bank accounts are being used for bookmaking :

- (i) Increased use on Mondays and Thursdays i.e. the days after the races.
- (ii) The Accounts have few transactions in July and August, which is the close season.
- (iii) The deposits are either 'no book cash deposits' or 'transfer deposits'.
- (iv) The withdrawals are in cash. Sometimes they are then followed by deposits to a number of other accounts, but the account holder

requests the transactions to be shown as cash deposits rather than transfer deposits, thereby breaking the audit trail.

The banks are well aware of this thanks to Police feedbacks and have made regular disclosures over the years. Police have tried different approaches :

- (i) Operation Birchwood was mounted against 25 syndicates operating in China and Macau who were laundering their proceeds through Hong Kong banks. In June 1998, 28 people were arrested and four were charged when they admitted what they were doing, with sentences of between a fine and 10 months imprisonment imposed. The man who got 10 months, YU Leung-chong is still fighting police as we are trying to get his proceeds confiscated. We have restrained his accounts and property worth \$3.9 million HK and we are attempting to confiscate up to \$6.9 million as his wife also has \$3 million in assets, but has never worked in her life. The confiscation hearing is set for March 2001. Following this operation we have had few successes as the overseas bookmakers now know it is an offence, which some did not before the operation. Consequently admissions are not so easy to obtain now.
- (ii) Operation Guildersome was mounted against a number of local bookmaking syndicates, and saw 25 bookmakers and 4 money launderers arrested. Fourteen of the bookmakers were convicted and received between fines and suspended sentences. This operation highlighted to us the

difficulties in proving the proceeds of crime in bookmaking cases. Proceeds in the Ordinance are described as payments received, whereas people bet on credit with bookmakers. Consequently bets on the day are not proceeds, one has to show that money going through the bookmaker's accounts previously were bookmaking proceeds and this is not easy. It relies on admissions, punters telling you, or old betting records and banking records matching up. All unlikely. Police now try and identify locally operating bookmakers and through surveillance or call forwarding records identify the location of operation.

- (iii) Other operations - have been mounted and police have had success against football bookmakers and launderers. Also last racing season HK Police worked with the Macau Judicial Police (MJP) to get them to arrest a syndicate operating in Macau, and we are now trying to build a case against the bank account operators (launderers) in Hong Kong who will be arrested once the bookmakers are convicted in Macau. Other initiatives include trying to put a circumstantial money laundering case together. Investigators will pick an account which displays all the indicators and use the financial investigation units head to give expert evidence, Police will also show the person had no employment (we can get tax records through Production Orders), those who are identifiable who have dealt with the account will be record checked, most tend to have gambling and bookmaking convictions and lastly bank tellers

will give evidence that the account operator requests the transactions to be shown in cash rather than as a transfer. It will be hoped that the Judge will only be able to conclude given all the different circumstances that the money being dealt with in the account is the proceeds of an indictable offence.

(e) *A Drug Case*

Narcotics Bureau have had some very successful drug money laundering cases over the years and some large asset seizures, but one case to highlight was significant because it arose purely from disclosures.

A housing estate in Kowloon East had one bank and that bank noted that a number of accounts operated by young people aged from 14 to 22 were receiving regular deposits of between \$20 - 60,000HK every few days in \$20, \$50 and \$100 notes. Very soon after the deposits the depositors would withdraw the sum in 1,000 dollar notes. The bank was suspicious and made a disclosure.

Investigators mounted an operation using surveillance, Observation Posts and undercover officers to make controlled buys. The Narcotics Bureau Financial investigators also looked at the money. Over a one year period this street level trafficking operation had laundered HK\$13 million through their accounts. Fifteen syndicate members were eventually charged and convicted in the High Court and over HK\$2 million in assets was confiscated.

VIII. INTERNATIONAL CO-OPERATION

Given that the proceeds of crime can be moved around the world easily, it is impossible for any one jurisdiction to effectively fight the battle on their own. Co-operation among all law enforcement agencies therefore becomes vital. Such co-operation should be two-phased; the exchange of intelligence in money laundering matters and the rendering of assistance to another jurisdiction in obtaining evidence. The swift exchange of intelligence between enforcement agencies and FIU of different jurisdictions at the investigation phase is important if transnational money laundering is to be tackled effectively and efficiently. There are treaties governing mutual legal assistance in criminal matters designed for collecting evidence for use in a court of law. FATF Recommendation No. 32 states:

“Each country should make efforts to improve a spontaneous or “upon request” international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection.”

Recommendation No. 37 goes on to state:

“There should be procedures for mutual assistance in criminal matters regarding the use of compulsory measures including the production of records by financial institutions and other persons, the search of persons and premises, seizure and obtaining of evidence for use in money

laundering investigations and prosecutions and in related actions in foreign jurisdictions.”

To assist other jurisdictions further in the fight against money laundering, Hong Kong has provisions for Overseas Confiscation Orders and Asset Sharing.

A. Overseas Confiscation Orders

The trans-national nature of organized crime is reflected in the fact that criminals will often keep their assets in different countries. It is essential, therefore that legislation provides for this by allowing for confiscation orders issued in overseas jurisdictions to be enforced domestically. In this regard, the FATF Recommendation No. 38 says:

“There should be authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate proceeds or other property of corresponding value to such proceeds, based on money laundering or the crimes underlying the laundering activity.”

B. Asset Sharing

Once an overseas confiscation order is enforced domestically, fairness dictates that the overseas jurisdiction be allowed to share the confiscated assets. Provision must therefore be made, both by law and by policy, for assets to be shared between jurisdictions. This may not always be practicable where only a small amount of property has been confiscated, as the administrative costs involved would outweigh the value of the assets to be shared. Government policy, therefore, should set a realistic threshold over and above which foreign governments may be allowed to apply for and receive a share of the assets commensurate with the work done by each side in that particular case.

IX. CONCLUSION

Tackling money laundering will never be easy. The ease with which money can be moved around the world, the ingenuity of money launderers in finding new ways to disguise their ill gotten gains, the prevalence of tax havens and shelf companies and the excessive secrecy of certain jurisdictions all combine to ensure that tracing the flow of dirty money and prosecuting the money launderer will remain one of the hardest tasks in criminal investigation. This task will be made somewhat easier, however, if various anti-money laundering components are welded together to form a cohesive anti-money laundering strategy in as many jurisdictions as possible. A workable and comprehensive law, close international cooperation, an effective FIU and strong regulation of the financial sector, combined with imaginative and thorough investigation, are vital if money laundering and its inherent dangers to society are to be effectively combated.

PARTICIPANTS' PAPERS

CURRENT SITUATION AND COUNTERMEASURES AGAINST MONEY LAUNDERING

*Kevueli Tunidau **

I. INTRODUCTION/BACKGROUND

Crime has traditionally been considered a domestic matter, a part of the life of each sovereign state with which it must cope. Criminals were almost always nationals of the sovereign state and crimes have generally been committed within its borders. The ability to regulate crimes and punish those who transgress society's rules has been, until recently, a matter fiercely guarded by each sovereign state. Money laundering, although not a new phenomenon, has become the talk of academics, law enforcement agencies and politicians. The reason appears to be because this crime has become an Organized Transnational Crime (OTC) conducted on a massive scale by Organized Transnational Criminal Enterprises (OTCE) or syndicates (see *UN Report on the Fifth Session, Economic and Social Council Official Records, 1996, Supp 10*). In short, money laundering and those who engage in it, have gone global and Fiji is no exception to its influences.

A. South Pacific Regional Meetings on OTC

As an OTC, money laundering can only be combated by Fiji in cooperation with other sovereign states. However, it is in the sphere of regional bodies that a most coordinated approach in addressing OTCE and money laundering had been very effective. The Forum Secretariat and Commonwealth Secretariat had been instrumental in harnessing the cooperation and participation of South Pacific island

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nations and enhancing an understanding and effective implementation of proceeds of crime, mutual assistance in criminal matters and extradition arrangements.

Fiji is very much indebted to the Japanese Government and her various donor agencies for the technical support, expertise, training and funding to facilitate the various mechanisms of combating crime in the Pacific. The Fiji Government also acknowledged the invaluable role of JICA and UNAFEI and the need for their support to continue.

B. Honiara Declaration

Although Fiji and her Pacific Island neighbors are not members of the Financial Action Task Force ("FATF") which was founded by the G-7 Summit in Paris in 1989, to examine ways to combat money laundering, the need for uniformity and a coordinated approach to tackle this transnational crime despite differing legal systems, language and culture was well realized regionally.

The Declaration by the South Pacific Forum on Law Enforcement Cooperation in Honiara, Solomon Islands on July 1992 ["Honiara Declaration"] echoed the concerns of Pacific Forum leaders that '*an adverse law enforcement environment could threaten the sovereignty, security and economic integrity of Forum members and jeopardize economic and social development.... and the potential impact of transnational crime was a matter of increasing concern to regional states and enforcement agencies.*' The Honiara Declaration recognized '*Mutual Assistance*

in Criminal Matters, 'Forfeiture of the Proceeds of Crime' and 'Extradition' as very vital in the region's concerted effort to combat money laundering and other OTC.

Mutual assistance in criminal matters *'would enhance cooperation between their courts, prosecution authorities and law enforcement agencies.'*

Forfeiture of the proceeds of crime *'enables the proceeds and instrumentalities of crime to be traced, frozen and seized. To attain this there is a 'need to regulate banking and other financial services to reduce the possible manipulation of these services to "launder" the proceeds of crime.'* A proper regulation of the banking system would ensure that bank secrecy laws cannot be used as a shield for the laundering of criminal profits nor to obstruct the operation of mutual assistance arrangements.

The Honiara Declaration also recognizes the need for Fiji and her neighbors to review extradition arrangements within the region and steps to be taken that extradition legislation be modified in line with the United Nation's Model Treaty on Extradition or on the current London Scheme for the Rendition of Fugitive Offenders within the commonwealth.

The Honiara Declaration was thus the platform for Fiji to legislate laws on Mutual Assistance in Criminal Matters and Forfeiture of the Proceeds of Crime and to modify her extradition legislation as pointed to above. Fiji fulfilled her desire to combat money laundering and other OTC by enacting the Proceeds of Crimes Act, 1997 (POC) and the Mutual Assistance in Criminal Matters Act, 1997 (MACM).

II. CRIMINALIZATION OF MONEY LAUNDERING IN FIJI

A. Scheme of the POC Act

It appears to be accepted that there are three phases or stages in the laundering process:

- (i) Placement: where cash enters the financial system;
- (ii) Layering: where the money is involved in a number of transactions; and
- (iii) Integration: where money is mixed with lawful funds or integrated back into the economy, with the appearance of legitimacy.

The POC Act endeavors to trace and monitor these phases of laundering culminating in a recovery process of the proceeds of crime. Thus the scheme of the Act is:

"To provide for confiscation of the proceeds of crime to deprive persons of the proceeds, benefits and properties derived from the commission of serious offences and to assist law enforcement authorities in tracing the proceeds, benefits and properties and for related matters".

B. Purpose of the POC Act

It's purpose is threefold:

- (i) Permits a court in Fiji to grant orders for the forfeiture and confiscation of property used in connection with the commission of a serious offence;
- (ii) Read together with the MACM Act 1997 it will provide a mechanism for parallel orders issued in a foreign country to be given effect in Fiji; and
- (iii) Targets proceeds of a serious offence. 'Serious offence' is defined under section 3 of the Act as an offence of which the maximum penalty prescribed by law is death,

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or imprisonment for not less than 12 months.

C. Money Laundering as an Offence

Part V of the POC Act creates money laundering as an offence against a natural person and a body corporate by virtue of section 69 (2) (a) & (b) respectively. It is also the penalty provision. Section 69 (3) POC Act considered money laundering an offence where:

A person either

- engages directly or indirectly in a transaction that involves money, or other property, that is proceeds of crime

Or

- receives, possesses, conceals, disposes of or brings into Fiji any money, or other property, that is proceeds of crime

And

- the person knows, or ought reasonably to know, that the money or other property is derived or realized, directly or indirectly, from some form of unlawful activity.
- Section 70 creates an offence of receiving, possessing, concealing, disposing of or bringing into Fiji of any money or property that is proceeds of crime.
- Section 71 imputes liability on a body corporate within the scope of the company's director, servant or agent's actual or apparent authority or of any other person at the direction, consent or agreement of a director, servant or agent's scope of actual or apparent authority.

III. SCOPE AND EXTENSION OF PREDICATE OFFENCES FOR MONEY LAUNDERING

Fiji is yet to determine and fully gauge the scope and extension of predicate offences for money laundering due to its internalization and sophistication. Despite this the joint cooperation of foreign detection and investigating agencies resulted in the seizure of about 300 kilogrammes of heroin with a street value of about F\$25million in Suva recently. A Chinese national from Hong Kong and Fiji Chinese national were arrested and now awaiting trial. The joint operation involved about 20 agents from the Fiji Police Force, Australian Federal Police, Royal Canadian Mounted Police, the United States Drug Enforcement Administration and New Zealand Police.

Another factor to consider in this regard is the absence in Fiji of a Finance Intelligence Unit ("FIU") manned by appropriately trained people to analyze and monitor various commercial and banking transactions.

Thus the scope and extension of predicate offences for money laundering in Fiji can not be fully realized without the assistance of foreign aid in cooperation with our internal security agencies.

IV. FINANCIAL INTELLIGENCE UNITS (FIU)

As noted above, Fiji is yet to establish Financial Intelligence Units. At this stage it is a proposal by a POC Implementation Committee comprising of the Attorney-General, Director of Public Prosecutions, Assistant Commissioner of Police and a representative of the Reserve Bank of Fiji. The committee's task is to look at regulations that can be put together to strengthen the Proceeds of Crime Act. The FIU is proposed to be manned by

appropriately trained officers of the police force and reserve bank.

The committee is also mooting the establishment of a regional FIU with the view that it be located in a more developed country such as New Zealand or Australia due to their established infrastructure and technological advance. The exchange of information between the national and regional FIU would assist recipient national statutory bodies such as the Fiji Trade and Investment Board about an individual person, organization or corporate entity.

It is envisaged that the expert and technical nature of a FIU requires assistance in the training of personnel in this area and the appropriate technology.

V. COOPERATION BY BANKS AND NON-BANK FINANCIAL INSTITUTIONS

A. Definitions

A “bank” under section 3 of the POC Act means:

- the Reserve Bank of Fiji; or
- a bank within the meaning of the Banking Act.

The Banking Act defines it as any financial institution whose operations include the acceptance of deposits of money withdrawable or transferable by cheque or other means of payment transfer.

Under section 63 of the POC Act ‘financial institution’ means:

- a bank
- a credit union; or
- a trust company, finance company or deposit taking company.

The Banking Act defines ‘financial institution’ as any company doing banking business. It further defines ‘banking

business’ as:

- the business of accepting deposits of money from the public or members thereof, withdrawable or payable upon demand or after a fixed period or after notice, or any similar operation through the frequent sales or placement of bonds, certificates, notes or other securities, and the use of such funds, either in whole or in part, for loans or investments for the account and at the risk of the person doing such business; and
- any other activity recognized by the Reserve Bank as customary banking practice which a licensed financial institution is authorized to do by the Reserve Bank.

It would be noted that the definition of a financial institution under section 63 POC Act is very limited. It does not cover lawyers who operate sole or in partnerships, accounting firms, foreign exchange agencies, travel agencies, second hand car-dealers, etc.

The POC Committee is proposing to amend the definition in line with the Financial Transactions Reporting Act No. 33 of 2000 of the Republic of Vanuatu. Under that Act the following falls within the meaning of a financial institution:

- Reserve Bank of Vanuatu;
- A licensee within the meaning of the Financial Institutions Act;
- A company licensed as an exempted bank or financial institution under the Banking Act;
- A company licensed under the Vanuatu Interactive Gaming Act;
- A person licensed under the Casino Control Act;
- A person carrying on business under the Betting Control Act;

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- A person carrying on business under the Gaming Control Act;
- A person carrying on a business:
- Of administering or managing funds on behalf of an international company within the meaning of the International Companies Act

- as a trustee in respect of funds of other persons
- as a trustee or manager of a unit trust

- A person carrying on a business of an insurer, an insurance intermediary, a securities dealer or a futures broker;
- A person carrying on a business of:

- exchanging money;
- collecting, holding, exchanging or remitting funds or otherwise negotiating fund transfers on behalf of other persons;
- preparing pay-rolls on behalf of other persons from funds collected
- delivering funds;

- A lawyer, but only to the extent that the lawyer receives funds in the course of his or her business for the purpose of deposit or investment or settling real estate transactions;

- An accountant, but only to the extent that the accountant receives funds in the course of his or her business for the purposes of deposit or investment;

- A person carrying on a business of:

- Dealing in bullion;
- Issuing, selling or redeeming traveler's cheques, money orders or similar instruments;
- Collecting, holding and delivering cash as part of a business or providing payroll services;

- A credit union under the Credit Unions Act or a cooperative society under the Cooperative Societies Act;

A person carrying on electronic business under the E-Business Act.

The limited meaning of a financial institution under the POC Act, unlike the Financial Transactions Reporting Act of Vanuatu, limits the scope of expectation for cooperation of non-bank financial institutions that do not fall within the meaning of a financial institution.

B. Retention of Records by Financial Institutions

Section 59(1) stipulates that a financial institution is to retain the original of a document that relates to a financial transaction carried out by the institution, for the minimum of the retention period - i.e. 7 years (s 63). Such document pertains to:

- opening and closing of an account;
- operation of an account;
- opening or use of a deposit box;
- telegraphic or electronic transfer of funds;
- transmission of funds between Fiji and a foreign country or between foreign countries; and
- application for a loan and grant of the loan.

Section 59 (3) requires a financial institution to retain the original documents on microfilm or in another way to facilitate retrieval of them reasonably practicable.

Section 59(4) imposes penalty of not exceeding \$30,000 for an institution that contravenes subsection (1) & (3).

C. Register of Original Documents

Section 60 requires the institution to retain a copy of the original if the latter is required by law to release it before the end of the retention period and to maintain a register of record the release of the document.

D. Communication of Information to Law Enforcement Authorities

Section 61 stipulates that where a financial institution is a party to a transaction and the financial institution has reasonable grounds to suspect that information that the financial institution has concerning the transaction:

- be relevant to an investigation of or the prosecution of a person for an offence
- or
- may be of assistance in the enforcement of the Act

The institution may give the information to a police officer or the Director of Public Prosecutions.

Subsection (2) protects a financial institution, it's officers, employees or agent against any civil liability in taking the action stipulated under subsection (1).

Subsection (3) restricts the financial institution, it's officers, employees or agent from disclosing to anyone else of it's suspicion or information given to the police or the Director of Public Prosecutions under subsection (1).

Subsection (4) penalizes any one who contravened subsection (3)

E. Protection for Financial Institutions

Section 62 protects a financial institution, it's officers, employees or agent

for the purposes of sections 69 (money laundering) and 70 (possession of property suspected of being proceeds of crime).

VII. ASSET CONFISCATION

A. Conviction Based

Asset confiscation under the POC Act is based upon the conviction of a person of a serious offence under the Act. A serious offence is an offence of which the maximum penalty prescribed by law is death, or imprisonment for not less than 12 months.

Under section 4 (2) of the Act a person is taken to be convicted of a serious offence if:

- the person is convicted, whether summarily or on indictment, of the offence;
- the person is charged with, and found guilty of, the offence but is discharged without conviction; or
- a court, with the consent of the person, takes the offence, of which the person has not been found guilty, into account in passing sentence on the person for another offence.

B. Application by Director of Public Prosecutions (DPP) for Confiscation Order

Section 5 (1) (b) of POC Act stipulates that after a person is convicted of a serious offence the DPP may apply to the court for a confiscation order against the person convicted in respect of benefits derived by that person from the commission of the offence.

C. Notice

Section 7 (2) provides that when the DPP applies for a confiscation order against a person he/she should give the person written notice of the application. The person upon receipt of the notice may appear and adduce evidence at the hearing

of the application.

D. Amendment of Application

Section 8(1) of the Act allows the DPP to amend the application at any time before the final determination of the application, to include any other benefit upon being satisfied that the benefit was not reasonably capable of identification when the application was originally made; or necessary evidence became available only after the application was originally made.

The DPP is obliged to give written notice of the amendment because the effect of the amendment would be an additional benefit in the application for the confiscation order (subsection 4).

E. Procedure on Application

The court may in determining an application for a confiscation order have regard to the transcript of any proceedings against the person for the offence (section 9(1)).

Where an application is made for a confiscation order to the court before which the person is convicted, and the court has not, when the application is made, passed sentence on the person for the offence, the court may if it thinks fit, defer passing sentence until it has determined the application for the order (section 9(2)).

F. Confiscation Order on Conviction

Where a court, after hearing the DPP's application for a confiscation order, is satisfied that a person has benefited from that offence, order the person to pay into court an amount equal to the value of the person's benefits from the offence or the amount that might be realized at the time the confiscation order is made (section 20 (1)).

Section 20 (3) provides that the court can not make a confiscation order:

- until the period allowed by the rules of the the court for the lodging of an appeal against conviction has expired;
- where an appeal against conviction has been lodged - until the appeal lapses or is finally determined.

G. Rules for Determining Benefit and Assessing Value

A person's benefit is the value of the property so obtained (section 21(1)).

Where a person derives an advantage from the offence committed, the advantage is deemed to be a sum of money equal to the value of the advantage so derived (section 21(2)).

The court in determining whether a person has benefited from the commission of a serious offence and in assessing the value of the benefit, shall, unless the contrary is proved, deem:

- (a) all property appearing to the court to be held by the person on the day on which the application is made; and all property appearing to the court to be held by the person at any time:
- within the period between the day the offence was committed and the day on which the application is made, or
 - within the period of 5 years immediately before the day on which the application is made,

to be property that came into the possession or under the control of the person by reason of the commission of the offence;

- (b) any expenditure by the person met out of payments received by the person as a result of the commission

- of that offence; or
- (c) any property received or deemed to have been received by the person as a result or in connection with the commission of the offence, to be property received by the person free of any interests therein (section 21(3)).

The court will leave out of account any benefits of a person that are shown to the court to have been taken into account when a confiscation order has previously been made against the person (subsection (4)).

If evidence is given that the value of a person's property after the commission of the offence exceeded the value of his or her property before the commission of the offence, the court will treat the value of the benefits derived from the commission of the offence as being not less than the amount of the excess (subsection (5)).

If the person satisfies the court that the whole or part of the excess was due to causes unrelated to the commission of the offence, subsection (5) will not apply to the excess (subsection (6)).

H. Statements Relating to Benefits from Commission of Serious Offence

Section 22 (1) & (2) requires the DPP to tender into court a statement which determines that a person has benefited from the offence and an assessment of the value of the person's benefit after a copy of the statement had been served on that person. The court will then require that person to indicate whether he accepts the allegations in the statement. If he or she does not accept any such allegation, to indicate what he or she proposes to rely on.

Where a person fails to comply with subsection (2) the court may, for the purpose of determination, treat the acceptance of the DPP as conclusive of the matters to which it relates (subsections (3) & (4)).

An acceptance by a person that he or she received any benefit from an offence committed is admissible in any proceedings for any offence.

I. Amount to be Recovered Under Confiscation Order

Section 23 provides that the amount to be recovered under a confiscation order shall be that which the court assesses to be the value of the person's benefit from the offence.

J. Variation of Confiscation Orders

The DPP may apply to the court for a variation of the confiscation order to increase the amount by the value of the property (section 24).

K. Court May Lift Corporate Veil

In assessing the value of benefits derived by a person from the commission of an offence the court may treat as property of the person any property that is subject to the effective control of the person whether or not the person has any legal or equitable interest in the property, or any right, power or privilege in connection with the property (section 25(1)).

The court may have regard to:

- shareholdings, debentures or directorships of a company that has an interest in the property and may order the investigation and inspection of the books of a named company;
- a trust that has a relationship to the property; and
- any relationship between persons

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having an interest in the property (subsection(2)).

The court upon the application by the DPP may make an order declaring the property under subsection (1) as available to satisfy the order (subsection(3)). The order may be enforced against the property and a restraining order may be made in respect the same property (subsection(4)).

L. Enforcement of Confiscation Orders

Section 26 provides that an amount under a confiscation order is a civil debt due to the state and enforced as in civil proceedings. A person who is a bankrupt is dealt with under the Bankruptcy Act.

M. Registered Foreign Confiscation Orders

Where under the MACM Act a foreign confiscation order is registered in the court, any amount paid, in Fiji or elsewhere, to satisfy the foreign confiscation order shall be taken to have been paid in satisfaction of the debt that arises by the registration of the said order in court (section 27).

VIII. OTHER ANTI-MONEY LAUNDERING SYSTEMS/ STRATEGIES

I had earlier draw attention to the Mutual Assistance in Criminal Matters Act (MACM) and the Extradition Act. Both legislation complement the POC Act in the extradition of suspected offenders to and from Fiji and in areas of mutual criminal assistance between Fiji and other countries.

A. Extradition Act

The Fiji Extradition Act is broadly based on the *UK 1881 Fugitive Offenders Act*. The provisions of the Act have continued in force even after Fiji became a Republic in 1987. All treaties negotiated and signed

before 1987 continued to be operative after 1987, although New Zealand and Australia decided to negotiate new arrangements. Section 4 of the Extradition Act provides that:

“Subject to the provisions of this Act, a person found in Fiji who is accused or convicted of an extradition offence in any treaty state or designated Commonwealth country or who is alleged to be unlawfully at large after conviction of such an offence in any such State or country, may be arrested and returned to that State or country as provided by this Act.”

Commonwealth countries are those listed in the schedule to the Act - actual membership of the Commonwealth was held to be irrelevant in R v Brixton Prison Governor ex parte Kahan (1989) 2 All ER.

An extradition offence is, in the case of a treaty State, it is provided for by the Treaty, in the case of a designated Commonwealth country, it falls within the Schedule and is punishable with imprisonment for twelve months or more; and if it satisfied the dual criminality test set out in section 5 of the Act.

The scope of the Extradition Act is restrictive and is due to the absence of Extradition Treaties between Fiji and non-Commonwealth or treaty countries. But this should change if money laundering is to be tackled squarely because its effect is global, international and wide ranging. The United Nation described OTC and money laundering as a “formidable problem for the International Community”, a new form of “geopolitics” and “one of the most pernicious forms of criminality of which the dimensions have yet to be fully measured and the impact fully determined”. (*Report of the Secretary-General*, 4 April 1996 at p.4; UN Press Release SOC/CP/179 20 May 1996; UNCPJ

Newsletter nos. 30/31, Dec 1995 at p 5.) Leading jurists have offered similar predictions of gloom and peril (see Money Laundering Control (Dublin) Sweet & Maxwell, 1996).

The need for Fiji to extend its extradition treaty borders is due to the fact that OTCE are not limited to operating within national borders, their international role has become increasingly important and powerful. Money laundering and the activities of OTCE are said to “pose a serious threat worldwide in terms of national and international security, as well as political, economic, financial and social disruptions”. (Zvekic, International Cooperation and Transnational Organized Crime, (1996) ASIL 537.)

But even countries that have extradition arrangements with Fiji or Commonwealth countries, the incompatibility between different systems in law, attitude of countries to the extradition of their own nationals and conflicting claims of jurisdiction are issues which affect the outcome of a request for extradition, which has a direct bearing on the real issue of extradition - the ability of criminals to use national boundaries and complicated legislation to avoid the justice system. Fiji and New Zealand, for example, saw the need to strengthen their extradition treaties by signing an Agreement on Extradition on 21st March, 1992.

Further to this both countries exchanged diplomatic notes for the passage of Mutual Assistance in Criminal Matters allowing video link evidence of witnesses in their respective countries.

B. Extradition Cases in Fiji

Our experience with the extradition cases in the past decade or so has shown that it requires a level of expertise not only in the ability to compare offences in two

different countries but also in the ability to work with the Extradition Act and a bilateral treaty.

Recent years have seen a spate of requests. The request made by Fiji to the United Kingdom for the return of Kahan to answer charges of arms smuggling, the request by Fiji to Australia to extradite Michael Desmond Benefield for Fraudulent Conversion, the request by the United States to Fiji for the return of Kaspar Paul Rutten for importation of marijuana, the request by Australia to Fiji for the return of _____ for Rape, the request by New Zealand to Fiji for the return of Maivelan for serious fraud offences and the request of the Hong Kong Government for the return of Tammie Tam Sukh Chong for fraud offences.

The recent arrest of two people with about 300 kilograms of heroin could be our first money laundering case. Another accomplice was recently convicted in Kiribati and sentenced to 5 years in prison. It is likely that Fiji will seek his extradition after he has served his prison term to face criminal charges in Fiji. It is established that one of the accused persons has properties in New Zealand, Australia, Canada and the United States of America.

There is much to be said for prioritizing the enactment of extradition laws to ensure compatibility of principles and practicability of arrangements to assist in combating money laundering. There are at present too many accessible countries where there are no extradition arrangements. Such a vacuum exists to benefit money launderers who can cross national boundaries by whatever means with ease.

C. Mutual Assistance in Criminal Matters Act 1997 (MACM)

Fiji enacted the MACM Act in 1997 together with the POC Act. We are yet to see some major developments in Mutual Assistance where the Act was practically implemented. We are on a learning curve and the only way of developing expertise is to run cases.

D. Procedures

The Mutual Assistance system is based on reciprocity and a network of treaties and conventions. However, the process depends on each country having domestic legislation to allow it to provide assistance to other countries. The MACM Act is the domestic law in Fiji.

If a country wants assistance from Fiji which involves the exercise of compulsory powers, it has to make a formal request to the Attorney- General of Fiji. The Attorney-General will decide whether assistance should be provided. If the Minister decides that assistance should be provided, the request is forwarded to the Commissioner of Police, if it requires investigative action, to the DPP, if it requires court action in Fiji.

E. Investigation

The provisions which apply at the investigation stage in criminal assets cases tap into the POC Act. They give the Courts in Fiji the same powers in respect of a foreign investigation that they have in relation to a financial investigation being conducted in Fiji. The Fijian courts can issue search warrants, make production orders and monitoring orders.

F. Cases

As pointed earlier, the only cases so far that had invoked the MACM Act are various serious criminal cases in Fiji where either the complainants or witnesses have returned abroad or have migrated. The

assistance is by taking of evidence by the courts of the requested country via video link. However, mutual assistance in this regard applies only to witnesses who are in Australia and New Zealand.

IV. CONCLUSION

Fiji has recognized the potential threat to her sovereignty, security and economic integrity by money laundering and other OTC. It is also recognized that through the work of the Financial Action Task Force (FATF) and other bodies, criminals are being progressively squeezed out of other regions by tighter laws. They are now finding Fiji and other South Pacific countries to be an attractive target. As a result money laundering and other OTC are becoming more prevalent in the region.

To counter these threats Fiji enacted the POC Act 1997 and MACM Act 1997. The POC Act criminalise money laundering and put in place a system of forfeiture of tainted property and confiscation of assets or proceeds of criminal activities after a person is convicted of the commission of a serious offence under the Act.

The MACM Act provide mutual assistance in criminal matters between Fiji and other countries. While the Mutual Assistance legislation facilitates obtaining material overseas, it does not of itself make that material legally admissible in the courts of the requesting jurisdiction.

Admissibility can be achieved by relatively simple amendments to the evidence laws of the requesting jurisdiction. For example, such amendments could provide that properly authenticated material obtained from overseas under a Mutual Assistance request could be prima facie admissible in evidence, subject to the discretion of the Court to exclude it in the interests of

justice.

For effective extradition between Fiji and other countries, the basic laws should allow the executive of each nation to respond to requests for the surrender of fugitive criminals. While reserving its sovereign right to refuse extradition in certain exceptional cases, the nation's law should enable it to surrender fugitives to another country in cases where that action does not offend its public policy.

THE SUSPICIOUS TRANSACTION REPORTING SYSTEM AND ITS EFFECTIVE USE

Tatsuo Ueda *

I. INTRODUCTION

The countermeasures against money laundering in Japan have just started in recent years. One of the most important pillars among them is the Suspicious Transaction Reporting (STR) system. However, unfortunately, the STR system in Japan has not been utilized effectively yet. In this presentation, the current situation of the Japanese STR system and also its effective use will be examined and studied.

II. SUSPICIOUS TRANSACTION REPORTING (STR) SYSTEM AND FINANCIAL INTELLIGENCE UNIT (FIU)

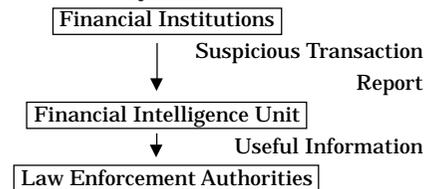
A. STR System

The Suspicious Transaction Reporting (STR) system is the principle mechanism to fight against money laundering. It is designed to use information reported by financial institutions for investigations of money laundering and predicate offences, and to prevent crime organizations from abusing financial services. Its purpose is to get useful financial information concerning money laundering from financial institutions, to utilize the information for actual investigations and to maintain confidence in financial institutions and the overall financial system.

Article 54 of the Anti-Organized Crime Law provides that “*any bank or other financial institution ... shall promptly*

report to the Minister in charge ... when it is deemed that there is a suspicion that the property received by such financial institution ... is crime proceeds.” This Article is the basis of the Japanese STR system. In short, this system requests financial institutions to report suspicious persons and their financial activities to law enforcement authorities. The law enforcement authorities will utilize such information as a clue for their actual criminal investigation.

Figure. 1 Flow Chart of the STR System



The STR system is not a system that was introduced only in Japan. This system is recommended internationally as the effective mechanism to prevent and detect money laundering. The 40 Recommendations of the Financial Action Task Force (FATF), which is the international standard for anti-money laundering measures, states as follows:

Recommendation 14

Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible,

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be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

Recommendation 15

If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.

This concept is based on the actuality that it is very difficult to chase the money flow, once it enters the financial system. Therefore, it is necessary for the law enforcement authorities to get cooperation (in short, information) from financial institutions before (or when) illegal money enters the financial system. Financial institutions are expected to play a role of a first barrier against illegal money, as they can examine such financial transactions from the viewpoint of their expertise. The cooperation from financial institutions is essential to detect money laundering. In this connection, in the case of Japan, there is no punishment for financial institutions not submitting STRs. Since judgment by financial institutions of whether it is

suspicious or not has ambiguity, it is impossible to impose a punishment on them.

As Japan is the one of the major financial centers of the world, the introduction of the STR system into the Japanese legal system was strongly recommended by related international anti-money laundering forums. As illegal money can cross borders easily, other countries that had already introduced strict anti-money laundering measures, such as the USA and European countries, had concerns that Japan would become a safe haven for illegal money.

In 1992, the STR system was first introduced into Japanese legislation by the enactment of the Anti-Drug Special Law. However, at first, the introduction of this new system created a lot of criticism from Japanese financial institutions. The point of these issues was the relationship between bank secrecy and STRs. As it was obvious that bank secrecy should be disclosed to related authorities in cases where a transaction might be related to a certain crime, financial institutions had resistance to submitting STRs, even after the enactment of the Law.

Table 1. History of Japanese Countermeasures

Year	Name of the Law	Countermeasures
1992	Anti-Drug Special Law	<ul style="list-style-type: none"> • Predicate offences: only drug crimes • STR system was introduced.
2000	Anti-Organized Crime Law	<ul style="list-style-type: none"> • Predicate offences: almost all organized crimes • Comprehensive STR system was introduced. • FIU (JAFIO) was established.

B. Financial Intelligence Unit (FIU)

In February 2000, the Anti-Organized Crime Law was newly established in Japan and this law introduced a comprehensive STR system. The scope of predicate offence of money laundering was expanded to almost all organized crimes. Based on the law, the Japan Financial Intelligence Office (JAFIO) was established in the Financial Services Agency (FSA) as the Japanese Financial Intelligence Unit (FIU). What is the FIU? The role of the FIU is:

- (i) to correct STRs from financial institutions;
- (ii) to analyze STRs;
- (iii) to disseminate the results of the analysis of STRs to law enforcement authorities.

In other words, the role of the FIU is a bridge between financial institutions and law enforcement authorities. The first FIU in the world was the FinCEN (Financial Crime Enforcement Network) in the USA, established in 1990. At present, more than 50 countries have FIUs; but the ministries to which the FIUs belong differ among these countries. In the case of the USA and France, their FIUs belong to the Department of Treasury or the Ministry of Finance. On the other hand, in the case of the UK, the FIU belongs to the Home Office. In any case, the FIU is the central national authority to act in the aforementioned role, and it does not matter where it belongs.

The absence of FIUs means that there are no authorities to analyze STRs. Not only is the introduction of the STR system an essential instrument to fight against money laundering but so is the establishment of FIUs. Therefore, the establishment of FIUs in Japan has also been strongly requested by related international anti-money laundering forums. FIU is an essential unit in the STR system. Regarding the STR system and

FIU, the United Nations Convention against Transnational Organized Crime requires member countries as follows;

Article 7, Paragraph 1: Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions ... which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

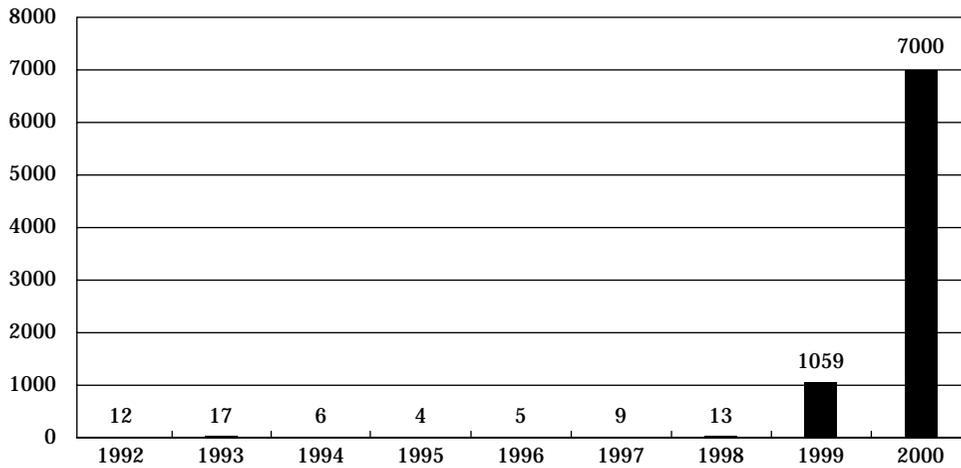
(b) ... shall consider the establishment of a financial intelligence unit to serve as a national center for the collection, analysis and dissemination of information regarding potential money-laundering.

III. CURRENT SITUATION OF THE STR SYSTEM IN JAPAN

Figure 2 shows the transition of the number of STRs. Before 1999, the number of STRs was very small. As I mentioned before, the main reason for the small number of STRs at that time was the reluctance of financial institutions to disclose bank secrecy. The following points are considered as the reasons for that:

- (i) Lack of awareness about the STR system by financial institutions.
- (ii) Financial institutions could not judge whether transactions were related to "drug crimes" or not, even when very suspicious.

Figure. 2 Suspicious Transactions Reporting



Source: Financial Services Agency (The data in 2000 is provisional.)

The data shows a drastic increase in the number of STRs after the enactment of the Anti-Organized Crime Law in 2000. The present number of STRs, several thousands per year, is equal level to the number of other developed countries. The JAFIO (Japan Financial Intelligence Office) in the Financial Services Agency receives a large number of STRs from many financial institutions. At present, the JAFIO is composed of thirteen staff members, some of whom are dispatched from law enforcement authorities such as the Police, Public Prosecutor's Office, and the Customs and Narcotics Control Office. Others are from the Financial Services Agency. People from the law enforcement authorities function as experts in criminal investigation; whereas, those from the Financial Services Agency have the role of financial experts.

JAFIO has its own database in which enormous data on STRs can be stored. JAFIO also has computer software to analyze STRs. This software was originally developed by JAFIO; it can automatically connect related transactions with persons.

JAFIO provides the results of their STRs analysis to each law enforcement authority every two weeks, in the form of electromagnetic data.

IV. PROBLEMS

Although the number of STRs is quite large, the number of exposed cases of money laundering in Japan has remained small. In addition, there are no cases where the results of analysis by JAFIO have been used to instigate investigations by law enforcement authorities. This means that the STR system does not contribute to law enforcement authorities investigation nor do the law enforcement authorities utilize the information obtained by JAFIO. The following are my personal observations of each organization.

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Table 2. Number of Exposed Cases of Money Laundering

Year	1992	1993	1994	1995	1996	1997	1998	1999
Number of exposed cases of money laundering	0	1	0	2	2	0	2	1

Source: National Police Agency

A. Financial Institutions

As I mentioned before, after the enactment of the Anti-Organized Crime Law, the predicate offences of money laundering were expanded to almost all organized crimes. However, Japanese financial institutions may misunderstand the new Law. They seem to be under pressure to submit STRs, even if there is "little" suspicion. The original idea of the STR system is that financial institutions carry out first screening of suspicious transactions. STR should be submitted to JAFIO only when "really" suspicious. According to what I have heard from my colleagues in JAFIO, the quality of STRs is still low. Therefore, the rapid increase in the number of STRs submitted from financial institutions does not necessarily present a good sign.

The Post Offices are also included in financial institutions under the Law, and they have a duty to submit STRs. However, until now, there have been only 2 cases of STRs from Post Offices since 1990. This extremely small number clearly shows their negative stance against the STR system. The Postal Service still has difficulties concerning the disclosure of customer's secrecy.

B. JAFIO

The JAFIO in the Financial Services Agency also has some problems. STRs are submitted from financial institutions in the form of a paper or document on floppy disc. If on a floppy disc, JAFIO can easily store the information in their database. However, according to what I have heard

from my colleagues in JAFIO, 90% of the STRs are still submitted in the form of a paper. As the total number of staff in the JAFIO is only thirteen, the manual storing of such an enormous number of STRs into their database is a heavy burden for JAFIO.

The analysis of STRs by JAFIO is also insufficient. For this reason, JAFIO analyzes only information contained in the STRs submitted by financial institutions. In other words, their present methodology of analysis is carried out only from the point of financial aspects.

As I mentioned before, the original concept behind the JAFIO is as a bridge between financial institutions and law enforcement authorities, and JAFIO has the role of providing high-quality information about money laundering to law enforcement authorities. For their mission, not only financial analysis but also criminal analysis has to be carried out.

However, JAFIO is not authorized to carry out their own investigations nor official inquiries to financial institutions. During the drafting of the Bill of the Anti-Organized Crime Law, there was a discussion that such power should be given to the JAFIO. As a result, JAFIO was not given such power because it was considered that only law enforcement authorities should carry out such "criminal" investigations, in compliance with criminal procedures not administrative procedures. As JAFIO is itself an administrative organization, not a law enforcement

organization, its powers are limited.

It is necessary to analyze STRs to check suspicious persons against existing criminal databases. FinCEN in the USA can access various governmental databases to analyze STRs. However, JAFIO cannot access related national or local databases, such as criminal records, drivers license records etc. The reason for this is simple. JAFIO is not a law enforcement organization. Under such conditions, JAFIO cannot attach additional informational value to STRs submitted from financial institutions. The JAFIO, with its present power, cannot provide high-quality information about money laundering to the law enforcement authorities. Presently, the JAFIO cannot attach additional information to their analyses, which is limited to correcting STRs from financial institutions and putting STRs in order.

C. Law Enforcement Authorities

As I mentioned before, JAFIO provides the results of their analyses of STRs to each law enforcement authority every two weeks, in the form of electromagnetic data. In the case of the Narcotics Control Department (NCD), the results of their analysis are stored in NCD's database server, and every Narcotics Agent can access the data through an intranet. However, access to it still remains at a low level. In the case of the Police, the National Police Agency (NPA) receives data from JAFIO in the first instance, and the NPA distributes the data to each Prefectural Police Headquarters.

The biggest problem that law enforcement authorities have is the lack of interest in the STRs. It seems that many law enforcement officers still do not know about the STR system and the existence of JAFIO. Though this situation might be compounded by the low-quality of analysis

by the JAFIO, law enforcement authorities should gain more interest in the information forwarded by the JAFIO.

As Japanese anti-money laundering measures have just started, law enforcement authorities still seem not to be interested in money laundering, or they do not still have enough expertise to carry out money laundering investigations.

V. PROPOSALS TO SOLVE THESE PROBLEMS

The following are my proposals to improve the present STR system in Japan and the activities of the JAFIO.

A. Financial Institutions

The STRs submitted from financial institutions are the basis of the STR system. Therefore, the quality of STRs is very important. As I mentioned before, the number of STRs from financial institutions might be sufficient, but its quality is still low. To improve the quality, I propose the following measures.

1. Increase Attention to Money Laundering Prevention

As the countermeasures against money laundering in Japan have just started in recent years, the attention paid by financial institutions to money laundering detection or prevention is still inadequate. To enhance their attention, the authorities concerned should provide education about money laundering and its countermeasures. Seminars for financial institutions should be improved so that they will be able to better understand their important role in money laundering prevention. Not only financial authorities but also law enforcement authorities should be involved in such seminars.

2. Improve the Quality of STRs

In the seminar, law enforcement authorities have to provide current information about money laundering for them. For example, actual cases of money laundering, including the *modus operandi* of money laundering abusing legal financial systems, should be introduced in seminars, whereby financial institutions can better understand their obligations and role in such transactions.

3. Involvement of the Post Office

The Post Office is a major and important financial institution in Japan. Their involvement in countermeasures against money laundering is crucially important. Like private financial institutions, seminars concerning money laundering for their staff are necessary to enhance their attention to money laundering. In addition, the Post Office should establish a central unit for anti-money laundering activities. Their lack of attention or drive, due to the nature of the Post Office as a nationalized organization, will cause crucial damage to national countermeasures against money laundering.

B. JAFIO

The JAFIO is the most important organization in the Japanese anti-money laundering scheme. Their reinforcement is essential to improve the current situation of money laundering Japan.

1. Strengthening of Human Resources of the JAFIO

The human resources of the JAFIO should be reinforced. As the lack of attention to the issues of money laundering in the Financial Services Agency (FSA) itself, the position of the JAFIO is less appreciated. Therefore, sufficient human resources are not allocated to the JAFIO within the FSA. However, as money laundering damages the confidence of

Japanese financial systems, the FSA should allocate more people to the JAFIO. In addition, as users of information from JAFIO, law enforcement authorities should dispatch more people to JAFIO.

2. Power of Investigation to the JAFIO

Power of investigation is necessary for JAFIO to effectively carry out their analysis. With such, the JAFIO will be able to get the necessary, complementary information from financial institutions. In addition, the JAFIO should be able to obtain information related to crimes, such as personal criminal records from law enforcement authorities. Thus, JAFIO would be able to carry out high-quality analysis of STRs and provide useful information to law enforcement authorities for their investigation. Needless to say, the JAFIO itself is not a law enforcement body, but a minimum power of investigation is necessary to improve the ability of its analysis.

C. Law Enforcement Authorities

1. Enhance their Attention to Money Laundering

First, like financial institutions, their attention to money laundering is still insufficient. Law enforcement authorities are required to study money-laundering investigations and also examine the effective use of JAFIO information. Therefore, each law enforcement authority should more actively conduct educational programs for their officers, to improve their expertise on money laundering.

In addition, the distribution of JAFIO information to each law enforcement authority must be improved. Information should be accessed by or distributed to all the law enforcement officers. These measures will contribute to the elevation of anti-money laundering awareness in all law enforcement officers.

All law enforcement authorities should contact JAFIO more actively. Their requests or inquiries to JAFIO are expected to contribute to the close relationship between law enforcement authorities and the JAFIO. Regular meetings between law enforcement authorities and the JAFIO should be held more frequently.

VI. CONCLUSION

In Japan, the countermeasures against money laundering have just started and fruitful outcomes have not yet been seen. Though it might be too early to judge the present STR system, several problems have already appeared. The STR system is a key mechanism of the countermeasures; thus the improvement of the STR system will boost the nationwide anti-money laundering movement.

CURRENT SITUATION AND COUNTERMEASURES AGAINST MONEY LAUNDERING IN SOUTH AFRICA

*Ronel Van Wyk **

I. INTRODUCTION

South Africa moved into an entirely new dispensation with a new democratically elected government that came into power on 27 April 1994. The return of South Africa to the international arena, the deregulation of financial markets and advances in communications technology have brought a dramatic increase in organized crime in the Republic. With a growing awareness of the threat presented by dirty money, South Africa has introduced certain measures to protect itself. Certain objectives have been reached and a comprehensive legislative framework to combat money laundering was developed in a fairly short period of time.

II. DEFINITION

Various definitions can be given for money laundering, each designed to fit a specific set of circumstances in which money laundering is taking place. In its simplest form money laundering can be defined as the manipulation of money or property in order to misrepresent its true source or nature.

III. THE FINANCIAL ACTION TASK FORCE (FATF)

South Africa is not a member of the Financial Action Task Force. However, the major financial centre countries of Europe, North America and Asia are members and have adopted the forty recommendations

as a standard for an effective money laundering control strategy. These countries will therefore measure South Africa's money laundering control strategy against the forty recommendations. Furthermore, the FATF has already embarked on projects involving South Africa and there is distinct possibility that South Africa will become involved in the FATF.

IV. DEVELOPMENT OF LEGISLATION IN SOUTH AFRICA

A. The Drugs and Drug Trafficking Act, 1992 (Act No 140 of 1992)

The first set of money laundering legislation in South Africa came into operation on 30 April 1993. Money laundering was originally criminalized in the Drugs and Drug Trafficking Act, 1992 (Act No 140 of 1992). The Act criminalized *inter alia* the laundering of proceeds of specific drug-related offences and required the reporting of suspicious transactions involving the proceeds of drug-related offences. It also provided mechanisms for restraining and confiscation orders in respect of such proceeds and for international assistance regarding the enforcement of foreign confiscation orders in respect of the proceeds of drug-related offence.

B. The Proceeds of Crime Act, 1996 (Act No 76 of 1996)

The general offence of money laundering was later included in the Proceeds of Crime Act, 1996 (Act No 76 of 1996). The Proceeds of Crime Act criminalized the laundering of the proceeds of any type of offence. The

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Act came into effect on 16 May 1997 and provided, *inter alia*, for the confiscation of the proceeds of crime in general. It created a general reporting obligation for businesses coming into possession of suspicious property and also made provision for the freezing and confiscation of the proceeds of crime. The misuse of information, the failure to comply with an order of court in terms of the Act and hindering a person in the performance of his or her functions under the Act was also criminalized.

C. The Prevention of Organized Crime Act, 1998 (Act No 121 of 1998)

Money laundering has been declared a criminal offence in South Africa in terms of the Prevention of Organized Crime Act, 1998 (Act No 121 of 1998)(POCA) which came into operation on 21 January 1999.

The Prevention on Organized Crime Act:

- Criminalises racketeering and creates offences relating to activities of criminal gangs.
- Criminalises money laundering in general and also creates a number of serious offences in respect of the laundering of the proceeds of a pattern of racketeering activity;
- Contains the general reporting obligation for businesses acquiring suspicious property;
- Contains mechanisms for criminal confiscation of proceeds of crime and for civil forfeiture of proceeds and instrumentalities of offences;
- Allows the National Director of Public Prosecutions to obtain information for purposes of an investigation under the Act from any statutory body, and creates
- mechanisms for co-operation between the investors and the Commissioner of the South African Revenue

Services.

Amendments to address certain flaws in the Act were effected by the Prevention of Organized Crime Amendment Act, 1999 (Act No 24 of 1999) and the Prevention of Organized Crime Second Amendment Act, 1999 (Act No 38 of 1999).

Section 2 of the Prevention of Organized Crime Act makes provision for seven (7) offences relating to racketeering activities. This section is largely based on the RICO (Racketeering Influenced and Corruption Organisations) legislation of the United States. The purpose of declaring these activities to be offences is to prevent the infiltration and contamination of legitimate enterprises by organized criminals and to prevent them from acquiring any interest in the establishment, operation or activities of such enterprises.

Section 4 of the Act addresses the offence of money laundering. This section applies to any act committed in connection with proceeds of crime by a person who appreciated or should have appreciated the illicit nature of the property, if it assists or is likely to assist the criminal to avoid prosecution or to hide, remove or diminish the proceeds.

Section 5 of the Act prohibits any conduct facilitating the retention or control of the proceeds of crime by another person, or benefiting person. In terms of section 6 no one may acquire, use or possess the proceeds of crime unless he has reported his suspicion to the reporting body.

The offence of money laundering, and related offences in terms of section 5 and section 6 were previously dealt with by the Proceeds of Crime Act, 1996 (Act No 76 of 1996), except for the fact that is now clear that the offences can be committed intentionally or through negligence. This

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was done by substituting the phrase "knowing or having reasonable grounds to believe" in the Proceeds of Crime Act with the phrase "knows or ought reasonably to have known" in the Prevention of Organized Crime Act.

Section 7 of the Act imposes a reporting duty on all persons conducting a business or who are in charge of a business undertaking and who suspect or ought reasonably to have suspected (intention or negligence) that:

- (i) any property which comes into his or her possession or the possession of the business undertaking, is or forms part of the proceeds of unlawful activities;
- (ii) a transaction to which he or she or the business undertaking is a party will facilitate the transfer of the proceeds of unlawful activities; or
- (iii) a transaction to which he or she or the business undertaking is a party and which is discontinued:
 - (a) may have brought the proceeds of unlawful activities into possession of the person or business undertaking; or
 - (b) may have facilitated the transfer of the proceeds of unlawful activity, had that transaction been concluded

The Act stipulates that the suspicion, as well as all available information concerning the grounds on which it rests, must be reported within a reasonable time to a person designated by the Minister of Justice. The designated person is the Commander of the subcomponent: Commercial Crime Investigations, Head Office of the South African Police Service.

The Proceeds of Crime Act was problematic in the sense that business undertakings that reported suspicious transactions were refusing investigating officers access to documents or records listed in their report. These documents or records had to be obtained by means of an order issued in terms of section 205 of the Criminal Procedure Act, 1977 (Act No 51 of 1977), which, in many instances, seriously hampered and delayed money-laundering investigations.

Section 7 of the Prevention of Organized Crime Act, largely negates section 205 orders as a prerequisite for access to bank records. The Commander: Commercial Branch can henceforth, in writing, require the person/business making the report to provide him with particulars "of any matter concerning the suspicion to which the report relates and the grounds on which it rests". The Commander may also instruct the person or the business making the report, to provide him with copies of all available documents concerning particulars or further particulars. Persons conducting a business or who are in charge of businesses are rendered criminally liable for failure to report their suspicions or to comply with any other obligation contemplated in section 7.

A person who knows or ought reasonably to have known that a report has been made, commits an offence in terms of section 75(1) if he or she brings information to the attention of another person, which is likely to prejudice an investigation.

No restriction on the disclosure of information, whether imposed by any statutory law, the common law or any agreement, relieves the person of this obligation, unless it can be classified under the narrow heading of attorney-client privilege.

Failure to comply with the reporting obligation constitutes an offence for which a person is liable to a fine or to imprisonment for a period not exceeding 15 years. A person who is convicted of a money laundering offence under section 4,5 or 6 of the Act is liable to a maximum fine of R100 million (\$13 192 612) or to imprisonment for a period not exceeding 30 years. Although the Proceeds of Crime Act was repealed by the Prevention of Organized Crime Act, some of its provisions may still be enforced.

D. A Proposed Financial Intelligence Centre (FIC) Bill

A Financial Intelligence Centre Bill will be tabled before the Parliament of South Africa, probably in 2001. The object of the Bill is to complement the Prevention of Organized Crime Act, 1998 ("POCA") by introducing mechanisms and measures aimed at preventing and combating money laundering activities. The essence of the new legislation is that it places the responsibility for detecting potentially illegal activities on accountable institutions.

The proposed Bill will *inter alia* provides for the establishment of a Financial Intelligence Centre (FIC) that will, among other things, act as a centralised repository and analyst of certain cash and suspicious transactions. It will be an independent statutory body, outside the Public Service but within the public administration, as envisaged by section 195 of the Constitution of South Africa, accountable to the Minister of Finance. It will create a framework of laws and regulations to control the way in which accountable institutions conduct their business as far as record keeping, reporting, staff, training and compliance requirements are concerned. The Bill will also impose certain duties, such as the duty to identify clients, the duty to keep records of transactions and

the duty to report certain transaction to the FIC, on institutions that may be used for money laundering purposes. The FIC will not be an investigative body. The structure of the Centre has not been decided on.

E. Other Legislation

Legislation which will help in the fight against money laundering, includes the International Co-operation in Criminal Matters Act, 1996 (Act No 75 of 1996) and the Extradition Amendment Act, 1996 (Act No 77 of 1996). These Acts deal with matters relating to the obtaining of evidence from foreign states, supplying evidence to foreign states, transferring the proceeds of crime, the carrying out of foreign penal orders and sentences and extradition.

Apart from statutory measures, our common law and existing law contain crimes and other provisions that may still be employed by investigators and prosecutors in money laundering cases, eg:

- (i) Fraud
- (ii) Conspiracy in contravention of section 18(2) of the Riotous Assemblies Act, 1956 (Act No 17 of 1956).
- (iii) Complicity (either as an accomplice or accessory after the fact); and
- (iv) Defeating, or attempting to defeat the ends of justice.

V. TYPES OF MONEY LAUNDERING SCHEMES IN OPERATION

Much research is still required on money laundering in South Africa. Statistics on the magnitude of money laundering are not readily available. Information on the main methods employed by money launderers at present is also mainly anecdotal. However,

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the following tentative observations can be made about money laundering methods in South Africa:

- (i) It appears that the informal business sector is often abused for money laundering. Front businesses that are often conducted include shabeens, taxi operations and micro-lending businesses.
- (ii) Casinos were used extensively in the past and some instances of laundering still occur in the gambling industry.
- (iii) Gold, jewellery, real estate, luxury vehicles and furniture are often bought to wash money.
- (iv) Professionals are sometimes involved in money laundering schemes. An investigation which was conducted by an appointed commission, showed an increase in the use of attorneys' trust accounts for money laundering purposes.
- (v) Cases are still often encountered where hot money was deposited in bank accounts or washed by buying insurance or other financial instruments.
- (vi) Electronic wire transfers to and from South Africa.

**VI. NUMBER OF MONEY
LAUNDERING CASES IN SOUTH
AFRICA (EXCLUDING CASES
REGISTERED AS ENQUIRIES)**

**A. Cases In Terms Of The Drugs And
Drug Trafficking Act**

Although cases were investigated in terms of this Act there has been no convictions for money laundering.

**B. Cases in terms of the Proceeds of
Crime Act**

Four (4) cases were registered in terms of this Act. Three cases are still under

investigation.

**C. Cases in Terms of the Prevention
of Organized Crime Act**

Three (3) cases were registered in terms of this Act. One case is still under investigation. In two cases that are before the court at present the suspects are charged with fraud and with contraventions of section 4 of the Prevention of Organized Crime Act, 1998 (Act No 121 of 1998). There has, however, not been any conviction for money laundering in terms of the Prevention of Organized Crime Act.

**VII. TRANSNATIONAL ORGANIZED
CRIMINAL GROUPS AND THEIR
ACTIVITIES**

Gangsters have identified South Africa as a fresh innocent market for money laundering and international crime. The opening of South African borders has spurred dramatic growth in crime. With globalisation, launders now have the ability to manipulate financial systems to move large sums of money across the world. It is estimated that R200bn (\$26 billion) in drug money finds its way into the financial system annually.

VIII. ASSETS CONFISCATION

Chapter 5 of the Prevention of Organized Crime Act, 1998 (Act No 121 of 1998) deals with the confiscation procedures that have to be followed to confiscate the proceeds of unlawful activities. Apart from the criminal confiscation procedure, the Prevention of Organized Crime Act also introduced a civil forfeiture procedure. Important differences between the criminal confiscation procedure and the civil forfeiture procedure include the following:

- (i) The criminal confiscation procedure focuses on the criminal benefit that a person obtained

through unlawful activities. The civil forfeiture procedure can also be used to forfeit such criminal benefit, but, in addition, allows the forfeiture of property that aided the commission of an offence.

- (ii) The criminal confiscation procedure follows upon the conviction of a person for an offence that gave rise to criminal benefit. No conviction or even prosecution of any person is required for tainted property to be forfeited.
- (iii) A successful criminal confiscation procedure results in a court order requiring the defendant to pay a specific amount to the State, while a successful civil forfeiture procedure results in an order forfeiting the specific property to the State.

In terms of civil forfeiture the State may seize and forfeit property merely by showing that there are reasonable grounds to believe that the properties concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities. Proceeds or the instrumentality of an offence can, therefore, be confiscated and forfeited without a conviction being a prerequisite. Civil recovery of property does, however, not imply that the State can seize and forfeit property at will. The National Director of Public Prosecution may apply to a High Court for an order forfeiting to the State.

The Act provides for two mechanisms to deprive the criminal of his ill-begotten gains. These mechanisms are the so-called "restraint order" and the "confiscation order". A restraint order is a proactive measure to conserve property, thereby prohibiting a person from dealing in any manner with any property to which the order relates. A restraining order can only

be made by the High Court of South Africa. Only the National Director of Public Prosecutions may apply to the High Court to have a restraining order imposed.

Property which was instrumental in the commission of a Schedule 1 offence or which are the proceeds of unlawful activities may only be seized by a police official if the High Court has made a specific order authorising the seizure of the property concerned by a police official. Such an order may only be made once the High Court has made a preservation of property order which is a freezing order, prohibiting any person from dealing in any manner with such property. The order can only be granted following an application of the National Director of Public Prosecutions to the High Court.

If the court finds that the defendant benefited from crime, the value of the proceeds of the defendant's unlawful activities is determined. Section 9 of the Act provides that the value of a defendant's proceeds of unlawful activities is the sum of the values of the payments or other rewards received by him or her at any time, whether before or after the commencement of the Act. Section 15 of the Act prescribes how the value of specific property, other than money, must be determined. Chapter 7 of the Prevention of Organized Crime Act makes provision for the establishment of a Criminal Assets Recovery Account to which all moneys derived from the execution of confiscation and forfeiture orders will be paid.

Civil recovery is undertaken by the Asset Forfeiture Unit. The Unit was created in terms of the National Prosecuting Authority Act, 1998 (Act No 32 of 1998). This Unit is headed by a Special Director and is located in the Office of the National Director of Public Prosecutions. The mandate of the Unit is to:

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- (i) develop detail policy guidelines for forfeiture proceedings;
- (ii) institute forfeiture proceedings; and
- (iii) co-ordinate the management of assets subjected to restraining orders.

Assets that have been confiscated thus far in terms of the Act include, among other, several houses, luxury vehicles and furniture that amounts to millions of rand. Criminal investigations are pending against the persons from whom these assets were confiscated.

IX. THE REPORTING OF SUSPICIOUS TRANSACTIONS

The Prevention of Organized Crime Act creates a general reporting obligation in respect of suspicious transactions. A suspicious transaction will often be one, which is inconsistent with a customer's known legitimate business or personal activities or with the usual business for that type of account. Whether that suspicion is reasonable will depend on the particular context and circumstances and the client's profile.

A. Prescribed Form of the Report

The report must be in writing and must correspond substantially with the form prescribed in the Prevention of Organized Crime Regulations, 1999. The report must contain the full particulars of:

- (i) the person making the report;
- (ii) the person against whom the suspicion has been formed, in so far as such particulars are available;
- (iii) the transaction or other action whereby the property concerned has come into the possession of the person making the report; and
- (iv) the property concerned.

It must also set out the grounds on which the suspicion rests and indicate what documentary proof is available in respect of the transaction or action and in respect of the grounds for the suspicion. The report must be accompanied by copies of documentation that are directly relevant to that suspicion and the grounds on which it rests. The report must be handed or faxed to the designated person or any official of the subcomponent.

The Commander of the Commercial Crime Investigations may, in writing, require the reporter to provide him with particulars or further particulars on any matter concerning the suspicion and the grounds on which it rests, as well as copies of all available documentation concerning such particulars. If the person has the required information or documentation, he must comply with the request within a reasonable time.

B. Analysis of the Reports

Analysis of the reported transactions is the responsibility of the South African Police Service. Reports made to Head Office are analysed by designated personnel. A reference number is allocated to a report and an acknowledgement of receipt is sent to the reporting institution. If the report meets the requirements in terms of the Act and the regulations, the report is sent to the Commercial Crime Units of the Commercial Branch of the South African Police Service for investigation. The units concerned are requested to provide Head Office with a reference number and the particulars of the investigating officer within ten days after the report has been received at their units respectively. The outcome of the investigation must be reported to Head Office after completion.

C. A Case Involving the Cooperation of a Financial Institution in Providing Information on Suspicious Financial Transactions

1. The State versus Jumnalalall Bantho and Parshan Bantho

In 1997, a bank in South Africa reported a suspicious transaction in terms of the then Proceeds of Crime Act to the South African Police Service. Further investigations revealed that a person was regularly depositing large sums of cash into his private banking account and that another person was depositing some considerably smaller amounts into the trading bank account of a close corporation. One of the suspects was requested to give an explanation of the deposits. He informed the investigating officer that he had a secondhand clothing business. He said that he bought clothing stock from a company in Swaziland and that he sold his stock to hawkers and persons from the Transkei, a former homeland. He stated that his turnover did not exceed R40 000,00 (\$5 333) a month and did not have any other source of income. He admitted that he did not have an import permit from Swaziland.

When the bank documents were perused, it transpired that the accused had deposited a sum of R 580 930,00 (\$77 457) in cash into his own bank account in August 1997. The suspect could not give an explanation, as this amount had not been deposited into his business account which was held at another branch. It was further established that the accused had a second private account held at another bank in which he held R 901 000 (\$120 133). He withdrew money and transferred the money to other accounts.

It was further established that Parshan Bantho also had a number of vehicles and

a house, of which the market value is R380 000 (\$50 666). There was a bond on the house to the value of about R220 000,00 (\$29 333). Parshan Bantho only had the business for about two years, and it would not have been possible to accumulate the above assets in a legitimate way. It was believed that the assets were the proceeds of crime. Although the case was also investigated in terms of the then Proceeds of Crime Act, the accused was found guilty on charges of contraventions of the Import and Export Control Act, 1963 (Act No 45 of 1963).

X. COOPERATION BY BANKS AND OTHER FINANCIAL INSTITUTIONS

Reporting institutions have identified a single reference point within their organisation to which their staff must report suspected money laundering transactions promptly. These reports are evaluated by a qualified person within the institution and suspicious activities are reported to the South African Police Service. The banks in South Africa have acknowledged the fact that they have to develop their own defence mechanisms against money laundering activities. This involves knowing the customer and his or her business, refusing to act for customers in suspicious transactions and determining of the true ownership of all their accounts and safe-custody facilities. The staff of institutions are encouraged to co-operate fully with the law enforcement agencies and provide prompt information on suspicious transactions.

In 1996 the Money Laundering Forum of South Africa was set up to create channels of communication between organisations in the private sector and the police. Matters of mutual importance concerning money laundering are discussed during meetings.

**XI. OTHER ANTI-MONEY
LAUNDERING SYSTEMS/
STRATEGIES**

**A. Intelligence Gathering and the
Capturing of Information on
Database**

Information on suspicious activities and persons is fed to a database of the South African Police Service. The Individual Structuring Information System (ISIS) is a database on which records and stores information in respect of suspect gangs, syndicates, organisations and activities of persons for enquiry purposes and the combating of organized crime. Information on persons against whom suspicions have been formed and their activities, in so far as particulars are available, is fed to this database.

**B. Establishment of an
Investigating Unit to Combat
Financial Crimes**

It is envisaged that an Investigating Unit that will be responsible for the investigation of reported suspicious transactions and all money laundering cases, which may flow from the information received will be established in 2001. The Investigating Unit will be included under the structures of the Commercial Branch of the South African Police Service. This team will gather information on suspicious transactions and proceed with further investigations in this regard.

C. Sharing of Information

Section 73 of the Prevention of Organized Crime Act provides that the Commissioner of the South African Revenue Service must be notified of any investigations in terms of the Act, notwithstanding secrecy provisions in income tax legislation, with a view to mutual cooperation and the sharing of information regarding possible money laundering activities.

**XII. INVESTIGATION OF MONEY
LAUNDERING IN SOUTH
AFRICA (METHODS OF
CONTROLLED DELIVERY AND
UNDERCOVER OPERATIONS)**

In the investigations which have thus far been conducted in South Africa in terms of money laundering methods of controlled delivery and undercover methods have not been used.

XIII. CONCLUSION

The most dangerous consequence of money laundering schemes is that it places vast amounts of money in the hands of criminals and enables them to put such amounts to further illegal use. Regulatory measures must be introduced to combat money laundering by means of proactive and preventive action. However, the key to effective money laundering prevention is recognition. It is important for financial institutions to recognise those situations in which money laundering might actually be occurring. It is further a truism to say that legislation is only effective as its enforcement.

CURRENT SITUATION AND COUNTERMEASURES AGAINST MONEY LAUNDERING: TANZANIA'S EXPERIENCE

*Saidi Ally Mwema **

I. INTRODUCTION

Prior to the mid-1980s, our country had no orientation with organized crimes. The crime pattern was largely dominated by ordinary traditional offences such as simple thefts, sporadic incidents of armed robberies, simple forgeries, and the like. We could not by then envisage that organized criminal syndicates would one day transcend across our borders with such force and speed.

Early symptoms of organized crimes were first detected in 1983 when the country experienced serious economic crisis¹. However, the nature and extent of organized crimes by then differs from what we are experiencing today. The organized criminal syndicates which dominated the scene were largely based within the country, without any external connections. As a result, even the legislation which was enacted in 1984 to cater for that situation contained fewer offences that forms part of the organized offences². As a matter of fact, the Act³ was specifically tailored against International Economic Saboteurs. Though some of the provisions of the Act are still valid and operational, their

application to what is taking place today in the organized crime world is very difficult and below the required standards.

II. THE CURRENT PATTERN OF ORGANIZED CRIME IN TANZANIA

In 1985, the organized crime pattern in the country began to take a different shape. This was a time when our country made a U-turn in her economic policy. The effects of globalization never spared us. The wind of change in the former East European countries also had a role in determining our economic policy.

As a result of such changes which were by then taking shape in the world, we decided to abandon our former closed-door economic policy and instead opted for trade liberalization. This change of policy left our doors open for both genuine investors and potential organized criminal syndicates of the world to infiltrate their operatives into our country.

Immediately there-after, we began to note an astonishing upsurge of certain offences as well as emergence of new forms of crimes, such as the illegal Arms dealing, major frauds, poaching, corruption, violent crimes, smuggling, economic crime/fiscal offences, drug trafficking, and most recently terrorism. The opening up of our economy and the development of science and technology have together fuelled up organized crime incidents in our country. This was the first real orientation which we had with organized crimes.

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¹ This was the time when the then Prime Minister, late EDWARD MORINGE SOKOINE, declared and led the war against economic saboteurs.

² The economic and organized crime control Act number 13 of 1984.

³ Ibid;

III. THE OFFENCE OF MONEY LAUNDERING

This is part of organized crime offences. It is very difficult and completely out of perspective to discuss about money laundering without discussing organized crimes. Money laundering should be discussed in the context of organized crimes. This is the reason why we have directed our attention to organized crimes in the foregoing paragraphs. Just as it was with organized crimes, the offence of money laundering has not yet manifested itself fully in our system.

There is however a very strong possibility that the offence has deeply entrenched itself in our system but owing to the intricacies involved in its detection and investigation, we have yet to flush it out. To many of us for example, we used to associate the offence of money laundering with illicit drug trafficking only. It took time before it dawned on us that money laundering can be facilitated by dirty incomes derived from all the organized crime offences.

With those brief foregoing introductory remarks, let us now examine the current situation and countermeasures that have been adopted in Tanzania against Money Laundering. In this regard, our discussion will cover a brief analysis of the current situation of money laundering and the legal framework for combating such crime; we shall also explore and identify current problems in the detection, investigation, prosecution and punishment of the said offenders and solutions for them. We shall finally discuss, albeit briefly, the possibility of introducing new investigation methods and legislation in the fight against money laundering.

IV. BRIEF ANALYSIS OF THE CURRENT SITUATION

As mentioned in the introductory part, the offence of Money laundering has not yet registered itself very firmly in our system. Perhaps we lack the necessary skills to detect and investigate this offence or it is non-existent. However, we would like to believe the former to be true because with the trade liberalization at its peak, there has been a lot of people from all over the world coming into the country under the guise of investors. Due to lack of adequate skills it has always been difficult on us to identify non-genuine investors from the genuine ones.

Being a poor country which welcomes investments from all over the world, sometimes it is felt that if you start enquiries against the so-called investors you risk the possibility of chasing them away with their much-wanted investments. As a result we are always in dilemma not knowing the right course of action to take.

It is partly because of these reasons that our record of detection is not very impressive at all. These are however instances when Money Laundering activities have been inferred. One such incident involved the MERIDIAN BIAO bank which had offices in Tanzania, Zambia and in other countries in the world⁴. Apart from that case we do not have any statistics to amplify this situation. This does not however mean that Money Laundering is not present in our country.

Most of the emphasis had therefore been placed in fighting other organized crimes.

⁴ This bank was opened by suspected criminals from Malaysia and after operating for some time, it wound up its activities abruptly leaving several account holders in abeyance. It is believed that the same happened in Zambia.

The legal framework that is in place caters generally for organized crimes without specifically addressing the offence of Money Laundering. Recently, however, emphasis has been placed on Money Laundering as well. Let us now examine the legal framework in place against the offence of Money Laundering in Tanzania.

V. THE LEGAL FRAMEWORK FOR FIGHTING MONEY LAUNDERING

The offence of money laundering has always been discussed in the context of organized crime. For a long time in our country, there were no specific legal frameworks to deal with money laundering as a separate offence. The tendency has always been to resort to various legal provisions in place against organized crimes. We therefore intended to highlight some registration put in place against organized crime which also somehow caters for the offence of money laundering.

A. Legislation Against Organized Crime

When traces of organized crime began to be felt in Tanzania, organized crime had not yet assumed the international character it has now. As such, the legislation enacted was mainly aimed at combating what was considered a group of local economic saboteurs and other local organized criminal gangs⁵.

Prior to the enactment of this legislation, there were of course, two United Nations conventions against Narcotic drugs and the other against psychotropic substances. These conventions adopted a number of resolutions aimed at controlling narcotic drugs and psychotropic substances which by then were the leading organized crimes. It was envisaged, correctly, that other

forms of organized crimes derive their origins from the illicit trade and abuse of dangerous drugs.

Apart from the two United Nations conventions, two legislations were also enacted in 1965 and 1969 respectively⁶. Though they were not expressly dealing with organized crime directly, they were intended to facilitate the extradition of criminals and to follow in hot pursuit, though special arrangements with other countries, all those people who commit crimes in one country and run to another country. It was envisaged, again correctly, that the existence of such legislation would deter potential offenders from organizing their criminal schemes in one country and run to seek refuge and reap fruits of their criminal acts in another country when things turn sour in their countries.

As started earlier, the best weapon that the Tanzanian Government thought would help wipe out or control incidents of organized crime, is the Economic and Organized Crime Control Act⁷. This Act was enacted in 1984 when the first real adverse effects of organized crime began to bite. The promulgation of this Act was aimed at making better provisions for the control and eradication of certain crimes and culpable non-criminal misconduct through the prescription of modified investigation and trial procedures, and new remedies and for connected matters. A number of new offences were created and enshrined in the first schedule of that Act. One such offence is that of "Leading Organized Crime"⁸. In the following part we wish to discuss briefly some of the provisions of the Act which criminalizes money laundering.

⁵ The economic and organized crime control Act, Number 13 of 1984.

⁶ The extradition Act of 1965 and the fugitive offenders (pursuit) Act of 1969.

⁷ No. 13 of 1984.

⁸ Ibid; paragraph 4(1) of the first schedule to the Act.

**B. The Economic And Organized
Crime Control Act, Number 13 of
1984**

Part III of the Act covers the procedure and regulation governing the investigation and prosecution of economic cases. Organized crimes (including money laundering) falls within the ambit of this part. Under the provision of the Act, the investigation of all economic offences reported to the Police shall be conducted by Police Officers, with the assistance of such public officials as may be designated by the Director of Public Prosecutions after consultation with the Director of Criminal Investigation and by order published in Gazette⁹.

The act also empowers a Police Officer to conduct search and seize property involved in an economic forfeiture or confiscation of a property proved to have been involved in the commission or facilitation of an economic offence¹⁰. Transfer of advantage or property involved in or arising out of the commission by any person of an economic offence is prohibited by the Act¹¹.

However, when one reads the above provisions of law between the lines, he will notice that they do not provide anything specific in relation to the money laundering offence but rather they provide for organized crimes in general. Absence of specific legal provisions that criminalizes money laundering creates loop-holes in our legal systems which assists organized criminal gangs to thrive and flourish.

This helpless situation led many countries to introduce legislative initiatives regarding money laundering and

confiscation of the proceeds of crime. In fact it was the United Nations convention which appealed to and mandated member countries to adopt a model with acceptable standards. In the following part, we wish to discuss briefly about the directive of the United Nations and the impact it had on our country in formulating the required legislation against money laundering.

C. The United Nations Convention

As we are all aware, the United Nations in many of its deliberations, convened a conference in Vienna, Austria.¹² The conference came up with a very famous convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The conference also came up with a model draft to be adopted by all member countries in order to intensify the war against organized crimes and especially illicit traffic in narcotic drugs which in most cases brews up other forms of organized crimes. The objectives of such model draft were/are to enable different countries of the world to unify their strengths in order to fight and eradicate organized crime syndicates more collectively.

Tanzania, being a member of the United Nations, adopted into her legal system the proposed model and enacted two legislation almost simultaneously, the Mutual Assistance in Criminal Matters Act¹³ and the Proceeds of Crime Act¹⁴. These legislation are of unique importance as they call for Agreements to be made between states with regard to mutual assistance in a variety of activities related to the investigation of crime such as; collection of evidence, location of witnesses or suspects, service for search and seizure of

⁹ Ibid; section 21(1).

¹⁰ Ibid; section 22.

¹¹ Ibid; section 23.

¹² Ibid; section 58(1).

¹³ In 1988.

¹⁴ Number 24 of 1991 and number 25 of 1991, respectively.

stolen property etc, just to mention a and seizure of stolen property etc, just to mention a few¹⁵. Let us now examine the appropriate legal provisions in these two Acts which criminalizes money laundering.

D. The Proceeds of Crimes Act, Number 25 of 1991.

This Act was designed to introduce a new law fashioned to provide the most effective weaponry so far against major crimes. Its purpose, according to the bill sent to parliament for debate¹⁶, is to strike at the heart of major organized crimes by depriving persons involved of the profits and instrumentalities of their crimes. By so doing, it was envisaged that the Act will suppress criminal activity by attacking the primary motive, profit, and prevent reinvestment of that profit in further criminal activities. Generally speaking, the Act contains provisions of a coordinated international effort designed to target both the pushers and others involved in criminal activities as well as those who reap the most reward from such crimes.

This Act also provides a mechanism for the tracing, freezing and confiscation of the proceeds of crime such as drug trafficking¹⁷. It also confers on Police new powers to assist in following the money trail¹⁸. Furthermore, the Act creates a few new offences such as money laundering and organized fraud¹⁹.

The Proceeds of Crime Act²⁰ when taken together with the Mutual Assistance in

Criminal Matters Act, enables freezing and confiscation orders made by courts in our country to be enforced abroad. Likewise, they enable orders made in foreign countries in relation to foreign offences to be enforced against assets located in Tanzania.

VI. CURRENT PROBLEMS IN THE DETENTION, INVESTIGATION, PROSECUTION AND PUNISHMENT OF MONEY LAUNDERING OFFENDERS

A. Detection

This is the key to the dismantling of organized criminal syndicates. Without detection, it is impossible to apprehend and prosecute perpetrators of this crime. Detection however, requires special skills and knowledge of how this offence is committed. The investigators have a duty of sharpening their detection skills by updating themselves on methods of laundering cash that have been used to convert dirty cash into clean assets. Once investigators are able to distinguish various techniques employed by the offenders of this crime, detection becomes an easy task.

With increasing globalization and liberalization, countries, especially developing ones, are vulnerable to the risks of money laundering. Therefore, appropriate detection strategies ought to be put in place in order to discourage offenders of money laundering offence from entrenching their roots into our countries.

As stated earlier, our records on criminalizing money laundering in Tanzania is not very impressive. The logical assumption is that our detection strategies are not well advanced. We highly appreciate invitations to forums like

¹⁵ Section 4 of the mutual assistance in criminal matters Act, 1991.

¹⁶ Bill for proposed enactment of a law against proceeds of crime.

¹⁷ Section 9 of the Proceeds of Crime Act, number 25 of 1991.

¹⁸ Ibid; section 31(3).

¹⁹ Section 71 of the proceeds of crime Act, Part VII.

²⁰ Number 25 of 1991.

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this because we are sure to learn something useful which can improve detection of money laundering in our country.

With the development in technology, for example electronic cashing through internet, organized criminal gangs can now move large sums of money easier from one part of the world to another. This has somehow substantially reduced the importance of national borders thus allowing international criminals to finance, profit from and expand their illicit operation. This therefore requires highest standards of detection. This can only be obtained through training and cooperation from other developed countries or international agencies.

B. Investigation and Prosecution

Money laundering investigations are very complex and require specialized expertise, and are normally lengthy investigations. Many traditional Police investigative tactics did not include emphasis on the money, now however, these investigations are becoming an essential part of any significant organized crime investigation.

The problems outlined about detection can equally be highlighted in the aspect of investigation. We lack the necessary skills and knowledge of how to successfully investigate a money laundering case. The complexity nature and the lengthiness of such investigations calls for well trained personnel to carry out such tasks. These persons should be well versed about the existence of both bilateral and multilateral instruments at their disposal and how best to utilize them to their advantage.

Equally important here, is to impart the necessary knowledge to the investigators about the current techniques involving modern technology in the commission of this global offence. Lack of such knowledge

would entail failure on our parts because organized criminals would always be several steps ahead of us.

Prosecution of this offence also requires training and understanding of certain intricacies surrounding this offence. Designated prosecutors should be picked and trained in the various aspects of money laundering.

C. Punishment to Offenders

Detection and prosecution of offenders alone is meaningless unless appropriate punishment is meted out to proved offenders. Punishment to offenders, as we all know, serves a number of purposes. First and foremost, it consoles the victims of the offence, it also teaches a lesson to the offender and more importantly, it acts as a deterrent to potential criminals.

There is a prevailing belief worldwide that the more severe a punishment is, the better. Members of the public would always be relieved if severe punishment is inflicted upon proved offenders. This is the reason why many penal statutes impose corresponding punishment to various offences.

In Tanzania, the Penal Code²¹ is the statute which creates most criminal offences and imposes penalties to offenders of various crimes. However, in so far as economic cases are concerned, organized crimes being among them, any person convicted of an economic offence shall be liable to imprisonment for a term not exceeding fifteen years, or to both that imprisonment and any other penal measure provided for in the respective Act²².

In cases involving money laundering, imprisonment of whatever term would not

²¹ Chapter 16 of the revised laws.

by itself teach offenders a lesson nor will it serve as a deterrence to others. Deprivation of the ill gotten property or any other proceeds of the crime would equally be very appropriate and would certainly inflict greater pain to the offender. Since most of proceeds of money laundering crime are located far away from where the offence took place, an appropriate machinery should be put in place to trace and seize such properties in those countries. This machinery has been established in Tanzania by the enactment of two Acts²³. However, so far there is no case example to amplify the application of the provisions enshrined in those Acts.

**VII. POSSIBILITY OF
INTRODUCING NEW
INVESTIGATION METHODS
(INCLUDING NEW LEGISLATION)
IN THE FIGHT AGAINST MONEY
LAUNDERING**

In order to win the war against offenders or perpetrators of this offence, deliberate and calculated steps need to be taken in order to sharpen the investigative skills of officers concerned and also the come up with a legislation that will iron out all the existing legal hurdles.

As narrated in the foregoing paragraphs, criminals of this offence employ very sophisticated tactics and resort to modern technology in facilitating the conversion of dirty cash into clean assets. They also use skilled personnel and other professionals such as Accountants, Lawyers etc. to fend for them. All these poses a great challenge to the law enforcers, especially those in developing countries like Tanzania, who lack adequate skills, knowledge and modern facilities.

This situation is further compounded from bad to worse by the fact that this offence is an internationalized one in the sense that offenders form themselves in strong organized criminal syndicates. This set up requires harmonization of different legal systems and global cooperation. No country the world over can manage to fight this crime single handedly and win. It is for this obvious reason that we in Tanzania have supported various Regional and International efforts between Law Enforcement Agencies and Other Institutions, geared at fighting organized crime and particularly money laundering, collectively. We believe that introduction of whatever investigation methods or new legislation would not bring the desired effect if there is no corresponding collective Regional or International resolve to tackle this problem jointly.

The following is therefore an example of the Regional and International cooperation that exists between us and other countries/institutions against organized crimes:

- (a) There is the Annual Chiefs of Police Conference for the three East African countries where security cooperation and exchange of intelligence information feature most. Organized crimes are discussed in this forum and appropriate strategies are set²⁴. This is also supplemented by the biannual operational drugs meeting for the Heads of Criminal Investigation Department and Anti-Narcotic units of the three East African countries²⁵. Within East African, there is also the East African Inter-State Defence and Security Sub-Committee which meets annually to assess the security

²² Economic and organized crime control Act, number 13 of 1984, section 59(2).

²³ Number 24 of 1991 and number 25 of 1991.

²⁴ The countries involved are Kenya, Uganda and Tanzania.

²⁵ Ibid; recently Rwanda joined as a member.

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situation within the Region. In all these forums organized crime is the main agenda item. As a result of such cooperation in the Region, the Heads of states for the east African states have signed the protocol for combating illicit drug trafficking and money laundering in East Africa²⁶.

(b) In the SADC region, in which Tanzania is one of the member countries, the Chiefs of Police for SADC have a forum called SARPCCO²⁷. They meet biannually to lay strategies to combat organized crime and other cross-border crimes in the region. A similar protocol as that in the East African Region was signed in 1996 for the SADC countries.

(c) In August 1999 a meeting was convened in Arusha, Tanzania, to launch the Eastern and Southern Africa Anti-money laundering group. In that meeting the ministers responsible for finance and Legal Affairs from nine countries of our Region, agreed on a number of points for action in the region. Among those points include:

(i) Working towards attainment of the international standards in the fight against the laundering of proceeds of those crimes referred to in relevant multilateral agreements and initiatives which deal with combating serious crime, and to implement the 40 Recommendations of the Financial Action Task Force on money laundering.

(ii) To improve cooperation between members, and with other states, in the fight against money laundering.

(iii) To co-operate with all relevant international organizations concerned with combating money laundering.

(iv) To study emerging regional trends in money laundering, and to share member states' experiences in order to address those trends.

(v) To institute an evaluation process, including mutual evaluation, to assess the measures in place in each member state, and their effectiveness, and to identify the gaps between existing measures and endorsed standards.

(vi) To address deficiencies identified through the process.

(vii) To develop institutional and human resource capacities to check money laundering.

(d) There is also the INTERPOL. This body has very much helped to coordinate a number of activities between Law Enforcement Agency of its 178 members. INTERPOL has provided us with the X-400 communication equipment which transmits swiftly any information in a safe and secure manner to be used by the member countries. Recently, the Interpol Sub-regional Bureau Office was opened in Nairobi, Kenya²⁸. The Bureau helps to pass over any information on clandestine money laundering activities.

It is therefore our considered view

²⁶ This was done Arusha, Tanzania, on 30th November, 2000.

²⁷ The Southern Africa Regional Police Chiefs Committee.

²⁸ Senior Police Officer from Kenya, Tanzania and Rwanda have already been seconded there.

that any new investigation methods or new legislation envisaged to be introduced, should take into consideration efforts being currently made both within the Region and Internationally so as to supplement such efforts not to contradict them.

concrete and appropriate strategies can embark from. We thus urge other developed countries and International institutions to emulate the traditional example set by the organizers of this seminar and attend to the short-falls in the developing countries in dealing with the offence of money laundering.

VIII. CONCLUSION

Now, money laundering has firmly established itself as a major worldwide law enforcement issue. Apart from the effects of globalization, trade liberalization and development of science and technology, our country is also faced with a large influx of refugees and other displaced people fleeing the fighting and civil strifes in the Great Lakes Region²⁹.

Experience over years has shown that these people (refugees) engage in smuggling of firearms, illicit dangerous drugs and other organized offences. Some of them have also established hidden properties arising from the proceeds of such crime and others are being used by organized criminal gangs to invest their ill-gotten money in our territory.

On the other hand, being a poor country in dire need for investments, it is very difficult to draw a line between genuine and fake investors. As a matter of practice, we do not quite often make a follow up or trace the source of money by such investors. This in turn diminishes our capabilities in dealing with this offence.

All in all, the best solution to the money laundering problem should come from concerted Regional and International efforts. This seminar for example, is one of the necessary platforms upon which

²⁹ The wars in the Democratic Republic of Congo, civil strifes in Rwanda and Burundi serve as an example.

CURRENT SITUATION AND COUNTERMEASURES AGAINST MONEY LAUNDERING IN THAILAND

*Pisan Mookjang **

Thailand is a democratic country with a strong economy in Southeast Asia. Like most developing countries, Thailand is mainly concerned with the economic and social development of the country for the well-being of her people. So she must face up to various kinds of problems such as unemployment, poverty, education, traffic, political corruption, the environment and crime, etc.

It is generally accepted that “crime” means an offence for which there is severe punishment by law and such offences are collectively treated as serious law-breaking. Not only “Street Crimes” such as homicide, rape, larceny, extortion, robbery, gang-robbery and drug offences etc. are serious problems to the Thai Government but also “Transnational Crimes” and “Economic Crimes” are the most serious ones in this decade.

I. MAJOR TRANSNATIONAL ORGANIZED CRIMINAL GROUPS AND THEIR ACTIVITIES

A. Drug Trafficking

Drug crime in Thailand starts at the beginning of the cycle in that many types of drugs like heroin, amphetamine, opium, marijuana are produced here in Thailand and immediately transported to “domestic markets” which will be trafficked directly to the “consumers”. This trade is stimulated by the tension people get from the country’s

economic crises and the negative effects emerging from the effort to convert the country’s economic system from agricultural oriented to industrial oriented.

Moreover, the proximity of the golden triangle where the borders of Thailand, Myanma and Laos, meet has allowed drug business to be prosperous, especially opium plantation.

B. Smuggling of Illegal Migrants

Since Thailand’s economic condition is much better than her neighboring countries’ such as Myanmar, Laos, Cambodia and China, there has been an influx of illegal foreign workers through the means of fake passports and visas made by organized smuggling rings. These organized criminal groups not only smuggle illegal workers from neighboring countries into Thailand but are involved in smuggling illegal migrants to other countries by using Thailand as the gateway and a temporary resort. This is also rewarding business for it turns out that this business makes a lot of money especially smuggling illegal migrants to other countries like the USA, the UK, the Netherlands and Japan, and it costs each person about 75,000 baht — 140,000 baht for one illegal trip.

C. Arms Trafficking

Thailand is located among neighboring countries which have problems concerning internal peace and order such as Myanmar, and Cambodia. Consequently, for the past 10 years, there has been an in-flow and out-flow of lethal weapons. Unfortunately, some Thai government officials cooperate with the organized criminal groups secretly

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to sell illegal weapons to ethnic or minor groups along the borders of Thailand. These weapons are used to fight against their governments.

D. Trafficking in Women

There are a large number of prostitutes in Thailand partly due to poverty and partly because many women have been misled and forced into it, some of whom have been trafficked to other countries such as Japan and Germany. However, it is widely known that some foreign prostitutes come and do their business in Thailand under the control of transnational organized crime syndicates.

II. PROBLEMS AND OBSTACLES TO SOLVING TRANSNATIONAL ORGANIZED CRIME

- (1) The authority and power of law enforcement officers is limited and this does not allow the officers to act quickly and fast, and to keep up with the development and different forms of crime, for example, wire trapping is still prohibited.
- (2) Most law enforcement officers lack knowledge about transnational organized crime and about the new types of crime such as computer crime.
- (3) The shortage of criminal justice personnel and the limited budget as a result of economic crises of the country.

III. ECONOMIC CRIME IN THAILAND

There are various types of economic crime in Thailand but this paper will focus on the enforcement of two kinds of offence which are increasing on a large scale both domestically and internationally : they are credit card fraud and counterfeiting and the laundering of money by organized crime groups.

A. Credit Card Fraud and Counterfeiting

At present, economic crime, especially credit card fraud and counterfeiting U.S. currency, are mostly committed by well organized crime syndicates, who operate not only within each country but expand to international level, by fleeing between countries believing that they will not be apprehended, with a significant number of trade transactions taken along neighboring countries such as Cambodia, Laos, Malaysia and Myanmar.

The occurrence of both credit card fraud and counterfeiting U.S. currency tend to increase at an alarming rate along with greater complexity in investigations and the inability of law enforcement officials to apprehend the suspects. In addition, the number of credit card holders is increasing because of competition between the credit card companies and more borders have been opened to allow trade with neighboring countries. Because of this, certain problems need to be emphasized.

1. Loop-Holes/Weak Points

Criminals who commit fraud always take advantage of existing loop holes or weakpoints to forge and counterfeit. We should try to minimize every advantage used by the criminals by communicating these loopholes and weakpoints throughout the law enforcement community.

2. *Modus Operandi*

It is the duty of law enforcement officials to know the *modus operandi* of the criminals and every type of *modus operandi* should be informed to all competent law enforcement officers.

3. Information

The criminal uses advanced communications (telephones, especially cellular hand or mobile phone, and faxes) to pass his information and travels to and

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from countries in a matter of hours. Law enforcement officers should, therefore, use these same means with each other to bring the criminals to justice regardless of geographical boundaries by establishing information exchange centers between law enforcement authorities to keep ahead of the criminals.

4. Co-operation

Both counterfeit and credit card fraudsters are organized and often commit their crimes in different countries at the same time. We need to be at least as organized as the criminals and also have the ability to pass information to other countries, for effective co-operation, before they can commit any crime anywhere in the world.

The above-mentioned problems have to be closely considered and administered by all competent law enforcement authorities continually, and effectively. Only then will a law enforcement strategy be developed to benefit the economy and societies of every country.

B. Money Laundering

Historically, "crime" has been considered only in terms of acts of violence, threats of violence and overt thefts. The Thai system of jurisprudence has evolved by defining as illegal, certain activities directed against property and persons, and over a number of years, law enforcement agencies have developed generally accepted methods for investigating these traditional crimes. As firstly mentioned, "economic crime" causes a lot of problems to law enforcement and one of the illegal activities of this type of crime, which becomes an alarming issue nowadays, is money laundering.

Since most money collected by organized crime activities is from illegal sources such as loansharking, prostitution, gambling or narcotics, the individual racketeer is

understandably reluctant to report the income and its source on his tax return. Before spending or using these funds, it is necessary that this money must be given an image of legality so that it can be reported on the tax return without revealing the true nature of its origins. This process of conversion is known as "laundering".

If law enforcement officials are to combat organized crime successfully, they must have an understanding of how money acquired from illicit sources is transformed into respectable funds that can be spent and invested without the fear of prosecution.

The Bank of Thailand has classified money laundering into several characteristics;

1. Carrying cash when traveling abroad

Criminals tend to carry dirty money, especially cash, with them every time they travel abroad to finance themselves abroad because dirty money obtained from drug trafficking or other economic crime activities could be traced by law enforcement officials if the transfer is done through financial institutions.

2. Deposits with domestic financial institutions

The role of the modern banking system has helped criminals to deposit their dirty money in financial institutions. Part of the ordinary business of financial institutions is discretion, which is the bankers duty when serving their clients, and last but not least, his obligation to keep all information secret.

3. International wire transfer

Satellite communication hold the promise of a new era in which people throughout the world while be linked,

including the Thai citizen, by a single telecommunications system. This will provide a great number of avenues to tremendously expand Thailand's telecommunication's capacity and enhance its chances of becoming the region's telecommunication's hub. Whereas electronic records favor law enforcement authorities, modern international banking favors the criminal. It is difficult, sometimes impossible, and often not worth the trouble, to follow the paper trail across international borders. Therefore, money launderers use typical international transfers to hide the true source of the money. With the advent of satellite communication, hi-tech information systems and the introduction of facsimile machines, both economic criminals and drug traffickers have been invited to launder their dirty money during this last decade and it will continue to flourish as we approach the conclusion of this century.

4. Front Companies

Drug traffickers and white-collar criminals certainly conceal their illegal income and the ownership of such illicit money to avoid being detected by law enforcement officials. They establish a "front company" in a free-port state and proceed with lending money or selling high price merchandise to their own companies with high interest rates or high costs with the real intention to launder the dirty money into legal income.

5. Others

While laundering money can be accomplished by a wide variety of legitimate businesses, it should be recognized that certain domestic businesses have characteristics which lend themselves to successful laundering operations. Businesses that normally experience a high rate of spoilage or other loss of goods also have a high potential to launder money. Groceries, hotels,

restaurants, money changers are good examples, since some spoilage of goods is expected during the normal course of business. When such a business is taken over, a large bulk of illicit money is introduced into the business and recorded in the general income accounts of the grocery stores, hotels, restaurants etc. as if this money has been received from customers. Fraudulent invoices, forms of produce or other perishable items are then issued to these business by other mob-owned or mob-controlled companies acting as suppliers.

Domestic laundries : domestic businesses also have characteristics which lend themselves to successful laundering operations. For example, the business selected as a "laundry" must be capable of absorbing a large volume of cash income, since most illicit income is received in the form of cash. The purpose of laundering funds is to co-mingle licit and illicit money so that they cannot be separated, while simultaneously preventing the discovery of the introduction of illegal money into the business. Since almost all checks and credit card receipts are traceable by law enforcement officials, businesses such as restaurants, bars, and massage parlors, which normally take in high proportions of cash, tend to be more desirable as a potential "laundry" than a business normally receiving most of its income in the form of checks or other traceable financial instruments.

The above technique has been used to launder funds successfully for a number of years, and a large number of domestic businesses controlled by organized crime groups are still being used for this function. A few years ago, however, law enforcement officials from the Office of Narcotics Control Board (ONCB) adapted new methods, such as sampling, ratio analysis, and flowcharting to discover laundering

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operations and to successfully prosecute the people involved in the conversion process.

Another method used to uncover domestic laundering operations involves researching the corporate and ownership structures of both the suspected business and all the companies' deals. Since the ultimate success of laundering operations are dependent upon keeping the money "in-house" there will be a commonality among the various businesses. The relationship between the various companies may be illustrated visually by the process of flowcharting, which allows investigators, prosecutors, and judges to grasp more easily the sometimes complex relationships which exist in laundering operations.

Implications for law enforcement : since the laundering of dirty money depends upon keeping the cash flow "in house", it creates such complexity that investigations into the operation appear to be too complicated to undertake. Experience has shown, however, that these laundering operations are not complicated and can be successfully investigated by law enforcement officers willingly to use techniques such as sampling, ratio analysis, and flowcharting, combined with traditional methods of investigation.

The success of organized crime in laundering funds through secret numbered bank accounts and foreign corporations and through securities and financial instruments issued by off-shore banks has, in larger part, been a result of the fact that these "foreign laundries" have traditionally been beyond the jurisdiction and resources of law enforcement agencies operating in the Kingdom of Thailand. While investigating this type of laundering operation remain expensive, difficult, and time consuming, significant steps have

been taken in providing investigators with new jurisdictional tools to combat this problem.

Worldwide rules and different legal cultures : since laundering is typically done by moving money across international borders, it is highly desirable to develop internationally uniform rules on money laundering definitions and forfeiture definitions.

IV. RECENT LEGISLATIVE DEVELOPMENTS

It has been taken for granted that Thailand provides a fertile ground where illegal businesses can operate lucratively much to their advantage. This is possible partly because of its socio-economic conditions and partly because of its geopolitical situation. Against this backdrop, however hard the government and the institutions concerned try to combat organized crimes in general and money laundering in particular, it seems that a total victory over such crimes is still an illusive object, if not a distant dream, if concerted efforts are lacking on both a regional and international scale.

There are a variety of illegal sources that contribute to the flourishing business of money laundering. In order to spotlight the gravity of the situation and its devastating impact on society, Chulalongkorn's Political Economy Center, Faculty of Economics, has undertaken a research into illegal trades in Thailand along the following main categories : (1) drug trafficking (2) trading in contraband arms; (3) diesel oil smuggling; (4) prostitution; (5) human trafficking, and (6) illegal gambling. The study provides estimates of these illegal trades concluding that these six activities generated 289-457 thousand million Baht of value added per annum during the period 1993-1995. The

figure is equivalent to 8-13 percent of GNP. The largest contributor was gambling, followed by prostitution, drug trafficking, diesel oil smuggling, trafficking labour, and trading in contraband arms, as can be seen in the table below:

Estimates of the Size of the Illegal Economy (1993-1995, billion baht per annum)

Category	Value added
1. Drug trafficking	29-33
2. Trading in contraband arms	6-31
3. Diesel oil smuggling	9
4. Prostitution in Thailand	100
5. Human trafficking	5-7
6. Illegal Gambling	140-277
6.1 Underground lottery	(80-98)
6.2 Football gambling	(12-16)
6.3 Casinos	(45-163)
Total	289-457

Remark : Thailand's GDP between 1993-1995 averaged 3.6 billion Baht a year.

The above table testifies to the fact that the average volume of turnover of the illegal economy in Thailand is staggeringly huge and it is enough to stimulate the business of money laundering and other related activities. It can therefore be safely deduced that these illegal business operators and their agents will resort to all available facilities whether they be legal, financial, or banking to launder their illicit proceeds of crime. Their widespread use of money to achieve their ultimate aims of turning illegal proceeds to legal money undoubtedly paves the way for a general degradation of morality, which unfortunately has become a negative social phenomenon tearing apart the fabric of society.

The overall situation being as such, it has become imperative that the

Government and the business community take timely action to guard against the onslaught of organized crime, particularly money laundering. To this end, as we have observed, the State reacted, and will continue to react, with some commendable determination by means of administrative and legislative initiatives.

Legislative & Administrative Initiatives

Beginning in 1991, the government of Thailand had taken the following legislative and administrative measures in pursuance of the 1988 Vienna Convention (The United Nations Convention against Illicit Trafficking in Narcotics Drugs & Psychotropic Substances) :

- a) the Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, B.E. 2534; (1991)
- b) Ministerial Regulations (to implement the above Act); and
- c) the Money Laundering Control Act, 1999

It may, however, be noted that the legal and administrative instruments shown in (a) and (b) above do not directly deal with money laundering properly; whereas item (c) is the precise answer to the problem of money laundering in Thailand.

**MONEY LAUNDERING CONTROL
ACT OF THAILAND 1999**

**The Money Laundering Control Act
1999 consists of 7 chapters and
66 sections :-**

- Chapter 1 : General Provision
- Chapter 2 : Reporting and Identification
- Chapter 3 : Money Laundering Control Board
- Chapter 4 : Business Transaction Committee
- Chapter 5 : Office of Money Laundering Control
- Chapter 6 : Actions on Properties
- Chapter 7 : Penalties

“Predicate offences” mean

1. Narcotic offences : offenses pertaining to narcotics, under the Narcotics Control Act or the Act on Measures for the Suppression of Offenders in an Offense Relating to Narcotics.
2. Trafficking of children and women : offenses relating to sexuality under the Penal Code, in particular sexual offenses pertaining to procuring, seducing, and taking away, for indecent acts, women and children in order to gratify the sexual desire of another person, sexual offenses against children and minors, offenses under the Measures to Prevent and Suppress Trading of Women and Children Act, offenses under the Prevention and Suppression of Prostitution Act, especially offenses pertaining to procuring, seducing and taking away persons for the purpose of forced prostitution, offenses pertaining to conducting a prostitution businesses as owner, operator, or manager of places of prostitution, or supervising persons who commit prostitution in places of known prostitution.
3. Cheating and fraud of the public : offenses of cheating and fraud of the

public under the Penal Code or offenses pertaining to acquiring loans fraudulently pursuant to the Fraudulent Loans and Swindles Act.

4. Misappropriation or cheating and fraud by financial institutions : offenses of misappropriation and cheating and fraud under the law governing commercial banks, law governing the conduct of business in finance, money market funds, securities and credit fencier, law governing securities and securities market, which are committed by managing directors or any person who is responsible for or has some interests in conducting the affairs of a financial institution.
5. Malfeasance in office or in judicial office : offenses pertaining to malfeasance in office or malfeasance in judicial office under the Penal Code, offenses pertaining to law governing officers of government organizations or sector or offenses pertaining to malfeasance on dishonesty in carrying out official duty under other laws.
6. Extortion or blackmail by financial institutions : offenses of extortion or blackmail which are committed by a member of a secret society or criminal organization, under the Penal Code.
7. Customs evasion : offenses of customs evasion under the Customs Law.

“transaction” means any activity relating to a juristic act, contract, or any operation with other persons dealing with finance, business or involving properties;

“suspicious transaction” means a transaction that is more complicated than the norm by which that transaction is usually conducted, a transaction that lacks economic possibility, a transaction believed to be conducted for the purpose of avoiding the application of this Act or a transaction

related or possibly related to a predicate offense, whether the transaction was conducted once or more than once;

“properties related to an offense” means :

- (1) money or properties derived from a predicate offense, or from supporting or assisting in the commission of a predicate offense;
- (2) money or properties derived from the sale, distribution, or transfer in any manners the money or properties in (1); or
- (3) fruits of the money and properties in (1) and (2)

Notwithstanding how many times the properties in (1), (2), or (3) have been sold, distributed, transferred, or changed from, or have been found in whosever ownership, or have been transferred to whomever, or have been shown registered or recorded under whosever ownership.

“Financial institutions” means :

1. Banks
2. Trust and investment companies, credit and finance companies and securities enterprises
3. Industrial Fund Enterprise of Thailand
4. Saving Cooperative
5. Other institutions as designated in the Ministerial Regulations.

Definition of “money laundering offence” under section 5 of the Money Laundering Control Act 1999

Whoever

- (1) transfers, receives the transfer, or changes the form of properties related to an offense, for the purpose of concealing or covering up the sources of those properties, or for the purpose of assisting other persons before, while, or after the commission of the offense so that the offenders can avoid

the penalty or receive lesser penalty for the predicate offense; or

- (2) takes any actions in order to cover up or disguise the true nature of the manner of obtaining, location, sale, transfer, and rights of ownership, of properties related to an offense

Shall be deemed as having committed the offense of money laundering.

The following persons are required to report without delay to the Anti-Money Laundering Office, all transactions that are unusual, suspicious or in excess of a given amount fixed in the Ministerial Regulations :-

1. Financial Institutions
2. Land registration offices
3. Other persons in exercise of their profession carrying out, supervising or advising on transactions involving movement of capital.

The Money Laundering Control

Board mainly consists of :-

- Prime Minister as Chairman
- Minister of Finance as Vice-Chairman
- Permanent Secretary of Ministry of Justice
- Attorney-General
- Commissioner General of the Royal Thai Police
- Secretary General of Narcotic Control Board
- Governor of the Bank of Thailand
- Other nine members with expertise in economics, monetary matters, finance or law appointed by the cabinet etc.

The Anti-Money Laundering Office is subordinate to the Office of the Prime Minister and has the following powers and duties;

1. To carry out resolutions of the Money Laundering Control Board and Business Transaction Committee
2. To receive, collect and examine information on financial transactions

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3. To share information with the Court and other competent authorities for the purpose of investigating and prosecuting offenders
4. To develop training programs for concerned government and private sectors.

Special methods of investigation

The competent officials may apply to the Civil Court for an order authorizing;

- Placing bank accounts under surveillance
- Tapping telephone lines
- Accessing computer systems.

There shall be a Business Transaction Committee consisting of :-

- Secretary General of the Money Laundering Control Board as Chairman
- Other 4 members appointed by the Money Laundering Control Board.

Action on Properties (section 48-59)

The acknowledgement of the report may accompany an order by the Business Transaction Committee seizing or attaching suspicious properties for a period not exceeding 90 days.

All properties related to predicate offences must be forfeited irrespective of whether there is a convicted person and the properties will devolve to the Kingdom of Thailand.

Penalties (sections 60-66)

Whoever commits a money laundering offence shall be punished with imprisonment of one to ten years and a fine from between twenty thousand Baht to two hundred thousand Baht or both.

If the offender is a juristic person, he shall be punished with a fine from two hundred thousand Baht to a million Baht.

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GROUP 1

METHODS FOR OBTAINING INTELLIGENCE FOR INVESTIGATION OF MONEY LAUNDERING

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I. INTRODUCTION

Money laundering and those who engage in it have gone global and “pose a serious threat worldwide in terms of national and international security, as well as political, economic, financial and social disruptions.”¹ It is a formidable problem for the international community, a new form of geopolitics and one of the most pernicious forms of criminality of which the dimensions have yet to be fully measured and the impact fully determined.²

Since money laundering is the processing of the criminal proceeds to conceal their illegal origin, the objective of the launderer is to disguise the illicit origin of the substantial profits generated by the criminal activity so that such profits can be used as if they were derived from a legitimate source.³

It appears to be accepted that there are three phases or stages in the laundering process. The first is the placement, where cash enters the financial system. This is the choke point or the nerve center of the procedure, where the launderer is more vulnerable and the attempt to launder can easily be identified. The second stage is the layering where the money is involved in a number of transactions so that the tracing of the origin of the money is lost. Finally the third stage is integration, where money is mixed with lawful funds or integrated back into the economy, with the appearance of legitimacy. The thrust of this report is on the important first stage.

The United States of America implemented the first national and domestic initiative to counter money laundering.⁴ It is apparent however that in a time of globalization of financial

¹ Zvekic, “International Cooperation and Transnational Organized Crime” (1996) ASIL 537.

² See Report of the Secretary-General, 4 April 1996 at p.4; UN Press Release SOC/CP/179 20 May 1996; UNCPJ Newsletter nos. 30/31, Dec 1995 at p.5.

³ Countering Money Laundering: The FATF, The European Union and the Portuguese Experiences - Past and Current Developments, Dr. Gil Galvao - Paper presented at 117th International Senior Seminar, UNAFEI, Tokyo, at p.1.

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markets, it is not sufficient to have domestic measures to combat money laundering. It is paramount therefore that action against money laundering and measures to prevent it are universally applied.⁵

In 1988, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) was adopted and the incrimination of money laundering was included in an international treaty for the first time.

A. Financial Action Task Force

The Financial Action Task Force⁶ (FATF) was founded in 1989 by the G-7 Summit in Paris to examine ways to combat money laundering. It published a report in 1990 with forty Recommendations⁷ which were to become the standard by which anti-money laundering measures should be judged. In 1996 the recommendations were revised to reflect the changes which have occurred in the money laundering problem.

The relevant provisions within the broad ambit of intelligence are recommendations

⁴ The United States criminalized money laundering on October 27, 1986 by passing the Money Laundering Control Act of 1986.

⁵ See Footnote 3, supra, at p.5.

⁶ The FATF currently consists of 26 countries and two international organizations. Its membership includes the major financial center countries of Europe, North America and Asia. It is a multi-disciplinary body - as is essential in dealing with money laundering - bringing together the policy-making power of legal, financial and law enforcement experts.

⁷ The forty recommendations set out the basic framework for anti-money laundering efforts and they are designed to be of universal application. They cover the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation.

10-12, 14, 15, 19, 21-25, 28 and 29 respectively.⁸

B. Egmont Group of Financial Intelligence Units⁹ (Egmont Group)

Following the FATF Recommendations several countries put in place legislation to counter money laundering and established their Finance Intelligence Units (FIU). The Egmont Group which comprises of the FIUs' of the world, defined an FIU as

“A central national agency responsible for receiving (and, as permitted, requesting), analyzing and disseminating to the present 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.”¹⁰

⁸ For the full text of these recommendations please see appendix 1.

⁹ The Egmont Group meetings named after the Egmont-Arenburg palace in Brussels on April 1995, consists of countries that have operational Financial Units. The group currently consists of 53 countries including: Aruba, Australia, Austria, Belgium, Bermuda, Bolivia, Brazil, British Virgin Islands, Bulgaria, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Estonia, Finland France, Greece, Guernsey, Hong Kong, Hungary, Iceland, Ireland, Isle of Man, Italy, Japan, Jersey, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Netherlands, NL Antilles, New Zealand, Norway, Panama, Paraguay, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan, Turkey, United Kingdom, United States, Venezuela.

¹⁰ This definition was adopted at the plenary meeting of the Egmont Group in Rome in November 1996 and reaffirmed in the Madrid meeting.

In its statement of purpose¹¹ the Egmont Group, among other things, recognized the international nature of money laundering and realized that many governments have both imposed disclosure obligations on financial institutions and designated FIU's to receive, analyze and disseminate to competent authorities such disclosures of financial information. It is also increase the effectiveness of individual FIUs and contribute to the success of the global fight against money laundering.

The 18 countries represented in this seminar have different legal stages in combating money laundering and establishment of FIUs. A majority has draft proposals for legislation against money laundering. Countries such as Fiji, South Africa and Tanzania have legislation but short of an independent FIU although in each of these countries suspicious transaction reports (STRs) are either made to the police or the Director of Public Prosecution (DPP) by Financial Institutions and/or by persons conducting a business or who are in charge of a business undertaking.

C. UN Convention against TOC

In November 2000, United Nations Convention against Transnational Organized Crime was adopted by the United Nations General Assembly and it was opened for signature by member states in December 2000. It requires member countries among other things, as follows:

“Article 7, Paragraph 1

Each State Party:

- (a) *Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions ... which regime shall emphasize*

requirements for customer identification, record-keeping and the reporting of suspicious transactions;

- (b) *... shall consider the establishment of a financial intelligence unit to serve as a national center for the collection, analysis and dissemination of information regarding potential money-laundering.”*

D. Techniques of “Placement” of Illicit Funds into the Financial System

We submit that it is important in this report to identify the various techniques money launderers utilize the financial system to launder their money.

1. The Banking Sector

- (i) Banks remain an important mechanism for the disposal of criminal proceeds, though there appears to be a recognition by money launderers that obvious techniques such as depositing large sums of cash into bank accounts for subsequent transfer is likely to be reported to law enforcement authorities, and thus extra steps are being taken. The technique of “smurfing” or “structuring” was commonly used - this technique entails making numerous deposits of small amounts below a reporting threshold, usually to a large number of accounts.
- (ii) Accounts in false names or accounts held in the name of relatives, associates or other persons operating on behalf of the criminal. Other methods used to hide the beneficial owner of the property include the use of shell companies.

¹¹ Resolved in Madrid on 24 June 1997.

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- (iii) Use of “collection account”. Immigrants from foreign countries would pay many small amounts into one account and the money would then be sent abroad. Often the foreign account would receive payments from a number of apparently unconnected accounts in the source country.
- (iv) Use of “payable through accounts”. These are demand deposits account maintained at financial institutions by foreign banks or corporations. The foreign bank funnels all the deposits and cheques of it’s customers into one account that the foreign bank holds at the local bank. The foreign customers have signatory authority to the account as sub-account holders and can conduct normal international banking activities. The payable through accounts pose challenge to “know your customer” policies and STR guidelines.
- (v) Loan back arrangements in conjunction with cash smuggling. By this technique, the launderer usually transfers the illegal proceeds to another country, and then deposit the proceeds as a security or guarantee for a bank loan, which is then sent back to the original country. This method not only gives the laundered money the appearance of a genuine loan but also often provides tax advantages.
- (vi) Telegraphic transfers, bank drafts, money orders and cashier’s cheques are common instruments for money laundering.
2. Non-Bank Financial Institutions
Banks offer a wide range of financial products and hold the largest share of the financial market and accordingly the services they provide are widely used for money laundering. However, non-bank financial institutions and non-financial businesses are becoming more attractive avenues for introducing ill-gotten gains into regular financial channels as the anti money laundering regulations in the banking sector becomes increasingly effective. The channels used include:
- (i) Bureau de change, exchange offices or casa de cambio. They offer a range of services which are attractive to criminals such as:
 - (ii) Exchange services which can be used to buy or sell foreign currencies, as well as consolidating small denomination bank notes into larger ones;
 - (iii) Exchanging financial instruments such as traveler’s cheques; and
 - (iv) Telegraphic transfer facilities.
 - (v) Remittance services.
 - (vi) Use of hawala, hundi or so called “underground banking”.
3. Non-Financial Businesses or Professions
- (i) These include lawyers, accountants, financial advisors, notaries, secretarial companies and other fiduciaries whose services are employed to assist in the disposal of criminal profits.
 - (ii) Casinos and other businesses associated with gambling.
 - (iii) Purchase and cross border delivery

of precious metals such as gold and silver.

II. METHODS OF OBTAINING INTELLIGENCE

A. STR System

The objective of an STR system is to facilitate the detection of illicit proceeds of crime as it enters the financial system via the financial institutions, i.e. at the placement stage of the money laundering process. This is the “choke point” where money laundering is most vulnerable. It is important therefore that a legal checks and balance system is put in place to

- (i) legally recognize the STR system domestically in compliance with the FATF recommendations;
- (ii) exert obligatory compliance by financial institutions to the STR provisions;
- (iii) sanction non-compliance by financial institutions of the legal STR obligations; and
- (iv) safeguard the integrity of the financial system¹².

¹² A typical example is the BCCI (The Bank of Credit and Commerce International) case. Unlike any ordinary bank, BCCI was from its earliest days made up of multiplying layers of entities, related to one another through an impenetrable series of holding companies, affiliates, subsidiaries, banks-within-banks, insider dealings and nominee relationships. By fracturing corporate structure, record keeping, regulatory review, and audits, the complex BCCI family of entities was able to evade ordinary legal restrictions on the movement of capital and goods as a matter of daily practice and routine. Thus it becomes an ideal mechanism for facilitating illicit activity by others, including many governments’ officials whose laws BCCI was breaking.

BCCI’s criminality included fraud by BCCI and BCCI customers involving billions of dollars; money laundering in Europe, Africa, Asia, and the for

This requires a methodical and practical approach to the form of STR relevant to suit a given situation in each jurisdiction. For instance, the form of STR expected from a financial institution would vary from a law or accountant firm due to the nature of the transactions peculiar to them.

In this report we propose to examine the STR of financial institutions and briefly the FIU of Japan and a comparative glimpse of Hong Kong¹³ and the United States as well.

1. The Japanese STR System¹⁴ and FIU

In 1992, the STR system was first introduced into Japanese legislation by the enactment of the Anti-Drug Special Law. Subsequent to this, the Anti-Organized Crime Law was enacted in year 2000 which introduced a comprehensive STR system. The scope of predicate offence of money laundering was expanded to almost all organized crimes. Based on the law, the Japan Financial Intelligence Office (JAFIO) was established in the Financial Services Agency (FSA) as the Japanese Financial Intelligence Unit.

example, use of shell corporations. Americas; BCCI’s bribery of officials in most of those locations; support of terrorism, arms trafficking, and the sale of nuclear technologies; management of prostitution; the commission and facilitation of income tax evasion, smuggling, and illegal immigration; illicit purchases of banks and real estate and a panoply of financial crimes limited only by the imagination of its officers and customers.

It is important to note also that among BCCI’s principal mechanisms (techniques) for committing crimes are that which we noted at item 1.4 above,

¹³ See Appendix 4 for the guidelines issued by the Monetary Authority of Hong Kong to financial institutions for the prevention of money laundering.

¹⁴ See Appendix 2 & 3 for the standard form of STRs by financial institutions and the full text of a typical STR in Japan.

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At present, depository institutions (banks), insurance companies, securities brokers and other non-bank financial institutions are covered in the STR system. However, non-financial institutions or other relevant professionals (so called gatekeepers) are not covered. Compliance by financial institutions is mandatory but no legal sanction is provided for non-disclosure of STRs.

**B. Better quality STRs vis a vis
Know Your Customer Policy and
Rules**

In order to facilitate better quality and reliable suspicious transaction reports banks and other financial institutions should know their customers.

What does that mean?

- (i) Making every reasonable effort to determine the true identity and beneficial ownership of the accounts.
- (ii) Knowing the source of the funds.
- (iii) Knowing the nature of the customers business.
- (iv) Knowing what constitute reasonable account activity.

Why are bankers concerned?

- (i) Can they simply take people at face value?
- (ii) Who are they dealing with?
- (iii) Where do they come from?
- (iv) How do we prove this information accurate?
- (v) Where are we dealing with them?
- (vi) Why should we bother?

Why cannot they simply take people at face value?

Unfortunately, quite a lot of people are not honest. The net result could be a bad debt or fraud. More importantly being involved with criminals puts their reputation at risk.

Who are they dealing with?

The customer tells the banks who they are. It would be necessary to obtain evidence of identity-reliable-circumstantial-hearsay?

The customer gives and an address. Is it correct?

Verification would be necessary. How?

What if the customer:

- (i) Is a foreigner?
- (ii) A child?
- (iii) Wife?
- (iv) Housebound?

Where are we dealing with them?

Traditionally, a customer would be seen in person.

In the world of:

- (i) Postal banking
- (ii) Electronic banking
- (iii) Telephone banking
- (iv) Internet banking

What would be the situation?

Why should they bother?

To protect profits, reputation, obey the law and be the good citizens.

What are the implications for the authorities?

- (i) The need to recognize that in a very few countries there is a completely reliable identification system.
- (ii) The need to recognize that remote identification is here to stay.
- (iii) The need to keep ahead of the counterfeitor.
- (iv) Accept that there will be instances that identification cannot be proved absolutely.

Therefore, it could be said that identification is rarely certain and difficult to prove. This statement would also be true in relation to the place of residence or domicile. Thus the way ahead is closer partnership to reduce difficulties.

C. Recommended Guidelines for STRs

In the context of the report, the following guidelines are recommended.

1. Cash Transactions

- (i) Large deposits and withdrawals without rational reasons.
- (ii) Transactions frequently made in short periods of time and accompanied by large deposits and withdrawals without rational reasons.
- (iii) Transactions where large amounts of small-denomination coins or bills without rational reasons.
- (iv) Large cash deposits into night safe facilities or rapid increase of amount without rational reasons.

2. Opening of New Accounts

- (i) New accounts in fictitious names or in the name of other persons.
- (ii) Accounts that are suspected of having been opened in fictitious names or in the names of other persons.
- (iii) Accounts bearing the names of corporations that are suspected of never having existed.
- (iv) Customers who wish to have cash cards sent to destinations other than their addresses.
- (v) Customers who have tried to open accounts by mail-order without proper information.
- (vi) Customers who attempt to open multiple accounts without rational reasons.
- (vii) Customers who have no convincing reasons to make transactions at a particular branch.

3. Transactions through Existing Accounts

- (i) Accounts that have been used for large deposits and withdrawals during a short period of time after their opening and have then been closed or discontinued for any other transactions without rational reasons.
- (ii) Transactions where large deposits and withdrawals are made frequently without rational reasons.
- (iii) Accounts with frequent remittances to a large number of people without rational reasons.
- (iv) Accounts that customers use for receiving frequent remittances from a large number of people without rational reasons.
- (v) Accounts that have not been active for a long time and suddenly experiences large deposits and withdrawals without rational reasons.
- (vi) Transactions those are unusual from the viewpoint of economic rationality.

4. Trading in Bonds and/or Other Securities

- (i) Transactions where customers bring in large amounts of bonds and/or other securities to sell them for cash without rational reasons.
- (ii) Customers settle trading in bonds and/or other securities with checks drawn by/or remittances from third parties without rational reasons.
- (iii) Customers attempting to buy large amounts of bonds for cash or checks and then request to receive bond certificates while refusing to use depositary services without rational reasons.

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5. Transactions Related to Safekeeping Deposit and Safety Boxes

- (i) Customers use safety box facilities frequently without rational reasons.

6. Cross-border Transactions

- (i) Customers who provide information which is suspected of being falsified or ambiguous information.
- (ii) Customers make frequent large overseas remittances within short periods of time without rational reasons.
- (iii) Customers send large overseas remittances for economically unreasonable purposes.
- (iv) Customers receive large remittances from abroad that are economically unreasonable.
- (v) Customers frequently order or encash large amounts of traveler's or remittance checks without rational reasons.
- (vi) Customers who are based in jurisdictions which do not cooperate with international anti-money laundering efforts or are shipping illegal drugs.
- (vii) Customers carry out with parties based in NCCTs (Non-Cooperative Countries and Territories¹⁵) or jurisdictions which are shipping illegal drugs.
- (viii) Customers introduced by parties based in NCCTs or jurisdictions which are shipping illegal drugs.

7. Loan Transactions

- (i) Customers unexpectedly make repayments of overdue loan.
- (ii) Loan applications where borrowing customers put up assets

held by third parties as collateral.

8. Other Transactions

- (i) Customers who jointly visit a bank branch and request different tellers to make large cash or foreign exchange deals.
- (ii) Customers who refuse to explain reasons or submit information when requested to verify the intended beneficiary.
- (iii) Transactions that are made by employees of banks or their relatives to benefit parties that are unknown.
- (iv) Transactions where employees of banks are suspected of committing crimes.
- (v) Transactions where deposits are made with forged or stolen money or securities and the customers are suspected of knowing that the money or securities are forged or stolen.
- (vi) Customers who unusually emphasize the secrecy of the deals, and customers who attempt to ask, force or bribe bank officials.
- (vii) Transactions that are identified as unusual by bank officials based on their knowledge and previous experience, and transactions involving customers whose attitudes or actions are identified as unusual by bank officials.

III. OTHER METHODS OF INTELLIGENCE¹⁶

Apart from STRs detected through the financial institutions, there are other methods of intelligence to detect money laundering offences. These include:

¹⁵ These are countries identified by FATF to have insufficient laws and regulations to assist in the fight against money laundering.

¹⁶ Some of the methods mentioned in this sub topic are also canvassed by Group 3 in their report.

A. Private Informers

The use of private informers could serve as a useful source of intelligence in money laundering investigations. However, one should expect the perils of using private informers as a source of intelligence in investigation. It is most prudent if possible to maintain the anonymity of these informers. The disclosure of their identity and the nature of information may risk the truth seeking mission of the criminal justice systems in using rewarded criminals as witnesses.

B. Surveillance (Electronic/Cyber)

Interception of private communication is a commonly used method of intelligence gathering. The use of electronic devices and computers feature a common tool in these operations. The use of persons in surveillance could also be described as another means in this regard. The wire tap as it is commonly known may not be recognized as a legitimate source of intelligence in certain jurisdiction however it is believed to be used widely as a source of intelligence gathering in investigation.

C. Undercover Operations

The courts¹⁷ have long upheld the validity of undercover operations as a means of intelligence gathering in investigation. The conduct of personnel in this operation must be that which does not violate fundamental fairness and does not impeach the fundamental rights of individuals.

D. Information derived from a Criminal Investigation

This source is derived through interrogation. The usage of interrogation in criminal investigation would in certain instances serve to alert the investigator about sources that target intelligence in regard to other crime. No one person is

likely to know the full extent of criminal enterprise. Therefore these interviews of different persons in criminal investigation could contribute as a source of intelligence gathering with regard to further criminal activity.

IV. PROBLEMS IN THE FUNCTIONING OF FINANCIAL UNIT AND PROPOSED SOLUTIONS

Financial Intelligence Units are functioning in some countries like United States of America, Japan, Hong Kong, etc. envisaged in their statutes to combat money laundering. Various problems have been experienced in it's functioning to make it a potent weapon against this crime. Money laundering has become a global phenomenon with the help of modern technology and it needs a global effort to combat it. Some major problems to fight this menace are enumerated here.

A. Lack of Relevant Legislation to Criminalize Money Laundering

A number of countries do not have the legislation to criminalize money laundering. All such countries need to make enactments in this connection to make this global effort successful. International pressure also needs to be brought on such countries to take immediate steps in this direction.

B. Absence of FIU

Some countries have the legislation to fight against money laundering but they have not created FIU. Fiji is an example where money laundering legislation exists but there is no FIU to build financial intelligence system. Such countries need to create FIUs expeditiously suitable to their situation in order to fight money laundering effectively.

¹⁷ As in the Operation Casablanca case.

C. Limited Scope of FIU

There are countries like Japan which have the required legislation and FIU but their STRs are limited to only banks and financial institutions. Transactions relating to real-estate, luxury cars, jewelers are not covered. In some countries, post-offices also conduct financial transactions just like banks. Real estate transactions are made through lawyers and attorneys. A significant part of illegal money is laundered through real-estate transactions. Similarly accountants, money-changers, businesses and trades can also be required to submit STRs to FIU to broaden the scope of FIU and facilitate analysis. Each country can think of broadening the scope of FIU according to its situation and requirement.

D. Improper Analysis of STRs

In most cases, receiving the STRs from banks and financial institutions without other relevant information about the transaction and proper analysis does not serve a useful purpose in identifying and detecting that the transaction relates to money-laundering. FIUs need to have access to wider data-bases of enforcement agencies like police, anti drug-trafficking enforcement agencies, anti-corruption agencies, customs and income-tax departments in order to analyze the STRs meaningfully.

The system of submission of STRs to FIUs and analysis by FIUs need to be computerized with the help of suitable software to make the job of analysis meaningful. Sometimes it may be necessary for analysis purposes to have additional information about the nature of the transaction and the persons involved in the transaction. For this purpose, FIU should have the authority to access further information from banks, financial institutions and law enforcement authorities.

E. Quality of STRs

Banks and financial institutions may find it difficult to identify as to which transaction is suspicious and which is not. In an attempt to overcome this difficulty, for instance, the USA has adopted the threshold approach in addition to STR system. Their legislation provides that cash transactions of \$10,000 and above should be reported to the FIU and the concept of Currency Transaction Report (CTR) was introduced. This approach results in receiving large number of CTRs which makes the process of identifying a suspicious transaction and analysis difficult. However, an accessible database was created for law enforcement authorities.¹⁸

In the case of Costa Rica, record keeping by financial institutions in a prescribed form is also undertaken on a threshold basis for access by law enforcement authorities when necessary.

Another approach may be proper education and training of personnel of banks and financial institutions in identifying suspicious transactions. Countries like Japan and Hong Kong have issued detailed guidelines to banks and financial institutions as to which transactions are to be suspected. There is also a necessity of monitoring banks and financial institutions and ensuring that they comply with instructions and guidelines regarding submission of STRs. In Hong Kong, a bank official has been designated as a compliance officer who monitors that guidelines are enforced. The experience has been found to be useful and can be useful for adoption by other countries.

¹⁸The Financial Crimes Enforcement Network (FinCEN) is the US FIU. It has a large data base that is accessible by law enforcement authorities and likewise, FinCEN can access their data bases.

F. Absence of Sanctions for Non-Disclosure of STRs

The provision of sanctions for non-compliance of guidelines to submit STRs by banks and other financial institutions need to be made in the relevant statute. Some countries do not have any criminal sanction for non-compliance. Each country should provide appropriate sanction for non-compliance in its legislation.

G. Extension of STRs to Non-Financial Institutions

STRs need to be broad based in order to fight money laundering. It has been found in countries where legal provisions for mandatory reporting to FIU exist that money launderers have turned to alternative avenues of money laundering due to tightening of controls in financial sectors. Legal provisions can be made to bring in the gate-keepers (lawyers and accountants), tax advisors, real-estate agents, dealers in high value goods and casinos etc. requiring them to file STRs.

Gate-keeper is a new anti-money laundering jargon and defined as someone who is responsible for allowing someone else access to a field although he does not own the gate or the field. They provide several services that may open the “gate” to financial transactions, management of deposits or securities accounts, real-estate transactions, investment services, company formation, creation of trusts and financial and tax-advice. This is a delicate and controversial issue and a balanced approach needs to be adopted reconciling requirements of professional secrecy and fight against money laundering.

The dividing line may be ascertaining the legal position for a client or representing a client in a legal proceeding and participation in a financial transaction involving money laundering. Here again, the problem of identification of a particular

transaction being suspicious by persons and institutions may arise. The solution may be found either in threshold approach or public education and awareness. It will depend on each country to adopt a particular approach or a combination according to its own conditions.

The European Union had brought in a directive in 1991 making STRs by financial institutions mandatory which came into effect in 1993. It has now brought an amendment to this directive in the year 2000 that the above-mentioned gate-keepers, business and trade-institutions should also be brought in the ambit of mandatory reporting of suspicious transactions.

In addition to STR, the USA also has provisions of filing CTR by casinos and Internal Revenue Service (IRS 8300) by trades and businesses. A Currency Monetary Instrument Report (CMIR) is required to be filed to customs authorities whenever money is transported in or out of the country.

V. CONCLUSION

It should be noted that a good number of jurisdictions do not have anti-money laundering legislation and do not have a Financial Intelligence Unit system. They should be encouraged to enact legislation in this contest and take constructive measures to set up suitable Financial Intelligence Units.

The jurisdictions who possess necessary legislation to tackle the laundering problem should identify and be mindful of deficiencies money in their systems and take appropriate measures to remedy the situation.

It would also be appropriate to suggest that suitable public awareness programmes

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be set up to educate both official and the general public in the sensitivities to the working of the anti-money laundering system.

Relevant jurisdictions should also take note of all matters discussed above and adopt appropriate recommendations with regard to the solutions discussed.

GROUP 2

COMPONENTS AND LEGAL FRAMEWORK FOR COMBATING MONEY LAUNDERING, CURRENT SITUATION, PROBLEMS AND SOLUTIONS FOR ASSET CONFISCATION SYSTEM

Chairperson	Mr. Meinrado P. Paredes	Philippines
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Co- Rapporteur	Mr. Ahmad Zaidi Bin Ibrahim	Malaysia
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I. INTRODUCTION

Rapid globalization and economic development has opened up new opportunities for pursuing more fulfilling lives. On the other hand, it has also created new opportunities for criminal exploitation, challenging the basic rules of our social, economic and political systems. In recent years, crime has become increasingly international in scope, and the financial aspects of crime have become more complex, due to rapid advances in technology and globalization of the financial services industry. Money laundering is an indispensable element of organized crime, narcotics trafficking, terrorist activities or arms trafficking. It is necessary for all the nations to enact the necessary laws and regulations to effectively combat money laundering. One such method is the establishment of an effective confiscation system.¹

Traditionally, nations concentrated only on crimes not on proceeds. Consequently, existing laws are inefficient to trace and confiscate proceeds of crime. Legal provisions for confiscation of the proceeds generated from all types of serious crimes is the main tool to fight against money laundering. Therefore, the focus of anti-money laundering legislation should include a strong confiscation provision. This group has identified problems relating to the tracing, freezing and the confiscation of illegal proceeds and suggests that strong legislative and administrative measures must be enacted to create an effective confiscation system. This paper will examine the following issues concerning confiscation:

¹ Article 1(f) of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (Vienna Convention), and Article 2(g) of the UN Convention Against Transnational Organized Crime define confiscation as the permanent deprivation of property by order of a court or other competent authority.

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- (i) The current situation in participating countries as well as other countries;
- (ii) Identification of common problems;
- (iii) Identification of possible solutions.

Prior to discussing these issues, however, it is first necessary to examine the current international standards concerning the creation of an effective confiscation system.

II. INTERNATIONAL STANDARDS

A. 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)

The scope of the Vienna Convention was to promote co-operation among the parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances. To comply with their obligations under the Convention, the parties must take such legislative and administrative measures which criminalizes all forms of narcotics trafficking, drug-related money laundering and provides for the confiscation of property derived from such drug-related crimes.

Article V of the Vienna Convention details the obligations of the parties to seek confiscation of drug trafficking and money laundering proceeds, as well as the instrumentalities used to commit such offenses. It mandates each signatory country to enact laws with domestic and international confiscation application. Article V requires parties to the convention to enact domestic confiscation legislations enabling the party in question to locate, freeze, and confiscate all kinds of property derived from, or used in, drug trafficking or drug money laundering. It also requires each party to provide assistance to another

country by identifying, tracing, seizing, freezing, or confiscating any property or proceeds which were derived from, or used in, drug trafficking or drug money laundering and which may be located in their country. Furthermore, Article V provides that bank secrecy laws must not serve as a barrier to domestic and international asset confiscation investigations.

B. The Forty Recommendations of the Financial Action Task Force (FATF)

The FATF is an international working group whose purpose is the development and promotion of policies to combat money laundering. These policies aim to prevent such proceeds from being utilized in future criminal activities and from affecting legitimate economic activities. The FATF requires each country to take necessary measures to criminalize money laundering for all serious crimes. The determination of what constitutes serious crimes and what will be designated as money laundering predicate offences is left to each country to decide.

In Recommendation 7, the FATF identified and recommended confiscation as one such measure to combat money laundering. It recommended that countries should adopt measures similar to those set forth in the Vienna Convention to enable their competent authorities to confiscate property actually laundered or traceable thereto, instrumentalities used in, or intended for use in the commission of any money laundering offence, or property of corresponding value, without prejudicing the rights of bona fide third parties. Such measures to confiscate should include the authority to:

- (i) Identify, trace and evaluate property which is subject to

- confiscation;
- (ii) Carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; and
 - (iii) Take any appropriate investigative measure.

C. 2000 United Nations Convention Against Transnational Organized Crime

The purpose of this Convention is to promote international co-operation to prevent and combat transnational organized crime more effectively. Article 12 of the Convention explicitly deals with the seizure and confiscation of proceeds of crime. It restates the requirements contained in Article V of the Vienna Convention but extends seizure and confiscation to other serious crimes.

III. REVIEW OF CURRENT SITUATION IN COUNTRIES

From the countries' reports and discussion, it was determined that Bangladesh, Cambodia, Costa Rica, Kenya, Malaysia, Nepal, Oman, Pakistan, Sri Lanka and Tanzania have enacted laws to confiscate the proceeds of drug trafficking, and a few have additionally extended their laws to confiscate the proceeds of other crimes such as bribery and other forms of corruption. The penal laws in Papua New Guinea and the Philippines provide for the confiscation of the proceeds of all crimes. However, these laws are inadequate as they do not apply to converted or transferred assets. Additionally, all the above named countries have not criminalized money laundering for all serious crimes.

Canada, Fiji, Germany, Hong Kong, Japan, Portugal, Republic of Korea, South Africa, Thailand and the United States have enacted anti-money laundering legislation which extends to all serious

crimes. These countries have comprehensive confiscation regimes which allow for the confiscation of the proceeds of drug trafficking and other serious crimes as well as the confiscation of instrumentalities used to facilitate the crime.

While all the above listed countries have provisions for criminal confiscation based on conviction, Malaysia, South Africa, Thailand and the United States additionally have civil *in rem*² confiscation procedures.

IV. PROBLEMS RELATING TO THE CONFISCATION OF PROCEEDS

The group identified the following general and specific problems relating to confiscation measures to fight against money laundering. Upon review of the legal provisions of participating countries, it was determined that while all the participating countries have confiscation laws, most countries' laws are insufficient and ineffective in the fight against money laundering.

A. General Problems

1. Lack of Awareness

In many of the countries, there is a general lack of awareness among the general public and particularly among lawmakers, law enforcement officials, and judges concerning the gravity and adverse effect of money laundering.

² Civil *in rem* confiscation proceedings are brought against the property and do not depend upon the conviction of the wrongdoer. The government must prove the basis of the confiscation action by a preponderance of the evidence, after which the burden shifts to the claimant to defend his or her interest in the property.

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2. Lack of a Strong Political Will

The increasing concentrations of wealth among criminal groups in a number of jurisdictions is a concern not only because of the impacts on investments, real estate values, legitimate commerce and government integrity, but also because these organizations have the wealth to make large campaign contributions to candidates who may then assist them in their criminal activities. A government elected with the help of such money generally loses the political will to enact strong anti-money laundering and confiscation legislation. Illicit funds and corrupt officials represent a continuing threat to democracy in virtually all regions of the world.

B. Specific Problems

1. Narrow scope of application of confiscation laws

In most of the participating countries, confiscation is only available for the proceeds of narcotics trafficking. In addition, only a few of the participating countries have legislation which criminalizes money laundering for the proceeds of all serious crime and which would extend confiscation to such proceeds. Because of the narrow scope of the countries' confiscation laws, successful confiscation actions have been limited in numbers.

2. Standard of Proof

In many countries, criminal confiscation is the only basis for confiscation. Therefore before any confiscation can occur, a defendant must be charged and convicted of a crime. The burden of proof in criminal cases requires the government to prove its case beyond a reasonable doubt. Because a conviction is necessary before confiscation can be effected in most countries, it is sometimes difficult to achieve. In many of the countries, the rate of conviction is very low. Sometimes, even though a defendant

cannot show any legal source for his assets, the confiscation will fail because the government has insufficient evidence to prove guilt. Additionally, most criminal forfeiture systems contain no means for confiscating the illegal assets of a criminal who has absconded or died.

3. Implementation Problems

A Study of the situation of the various countries also shows that despite having some confiscation provisions, their effective implementation has been lacking. In most of the countries, there are no prosecutions for money laundering or confiscation. Most of the implementation problems are related to a country's ability to identify, trace, freeze and confiscate the proceeds of crime both pre-trial and post conviction. The following causes were determined to hinder the implementation of confiscation laws.

(a) *Strong Bank Secrecy Laws*

In countries like the Philippines, there is a strong bank secrecy law which cannot be pierced for law enforcement purposes. Because of this, investigating authorities cannot identify or trace illicit monies for confiscation.

(b) *Lack of Reporting Obligations of Financial Institutions as Regards Suspicious Transactions*

In most of the participating countries, there is no provision mandating financial institutions to report suspicious transactions. Consequently, the investigating authorities do not receive the necessary information which would alert them to the possible existence and location of illegal assets.

(c) *Lack of Financial Intelligence Units*

Criminals are increasingly using sophisticated methods to hide their illegal proceeds. Without the assistance of a financial intelligence unit to analyze suspicious transaction reports and

facilitate financial investigations, most illegal assets cannot be identified and consequently are not confiscated.

(d) *Lack of Procedural Laws*

Additionally, it was determined that in some countries, there is a lack of procedural laws to satisfactorily give effect to confiscation. In many countries, for example, the property laws create an equal property right of the father, mother and sons over the ancestral property. If one member of the family is involved in criminal activity and has used the common property for facilitating his/her criminal activities, naturally, it is unfair to confiscate the entire common property. The property rights of those family members who did not know of the criminal use of the property should not be affected. Because of the difficulty in determining which part of the property should be confiscated, confiscation claims usually fail. Thus, because the procedural law has no means to satisfactorily divide the property, it is impossible to execute a confiscation order.

(e) *Lack of Proper Provisions for International Co-operation*

Even those countries which have confiscation laws often are unable to fully implement the law because there is no provision for international co-operation. In many instances, illegal proceeds have been transferred to another country and without assistance from that country, the proceeds cannot be confiscated. However, if the country in which the assets are located does not have the ability to provide such international assistance, the confiscation action will fail.

V. SOLUTIONS TO IDENTIFIED PROBLEMS

A. Increase Awareness Concerning Money Laundering

Substantive efforts should be made to raise the public awareness concerning the dangers of money laundering to the national security of a country. This can be accomplished through the publication of informative articles in local newspapers, the conducting of seminars for lawmakers, judges, law enforcement officials and private sector persons and ultimately, in the investigation and prosecution of money launderers.

B. Need for a Comprehensive Proceeds of Crime Law

Those countries which only have a limited confiscation system should enact a comprehensive law to confiscate the proceeds of serious crime. It is suggested that developed countries should provide assistance to those countries in the drafting of such new legislation as well as provide financial and technical assistance to create an infrastructure for the effective implementation of the confiscation laws. Furthermore, where countries are unwilling to enact and implement such laws, the international community must exert pressure through the use of countermeasures against such non co-operating countries. An effective confiscation law should include the following provisions.

1. All Serious Crimes to be Included

All countries should include provisions within their law which allow the confiscation of proceeds from serious crimes³. However, it is recognized that each country will determine those crimes to be designated as serious. It is suggested that certain crimes be included in such definition such as, drug trafficking, human and arms trafficking, terrorism, corruption,

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fraud and other transnational organized crimes.

2. Provisional Measures

Any confiscation law should provide for the pre-trial freezing or seizure of assets. If any individual or organization or company is suspected of engaging in an illegal transaction with the proceeds of crime, the competent authority must be given the power to demand particulars of the accounts of such persons and if necessary, to freeze and/or seize the identified assets prior to trial.

3. Types of Property to be Confiscated

In some countries, only the proceeds which are located with or in the name of an accused can be confiscated. In other countries, intangible property cannot be confiscated nor can the property generated from the proceeds be confiscated. Difficulties are also experienced concerning the confiscation of instrumentalities, mixed property (illegal property mixed with the legal property) and other property which facilitates the concealment of illegal property. A comprehensive confiscation law should provide for the confiscation of the following types of property:

- (i) All movable, immovable, tangible, intangible, claim rights, and securities;
- (ii) All property that is proved to be proceeds or traceable thereto, even

if it is registered in other's name so long as the owner is not an innocent owner or a bona fide purchaser for value;

- (iii) All instrumentalities including real estate, vehicles, and machinery which have been used or intended to be used in the commission of a crime;
- (iv) Any proceeds which have been mixed with other legal property to the extent of the value of the illegal property;
- (v) Interest and profit generated from the proceeds.

4. In rem Confiscation

In some countries like the United States, there is a provision under which, in certain instances, property can be confiscated even without conviction. This type of confiscation is difficult for many countries to accept. However, as has been stated earlier, in many of the developing countries, the conviction rate is very low thus prohibiting the confiscation of most illegal assets. Consequently, adoption of such in rem confiscation measures is suggested if the legal system of a particular country permits.

5. Legal Presumptions

If a country's domestic legal systems allows, a defendant should be required to prove the lawful origin of the alleged proceeds of serious crime or other property liable to confiscation.⁴

³ The UN Convention Against Transnational Organized Crime in Article 2(1)(a) requires the confiscation of the proceeds of offences covered by the Convention. The offences mentioned are organized crimes, money laundering, corruption, and obstruction of Justice. (See Articles 5, 6, 8 and 23). The Convention also defines serious crime as conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

⁴ See Vienna Convention, Article V(7) and Convention Against Transnational Organized Crime, Article 12(7).

C. Enhancements for Effective Implementation

Effective implementation is still a problem in most countries. The following measures are suggested to enhance effective implementation.

- (i) Bank secrecy laws must be amended to allow law enforcement agencies to obtain information concerning the location of the proceeds of crime.⁵
- (ii) Financial institutions must be required to report suspicious transactions.⁶
- (iii) A Financial Intelligence Unit should be established to analyze suspicious transaction reports and assist in financial investigations.

D. Disposition of Confiscated Property

In some countries, all or a portion of confiscated assets are segregated to be used to enhance law enforcement capabilities. However, other countries believe that such confiscated assets should be returned to the general treasury. It was concluded that each country should determine the proper use of such property according to their respective laws.

E. International Co-operation

Major drug traffickers and other criminals often hide their illicitly generated proceeds outside the country where they commit their crimes. Thus, one country's confiscation efforts, however effective and comprehensive, may not be enough to take the profit out of transnational crime. For confiscation laws to work effectively, countries must apply and enforce their domestic confiscation measures

consistently and must pursue the confiscation of illegal assets found abroad.

Recognizing the diversity of legal systems among nations, the Vienna Convention⁷ and the Convention Against Transnational Organized Crime provide that a requested country may seek the forfeiture of property at the request of another country in one, or both, of two ways. The requested country may initiate its own forfeiture proceedings against the property in question using the evidence provided by the requesting country. Alternatively, the requested country may give full faith and credit to a forfeiture judgment rendered by the competent authorities of the requesting country.

The sharing of confiscated assets among countries serves to create an incentive for future cooperation and often provides the means for a country to assist in the investigation, tracing, freezing, seizing and confiscation of illegal assets. The means to effect a request for assistance in the freezing, seizure and confiscation of illegal proceeds and asset sharing should be determined through multilateral or bilateral agreements among countries.

VI. CONCLUSION

To combat money laundering, participating countries should have strong substantive and procedural laws against it. Effective asset confiscation is a critical tool of modern law enforcement. Through asset forfeiture, governments can take both the profit out of crime and disrupt criminal activity by forfeiting the property that makes the crimes possible. In this way, law enforcement is not limited to arresting and prosecuting criminal offenders, but can also attack the economic underpinnings of crime and make restitution to victims.

⁵ FATF Recommendation 2.

⁶ See FATF Recommendation 15 and Convention Against Transnational Organized Crime, Article 7.

⁷ See Article V.

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However, as criminal activity becomes increasingly transnational, international cooperation has become a law enforcement imperative. Only through such international cooperation, can nations hope to win the fight against transnational organized crime.

GROUP 3

CURRENT SITUATION, PROBLEMS AND SOLUTIONS FOR SPECIAL INVESTIGATIVE TOOLS IN COMBATING MONEY LAUNDERING

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I. INTRODUCTION

Money laundering, which briefly means “making dirty money look clean”, occurs in every crime where there is a financial motive. The problem of laundering money derived from illicit trafficking in drugs, as well as other serious crimes, has become a global threat to the integrity, reliability and stability of financial and trade systems and even government structures. This growing threat requires countermeasures by the international community as a whole, in order to deny safe havens to criminals and their illicit proceeds. The proceeds of crime, particularly cash, are laundered for reinvestment. This involves a series of complicated financial transactions i.e. wire transfers, purchase of money orders or cashiers cheques, underground banking etc, which ultimately results in criminal money become “clean” and accepted for legitimate business purposes.

Over the past few years, we have witnessed the benefits of industrialization and globalization of transport and

communication. However, on the negative side we see criminals crossing borders with an ease unknown in the past and are expanding their area of criminal activity and become ever more intelligent and organized. To meet the threats posed by domestic and transnational organized crime and to enhance law enforcement's ability to succeed in combating money laundering, we need national and international combined efforts.

It may also be noted that the newly emerging forms of multilateral cooperation among law enforcement agencies is, on the one hand, necessitated by globalization of crime, but, on the other hand, it encounters problems due to the insufficiency of laws and regulations which would enable fuller application of modern technology as an instrument of special investigation techniques.¹

In proving money laundering offences it is important to prove the link between the money laundering offence and the fact that the criminal was aware that the proceeds

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had been obtained illegally. Through the continuous surveillance of these offences we will also be able to effectively investigate and prove the money laundering offences.

In this paper we intent to examine the three special investigation techniques namely (i) controlled delivery (ii) electronic surveillance (wiretapping etc.); and (iii) undercover operations as effective weapons in combating money laundering. In this regard our discussion will cover a brief analysis of each of the three investigative techniques. We shall also explore the legal framework and identify current problems encountered in the use of these tools in facilitating the investigation of money laundering. Finally, we shall recommend albeit briefly, the use of the above mentioned investigation techniques and call for change of provisions of domestic laws.

II. CONTROLLED DELIVERY

A. Introduction

In terms of Article 2(i) of the United Nations Convention Against Transnational Organized Crime, controlled delivery shall mean the technique of allowing an illicit or suspect consignment to pass out of, through or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.² This is done for the purpose of furthering the investigation of an offence and the possible identification of persons involved in the commission of the offence.

It is an investigative technique which has been known for years as an internationally and domestically accepted method for the monitoring and the combating of crimes including money laundering and predicate offences such as drug trafficking, illegal firearms, smuggling, stolen motor vehicle etc.

There are two methods of controlled delivery namely live control delivery and clean controlled delivery. If the illegal goods or surrogates, at least in part, arrive at their final destination it is called live control delivery. Where the circumstances of the detection and concealment are as such, that it is possible to remove all or most of the illegal goods and substitute counterfeit illegal goods before allowing the consignment to proceeds, a clean controlled delivery can be made. If the final destination of the consignment is within the frontiers of the country in which the initial detection occurred, "Internal Controlled Delivery" is possible. If the intended final destination of the consignment is in a country other than that where the initial detection was made, there is the potential for an "External Controlled Delivery".³

An example of a clean control delivery in a money laundering investigation can be found in 'Operation Mule Train', an undercover operation which was conducted in the United states. On July 1, 1998, the Chief Financial Officer, President, and Vice President of Supermail International, Inc., cheque cashing company, were arrested on money laundering charges stemming from a two-year investigation conducted by the Los Angeles office of the FBI and the Los Angeles Police Department. According to corporate filings, the company was one of

¹ Statement of Slawomir Redo at the Central Asian Seminar on TOC, 22-23 March 2000.

² Art 2 of the UN Convention against Transnational Organized Crime: September 2000

³ PD Curring: The technique of controlled delivery as a weapon in dealing with illicit traffic in narcotic dugs and psychotropic substance: 2000/06/07/

the largest cheque enterprises operating in the western U.S., and purported to be one of the leading U.S. money transfers agents providing services to Mexico and Latin America. It was considered a significant and growing company among the increasing number of independent non-bank financial institutions operating in many inner-city neighborhoods where banks have reduced their presence.

The three executives, along with six other employees and associates, were arrested after a federal grand jury returned a 67-count indictment against 11 defendants, including the Supermail corporation, charging multiple conspiracies, money laundering, evading currency reporting requirements, aiding and abetting, and criminal forfeiture. The initial target of the investigation was a company store in Reseda, California. Investigators, working in an undercover capacity, approached the manager, who agreed to launder “drug” money in exchange for a cash fee. The undercover officers then delivered cash which he represented to be drug proceeds to the managers and he converted the cash into money orders issued by the company. As larger sums were launched, the manager sought the assistance of his associates working at other store locations. When a new manager took over operations at the Reseda store in April 1997, he brought in the company’s corporate officers, including the CEO, the President and the Senior Vice President. Pocketing the cash fee, the corporate officers authorized the issuance of money orders and the wire transfers of large sums of “drug” money to a secret bank account in Miami, Florida while the cash was used to maintain operations at the company stores.

To avoid detection by law enforcement, no Suspicious Activity Reports (SAR) forms of Currency Transaction Reports (CTR)

were filed by the company for any of these transactions; however, SAR forms and CTR’S were filed by the banks into which the cash deposits were made, and these filing significantly enhanced the value of other information received. In total, the defendants laundered over \$3.2 million dollars of “drug” money. The investigation is believed to be one of the largest money laundering “sting” operations targeting a cheque cashing business in U.S. history.⁴

B. Common Issues and Problems

In many countries the controlled delivery technique is used as a method for conducting criminal investigation but there is no specific legal authorization provided in the domestic laws. In those countries, controlled delivery operations are conducted in accordance with departmental guidelines in the relevant law enforcement agency i.e. police, prosecutors, customs etc. These authorities have employed the technique mainly in the fight against money laundering, drug trafficking, illegal firearms, stolen properties trafficking and human trafficking. However, as criminals employ modern technologies to assist in their criminal activities, there is a need to enact new laws which allow law enforcement to use the same modern technologies in their investigative techniques.

Due to the economic and technological gap between developed and developing countries, there is often a lack of resources such as skilled personnel and modern investigation equipment for evidence collection. This, in a way, affects the efforts made in combating money laundering. Certainly combating money laundering requires resources both physical and human. Controlled delivery as an effective investigative tool is being used in many

⁴ Susan L Smith: Money Laundering: Trends and Techniques: February 2, 2001

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countries. However, law enforcement agencies are reluctant to reveal their use of this investigative technique as not to tip off criminals.

C. Proposed Solutions

Money laundering and other predicate offences such as drug trafficking, fire arms smuggling, corruption, fraud, extortion etc. are extremely difficult to detect. It, therefore, requires not only a high level of skill, professionalism, team work and cooperation, but also as a special investigative technique. In this regard, the following points may be considered in a controlled delivery operation :

- (1) Those controlling the operation must make sure the information does not leak as premature publicity will render controlled delivery operation useless.
- (2) Whenever possible, removal of illegal goods such as drugs, firearms etc should be made and a harmless substance substituted. It should be noted that "clean controlled delivery" eliminates not only the risk of illegal goods being lost but also gives greater freedom in organizing surveillance and reduces the risk of alarming the criminals who may have arranged counter surveillance.
- (3) The ultimate delivery of the consignment should be made with the cooperation of the firm that would normally make such a delivery. A law enforcement officer posing as a driver's assistant should travel with the delivery vehicle which should be monitored by other operation team members who will take the necessary evidence such as fingerprints, photographs etc.

(4) In case there will be need for external control delivery there are additional factors which will have to be considered including:

- (i) The legal provisions in force in the detecting country and the country of destination.
- (ii) Whether there is sufficient time to develop an acceptable action plan between the law enforcement agencies in the detecting country and the country of destination.
- (iii) Whether the authorities in the country of destination are able to launch an operation given the identification and detection principles.⁵

II. ELECTRONIC SURVEILLANCE

A. Introduction

Criminal investigations are becoming increasingly more difficult as criminals use advanced technologies and more sophisticated methods to commit their crimes. In order for investigators to keep pace, they must use sophisticated investigative techniques. One extremely successful technique has been electronic surveillance, both silent video surveillance and interception of wire, be it oral or electronic communication. In fact, recording criminals talking about their crimes in their own voice not only helps to prove a case against them but also enables law enforcement authorities to learn of conspirator's plans to commit crime and lay a trap to prevent the occurrence of violent crimes.

Electronic surveillance can be defined simply as the interception of oral or

⁵ See Footnote 3, supra P4

electronic communication through wire, telephone, computer etc. in order to listen and record information by using technical means. Electronic surveillance can effectively be used in cases such as money laundering, drug trafficking and extortion.

B. Common Issues and Problems

The major problem in the use of this technique is the need to strike a balance between the investigation of the criminal activity and the constitutional rights of the individual i.e. a persons' reasonable expectation of privacy. In an effort to strike such balance the domestic legislation of various countries prohibits any unauthorized electronic surveillance.

However, there are established requirements for obtaining authority to make such interceptions. A warrant authorizing electronic surveillance of oral, wire- and electronic communications as well as silent video can only be issued by a judge. For example in the United States, law enforcement officers are required to confine their surveillance to only relevant conversations or activities, specify the length of time the technique will be used and certify that normal investigative techniques have either been tried and failed or are reasonably unable to succeed, or too dangerous to attempt.

In other words, before obtaining an interception warrant, law enforcement officers are required to exhaust normal/traditional investigation techniques unless such techniques will alert the criminal of an investigation. Another traditional method is to search a person's home under the authority of a search warrant while the owner is present, but again it is not necessarily true that criminals will hide or keep valuable information of their criminal activities in their homes. Even if the law enforcement officers use an informer or undercover officer, the target can choose

not to divulge information assuming any information will be given to law enforcement authorities. From the foregoing, it would appear that the court will issue a warrant after evaluating the following points:

- (i) Traditional/normal investigative techniques have been tried and failed,
- (ii) Traditional investigative techniques are reasonably likely to fail, or
- (iii) Traditional investigative techniques are too dangerous to try.⁶

C. Proposed Solutions

While we see electronic surveillance is an effective investigative tool as the criminals are not aware that their words or actions are being recorded by law enforcement agencies because of its extraordinary invasiveness, the use of electronic surveillance should be limited to only those times when it is necessary. The necessary requirements can be shown if investigators can satisfy the court that traditional investigation techniques have been tried and failed and can explain how each traditional technique i.e. interrogation, physical surveillance, search warrants etc. would be futile or dangerous in their particular investigations. Certainly, as electronic surveillance can be conducted across border, the necessity of having multilateral and bilateral agreements between member states cannot be ignored.

In analyzing the use of electronic surveillance among the participating countries, there are countries, which have,

⁶ T D Colbridge : Electronic surveillance. A matter of necessity: February 2000

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and those which have no legal provisions governing electronics surveillance. For example, Germany,⁷ Japan, Pakistan, South Africa and the United States of America South Africa etc, have laws concerning interception of communications for the purpose of criminal investigation. However, there are countries that do not have legislation but still use the technique as a criminal investigation tool.

Lastly it should be noted that as money laundering offences are more likely to be cross-border crimes there should be international cooperation in the use of electronic surveillance just as it is true for other special investigative techniques. A minimum requirement for the admissibility of cross-border surveillance should be that the conditions for applying the methods are met under the law of either State.

III. UNDERCOVER OPERATIONS

A. Introduction

Money laundering takes place in a myriad of ways. A small-time criminal might launder stolen money by purchasing a valuable item in one country and selling it at a later stage in another country. A criminal with more funds to wash and criminal organizations whose activities generate large amounts of illicit profits cannot rely with safety on one laundering transaction only. They usually require a more complex money laundering scheme which might utilize shell companies and an intricate web of international financial transactions.

The methods used by criminals in their trade, whether it is narcotics, organized crime, money laundering etc., have become more advanced and are sometimes

extremely complex and difficult to detect. Undercover policing is proving to be one of the most successful investigative tools in combating money laundering. The use of undercover investigative techniques requires extensive planning, preparation and handling. This investigative technique also imposes heavy demands on police officers on a professional as well as ethical level. They are faced with certain problems which are not encountered in any other type of enforcement activity. Undercover work is a useful technique for obtaining information regarding the activities of criminal elements. The information obtained is virtually indispensable in the development of intelligence that leads to the identification, arrest and conviction of offenders and recovery of stolen property, and is also one of the most effective means of detecting or preventing criminal activity.

An undercover operation is a method of investigation where substantial information and evidence on money laundering activities are gathered over a period of time, involving the use of lawful measures by law enforcement and by using undercover agents to obtain such information and evidence.

Law enforcement agencies rely on these undercover agents to infiltrate criminal organizations to gather information to dismantle them. Undercover assignments come in many varieties. They include everything from short-term, buy-bust scenarios to longer-term investigations lasting months or years. There are two dimensions within undercover operations. One being the utilization of a confidential informant who provides insight and information concerning the activities of criminals, and the other is the utilization of undercover police officers (agents) that assume a different identity in order to obtain information and evidence. These two dimensions are normally used

⁷ German Code on Criminal Procedure: Guidelines set by the Prosecutions Service

simultaneously in an effort to address the threat effectively.

Undercover operations conducted in a proper manner are very expensive and in some instances, can be a controversial investigative method. It is furthermore a dangerous investigative technique which may involve innocent members of the public. Proper measures should therefore be put into place in respect of the sensitivity of the information, the involvement of the public, the security of the agent(s) and the informant and the evidence gathered during the operation.

A good example of a successful undercover operation with regard to money laundering is 'Operation Casablanca'. The United States Customs Service concluded the operation in May 1998. It was the largest, most comprehensive and significant drug money laundering case in the history of the United State law enforcement. This undercover money laundering investigation resulted in the seizure of more than \$98 million in cash from drug traffickers, more than 4 tons of marijuana and two tons of cocaine. The indictment, which was issued in United State District court in Los Angeles, charged 26 Mexican bank officials and three Mexican Banks, CONFIA, SERFIN, and BANCOMER with laundering drug money. Additional, bankers from two Venezuelan banks, BANCO INDUSTRIAL DE VENEZUELA and BANCO DEL CARIBE were charged in the money laundering scheme. In 'Operation Casablanca', undercover agents were introduced to financial managers from drug cartels, and they obtained contracts to "pick up" drug proceeds on the streets of major United States cities. The agents were later introduced to Mexican bankers who opened bank accounts for them. Funds that were "picked up" were transported back to Los Angeles, California where it was deposited

in United State Customs Services-controlled undercover bank accounts. Funds were then wire transferred to accounts opened by the Mexican banking officials. After taking out their commission, the officials then issued Mexican bank drafts drawn on the U.S. accounts of the Mexican banks. These bank drafts were delivered back to the undercover agents in the U.S. either in person or via courier. The funds were then disbursed at the direction of the money launderers.

Court orders were obtained allowing for the seizure of the total amount of drug money laundered through the accounts and the amount of commissions paid to the bankers. Because the Mexican bank drafts were drawn on the U.S. accounts of the Mexican banks, court orders were obtained allowing for the seizure of the aforementioned funds from those U.S. accounts. As a result of the investigation, BANCOMER and SERFIN each pled guilty to criminal money laundering violations and together forfeited a total of \$16 million to the government. Each bank was also fined \$500,000. CONFIA settled the indictment with a civil plea and forfeited \$12 million.

Twenty individuals, including 12 Mexican bankers and their associates, have pled guilty to money laundering and/or drug smuggling charges. Three Mexican bankers were convicted after a jury trial, and three Mexican bankers were acquitted. Three Venezuelan bankers were convicted in December 1999 on money laundering charges. An amount of \$64 million of the \$98 million originally seized during this investigation has been forfeited to the government of the United States.⁸

B. Common Issues and Problems

The most common problem that countries have to deal with is the question of whether an undercover operation is

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justifiable and whether it has been executed within the boundaries of the law. Furthermore, the methods employed during the operation should not infringe on the constitutional rights of the person(s) involved. The Supreme Court in the United States has long upheld the validity of undercover and reverse sting operations as long as outrageous governmental conduct is avoided. Four factors can be considered in determining whether outrageous conduct exists: (i) the need for the type of conduct in relationship to the criminal activity; (ii) the preexistence of the criminal enterprise; (iii) the level of discretion or control of the criminal enterprise by the government; and (iv) the impact of the government activity creating the commission of the criminal activity.⁹

Additionally it is important that an undercover operation be approved and monitored. The approval must require written documentation, stating supporting facts and circumstances, that: (i) initiation of investigative activity regarding the alleged criminal conduct or enterprise is warranted under applicable departmental guidelines; (ii) the proposed undercover operation appears to be an effective means of obtaining evidence or necessary information; (iii) the undercover operation will be conducted with minimal intrusion consistent with the need to collect the evidence or information in a timely and effective manner; (iv) approval for the use of an informant or confidential source has been obtained as required by Attorney Generals or National Public Prosecutors; and (v) any foreseeable participation by an undercover employee in illegal activities is justified.¹⁰

⁸ Susan L Smith: *The Fight against Money Laundering: The U.S. Perspective*: February, 1 2000

⁹ William P Schaefer: *Combating organized crime: the legislative and regulatory framework*

Another issue which is the subject of a legal debate is the question of the role of the undercover agent. Instead of preventing crime there is some possibility that a police agent may further and facilitate the commitment of crime. In money laundering cases, the agent has to participate. The involvement of the agent in this case is not a question of committing the offence, but of intent. The agent does not help the money laundering offence, but he rather assists in preventing further crimes. A line should be drawn between the legal participation of an undercover agent in illegal activities and the legal inducement of a crime during the operation. The courts of the countries should in terms of their own legal frameworks deal with this matter.

Undercover operations as a method of investigation have proved successful in the United States and in other countries. The participating countries have also acknowledged the importance of these investigative techniques. A majority of the countries represented have employed the technique of undercover operations for investigating crimes which include drug and firearms trafficking, money laundering, stolen properties, woman trafficking etc. Japan (for narcotics and firearms trafficking only) and Malaysia have some special laws or regulations pertaining to conducting undercover operations.

The German Code on Criminal Procedure makes provision for the use of undercover investigators where there is sufficient factual indications showing that a criminal offence of considerable importance has been committed and if clearing up this using other means would offer no prospects of success or be much

¹⁰ US Attorney General Guidelines on FBI Undercover Operations Revised: 11/13/93

more difficult. Some problems with undercover agents and the due process requirements have led to stringent court practice concerning the sentencing of offenders that have been induced by undercover agents to commit the offence, but not to a broad questioning of the tactic itself. In the United States and in many other countries the use of this method of investigation is not regulated by law but is considered a valuable investigative tool.

Countries should not permit undercover operations where agents are required to commit violent acts. In cases where this cannot be avoided, necessary measures should be taken to prevent the violence from occurring. Countries should, however, consider the regulation of investigative techniques such as undercover operations, by law in day to day judicial practice.

Law enforcement agencies often find it necessary to use information provided by individuals of less than sterling character and reputation, who live and function within the criminal element itself. Although a multitude of factors may motivate these individuals to provide information to the police, the use of informants remains one of law enforcement's oldest and most essential investigative tools. The rights and obligations of the informant should be protected and an assurance of confidentiality should be given. Proper records on informants should be maintained and the identity of each informant should be concealed.

Informants should have an explicit understanding of what they may and may not do while working for a law enforcement agency. By granting limited and specific authority, law enforcement agencies can effectively control the activities of the informant. It, however, often becomes necessary for informants to visit locations

where criminal activities, such as the buying and selling of narcotics takes place, where they are subjected to arrests by other agencies and prosecuted for the offences. The officer in charge of the informant should therefore effectively control the activities of the informant and times should be limited where informants can become involved in such activities.

C. Proposed Solutions

In this regard countries should consider and adopt the recommendations made by the United Nations to create an obligation under international law to criminalize money laundering. Article 4 of the Council of Europe Convention on Laundering, Search and Seizure and Confiscation of the Proceeds of Crime (1990) refers to special investigative powers and techniques. It places an obligation on the member states to consider adopting legislative and other measures as may be necessary to enable it to use special investigative techniques.

The approach of courts when presenting evidence, which was obtained during undercover operations, is very important. Courts must recognize the importance of not disclosing certain information on the persons involved and the techniques used. The disclosure of this information can lead to the endangerment of the lives of law enforcement officers, the persons who allow their properties to be used and will reveal the methods used during undercover operations, thus making it difficult to use the methods in the future.

In terms of article 14 of the Convention on Mutual Assistance in Criminal Matters between the Members States of the European Union (2000), member countries may agree to assist one another in the conduct of investigations into crime by officers acting covertly or with a false identity.

IV. CONCLUSION

It is our considered view that special investigative techniques such as controlled delivery, electronic surveillance and undercover operation should be included in domestic laws with a view of strengthening enforcement of money laundering laws and to intensify law enforcement efforts in detecting money launderers and prosecute them. This action will, however, not eradicate traditional investigation techniques but will supplement detection efforts.

As global communications and world trade agreements are increasing due to technological development, the ability to investigate money laundering cases is something that will continue to challenge law enforcement officers for the foreseeable future. It is therefore, important that as criminals employ modern technologies to assist their criminal activities, there is a need to enact new laws which allow law enforcement agencies to use such modern technologies in their investigating techniques.

Money laundering techniques will make progress as technology advances. We should make joint efforts worldwide to establish anti-money laundering laws and systems. We must also combat money laundering through training and exchange of information among countries. Additionally, each country should continue to work closely with its international partners in bilateral and multilateral assistance agreements to promote further actions to effectively address money laundering and other criminal activities and to win the fight against money laundering.

RESOURCE MATERIAL SERIES No. 58

APPENDIX

COMMEMORATIVE PHOTOGRAPHS

- ***116th International Training Course***
 - ***117th International Senior Seminar***
-
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UNAFEI

THE 116th International Training Course



Left to Right:

Above:

Mr. Yam (Hong Kong), Mr. Park (Korea), Prof. Tsutomi (UNAFEI), Prof. Nosaka (UNAFEI)

4th Row:

Mr. Takagi (Chef), Ms. Kubo (Staff), Mr. Souma (Staff), Ms. Takeda (Staff), Ms. Matsushita (Staff), Ms. Saitou (Staff), Mr. Nozaki (Staff), Mr. Gohda (Staff), Mr. Kimura (Staff), Mr. Kai (Staff), Mr. Nakagawa (Staff), Ms. Inada (Japan), Ms. Ono (JICA)

3rd Row:

Mr. Hirata (Staff), Mr. Wang (China), Mr. Yokokawa (Japan), Mr. Sengsouvanh (Laos), Mr. Hatanaka (Japan), Mr. Amamoto (Japan), Mr. Suwit (Thailand), Mr. Miyamoto (Japan), Mr. Fukushi (Japan), Mr. Shibata (Japan), Mr. Jimbo (Staff), Mr. Konno (Japan), Ms. Hoshi (Japan)

2nd Row:

Ms. Kamitani (Staff), Mr. Tamagoshi (Japan), Mr. Ruy (Brazil), Mr. Hubert (P.N.G), Mr. Ramend (Fiji), Mr. Kamy (Uganda), Mr. Upadhyay (India), Mr. Gondal (Pakistan), Mr. King'wai (Tanzania), Mr. Hariyanto (Indonesia), Mr. Paminluan (Philippines), Mr. Mustafa (Malaysia), Mr. Inoue (Japan), Mr. Awunah (Nigeria)

1st Row:

Ms. Findlay-Debeck (L.A.), Mr. Miyamoto (Staff), Prof. Kakihara, Prof. Satou, Dep. Director Aizawa, Ms. Hilger (Germany), Dr. Hilger (Germany), Director Kitada, Mr. Roberti (Italy), Mr. Ohr (U.S.A.), Prof. Iitsuka, Prof. Tachi, Prof. Watanabe, Mr. Chishima (Staff)

THE 117th International Senior Seminar



Left to Right:

Above:

Mr. Sin (Hong Kong), Mr. Chae (Korea), Mr. Wilkitzki (Germany), Ms. Smith (U.S.A),
Prof. Satou (UNAFEI)

4rd Row:

Ms. Saitou (Staff), Ms. Matsushita (Staff), Mr. Kimura (Staff), Mr. Kai (Staff), Mr.
Souma (Staff), Mr. Nozaki (Staff), Mr. Nakagawa (Staff), Mr. Gohda (Staff), Mr. Hirata
(Staff), Mr. Jimbo (Staff), Mr. Takagi (Chef)

3nd Row:

Ms. Takeda (Staff), Ms. Kubo (Staff), Mr. Maruyama (Japan), Mr. Nishikori (Japan),
Mr. Awasthi (India), Mr. Itoyama (Japan), Mr. Tunidau (Fiji), Mr. Nemoto (Japan),
Mr. De Livera (Sri Lanka), Mr. Ueda (Japan), Mr. Phoung (Cambodia), Ms. Kamitani
(Staff)

2th Row:

Ms. Mitani (JICA), Ms. Van Wyk (South Africa), Mr. Okore (Kenya), Mr. Nasim
(Pakistan), Mr. Sambua (P.N.G.), Mr. Chihara (Japan), Mr. Mwema (Tanzania), Mr.
Zaidi (Malaysia), Mr. Porter (Costa Rica), Mr. Mookjang (Thailand), Mr. Poudyal
(Nepal), Mr. Paredes (Philippines), Mr. Soeryo (Indonesia), Ms. Nadira (Bangladesh),
Mr. Bader (Oman)

1st Row:

Mr. Chishima (Staff), Prof. Kakihara, Prof. Watanabe, Prof. Tachi, Deputy Director
Aizawa, Mr. Murphy (Canada), Director Kitada, Dr. Galvao (Portugal), Prof. Iitsuka,
Prof. Tsutomi, Prof. Nosaka, Mr. Miyamoto (Staff), Ms. R. Findlay-Debeck (L.A.)