Introduction

1.1. Background

There is a relationship between money laundering and anti-money laundering regime (hereinafter referred to as 'AML-regime'). On the one hand, money laundering has significantly increased following the development of technology that offers complicated, sophisticated, and professional methods used in conducting this type of crime. On the other hand, however, the AML-regime has also been adjusted with the development of technology and the laundering techniques to counter the threat. The higher the sophistication of money laundering, the more sophisticated the AML-regime. Likewise, the more sophisticated and complete the AML-regime is, the higher the creation of innovative techniques used in laundering methods. Up to this point, the problem becomes how can or how should the AML-regime response the threat.

The present study explores the important legal issues related to the development of the AML-regime in response to the progress of money laundering practices. It examines the expansion of the AML-regime through the creation of international standards which internationalize[1] and criminalize[2] the acts of money laundering. The logic of these expansions counterbalance the increasingly complicated, sophisticated, and professional methods used in conducting this type of crime. Although the expansion of the regime is in essence uncontested, questions regarding the implementation and enforcement of the regime arise where varied answer are given. The implementation and enforcement of the regime includes critical legal issues that challenge the longstanding principles of sovereignty, jurisdiction, and law enforcement, ranging from its theoretical basis to practical problems.

[1]Internationalization of money laundering may be seen as the efforts to raise the issue of money laundering into an international level. It is acknowledged that anti-money laundering regime has moved toward internationalization. The internationalization of money laundering is aimed to raise the issue of money laundering into an international level in order to respond the global character of this type of crime.

[2]Criminalization of money laundering refers to the process by which any conduct that is involved in the laundering process is considered to be as an offence. The criminalization of anti-money laundering started in the domestic level and then moved to an international level. On the domestic level, the first national legislation is the Bank Secrecy Act (BSA) of 1970 which was amended by the Money laundering Control Act of 1986. On an international level, the UN Vienna Convention of 1988 is the first international agreement to require the criminalization of money laundering.

Regarding the issue of sovereignty, any state is sovereign if it has the ability to make and implement laws within its territory and can function without any external power of another state.[3] From a legal point of view, the basic concern that needs to be addressed is the creation and implementation of international standards[4] in the framework of the AML regime that seem to impair the sovereign rights of any state in developing and implementing its own policy.[5] This leads to the following two questions: to what extent do these international standards interfere in the domestic affairs of sovereign states? Does the implementation of international standards infringe upon the principles of sovereign equality and non-interference of any state?

The issue related to criminal jurisdiction focuses on the complexity of cross-border nature of money laundering operations.[6] This type of crime might be set up in one jurisdiction but operated in another.[7] In this point, criminals

[3]Orfan Badakhshani, "Globalization: The End of State Sovereignty?", Paper, written assignment for International Relation. Available at http://www.khorasanzameen.net/rws.

[4]In the context of anti-money laundering, the FATF Forty Recommendations are regarded as international standards. In the words of Drezner, the Forty Recommendations are "a global anti-money laundering watchdog that issues international standards which have become a blueprint for money laundering laws and regulations around the world". *See* Daniel W. Drezner, "Who Rules? State Power and the Structure of Global Regulation", University of Chicago, 2002, p.10.

[5]International financial systems which are dominated by powerful western states like the United States, major European power, and Japan can force the implementation of the AML regime in their territory for their preference. *See* Vincent Sica, "Cleaning the Laundery: States and the Monitoring of the Financial System", Millennium: Journal of International Studies, Vol.29, No.1, 2000, p.67. *See* also Jared Wassel, Paper, "The Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law"; Eleni Tsingou, "Who Governs and Why? The Making of the Global Anti-Money Laundering Regime", Draft Paper, Centre for the Study of Globalization and Regionalization, University of Warwick, United Kingdom, p.4.

[6]The term 'transnational' means 'extending or going beyond national boundaries'. Transnational crime can be defined 'an activity that is considered a criminal offence by at least two countries', or 'a serious crime business model involves setting up in one jurisdiction but operating in another'. *See* A. Bossard, *Transnational Crime and Criminal Law*, Chicago, 1990, p.5, and Staven David Brown, *The Longer Arm of the Law*, (London and New York: Routledge-Cavendish), 2008, p.6. Another meaning of transnational crime is 'criminal activities extending into a violating of laws of several countries'. *See* Gerhard O.W. Mueller, 'Transnational Crime: An Experience in Uncertainties', in Einstein and Amir, *Organized Crime: An Uncertainties and Dilemmas*, (Chicago: University of Illinois), 1999, p.15. Passas used the term 'cross-border crime' which means 'conduct, which joepardizes the legally protected interests in more than one national jurisdiction and which is criminalized in at least one of the states concerned'. *See* Nikko Passas, "Cross-border Crime and the Interface between legal and Illegal Actors", Security Journal, Vol.16(1), 2003, p.20.

[7]Staven David Brown (2008), *Supra* note 6, p.6. *See* also Sompong Sucharitkul, "International Terrorism and the Problem of Jurisdiction", Syracuse Journal of International and Comparative Law, Vol14, 1987-88, p.161. 'The *locus delicti* may cover more than one territory, or the injured party may have the nationality of one state, the offender being a national of another state. Two or more states may have concurrent jurisdiction for various reasons which provide different grounds or bases for jurisdiction'.

move their illicit money through several financial institutions in different countries in an attempt to distance the funds from their illegal sources.[8] Another condition is that the perpetrators or the proceeds of crime have moved from one jurisdiction to another. This criminal activity might cause several jurisdictions to be involved in it: that in which the crime is committed, that in which the criminal is arrested, that in which the proceeds are located, and the jurisdictions in which the proceeds have been frozen, confiscated, and forfeited.[9] In this case, two or more sovereign states may attempt to assert criminal jurisdiction over the same crime. These conditions may lead to a jurisdictional conflict in determining which state has the right to exercise jurisdiction over the crime.[10] In addition, it may lead to the problem in coping with money laundering offences. Questions that arise from these conditions include: is the traditional understanding of criminal jurisdiction sufficient to overcome the problem of cross-border nature of money laundering? How do the dynamic aspects of jurisdictional models face this problem?

Lastly, the issue related to law enforcement focuses on the international dimension of money laundering that transcends the boundaries of any state. In this case, the criminals, the proceeds, and documentary evidence might move from one jurisdiction to another. This in turn leads to the range of practical barriers that make it harder to implement and enforce money laundering laws and regulations. Given this condition, an individual country cannot deal with the problem through unilateral actions, but requires interstate cooperation. It is at this point that criminal law has moved beyond the boundaries of sovereign states. At the same time, law enforcement has also expanded from a domestic to an international level. The following question examines this change in law enforcement: what are the potential challenges that will appear in conducting

[8]'Jurisdiction could exist either in the state where the transaction was initiated or where the transaction terminated. Started this form, the issue is merely one of deciding whether an initiatory or terminatory theory of jurisdiction should be applied. But the difficulty arises because of the numerous transactions that are involved in a short space of time. This not only poses problems for investigation of the crime but also as to which of the different states could exercise jurisdiction.' *See* M. Sonarajah, "Globalization and Crime: The Challenges to Jurisdictional Principles", Singapore Journal of Legal Studies, 1999, p.418.

[9]R.E. Bell, "Prosecuting the Money Laundering Who Act for Organized Crime", Department of the Director of Public Prosecution for Northern Ireland. Paper, Unpublished. *See* also Cedric Ryngaert, *Jurisdiction in International Law*, (Oxford: Oxford University Press, 2008), p.75. "A crime may be initiated in State X and consumated in State Y. Person A may make a criminal attempt from State X directed in State Y. Person A may participate in State X in a crime committed by person B st State Y".

[10]'The Lotus Case (1927) is the classic authority on the subject of jurisdiction. But dicta in the case are capable of broad interpretation to support virtually any theory of jurisdiction. The emphasis was on state sovereignty and the ability of a state to espouse any theory of jurisdiction it whished so long as other states did not protest. The case excluded the idea that territoriality was the only basis of jurisdiction and expressly accepted the passive nationality principle and the effects doctrine'. *See* M. Soranajah (1999), *Supra* note 9, p.411.

interstate cooperation in countering cross-border money laundering criminalities?

1.2. The Scientific Relevant of the Study

The scientific relevance of the study can be found in further clarification and better understanding of the emerging trends of money laundering, the development of the AML regime in responding to the emerging trends of money laundering, and the challenges of such development on the basic principles of sovereignty, jurisdiction, and law enforcement. This study argues that the development of the AML regime in responding to cross-border money laundering has confirmed the need to rethink the longstanding principles of sovereignty, jurisdiction, and law enforcement. It would require the reassessment of such modalities in order to counter the threat. At the same time, this study is significant for uncovering state practices and opinions of jurists, both of which can be used in adopting new concepts for countering transnational money laundering effectively.

1.3. Research Questions

This study aims to discuss the changing typologies and emerging trends of money laundering; to analyze the development of the AML regime in responding to the emerging trends of money laundering; to examine the ways in which such development challenges the basic principles of sovereignty, jurisdiction, and law enforcement; and to propose an appropriate legal framework in eradicating those implications that exacerbate the effectiveness in implementing and enforcing the AML regime. In this study, an attempt will be made to answer the following questions: what kind of typologies can be found in the emerging trends of money laundering? How does the AML regime develop in response to the emerging trends of money laundering? How does the AML development challenge on the longstanding principles of sovereignty, jurisdiction, and law enforcement? How does the appropriate legal framework develop in eradicating the negative implications that exacerbate the effectiveness in implementing and enforcing the AML regime?

1.4. Terminology and Definitions

In this section, several concepts will be defined that are explored in subsequent chapters. The definition of ‘anti-money laundering regime’, which consists of ‘anti’, ‘money laundering’, and ‘regime’, will be revisited. The term ‘anti’

refers to 'against, opposing, counteracting'; 'opposed to party, policy, attitude.[11] 'Money laundering' is commonly understood as 'concealing the source of illegally gotten money'[12], or 'the process by which offences disguise the origins of the proceeds of crime and create the illusion that the money they are laundered is their legitimate income'[13]. The term 'regime' refers to 'a prevailing social system or pattern'.[14] International society posits that a 'regime' is manifested into a set of rules and principles.[15] Karl Alexander provides another point of view by defining 'regime' in an international context as 'a system of norms, standards, procedures, institutions, and rules of conduct that constrain and shape state behavior in a particular issue area'[16]. Within this context, the AML regime may be construed as opposing, against, or counteracting to the activities of money laundering by providing a system of particular administration for the prevention and control of this type of crime. Thus, for the purpose of this study, the 'AML regime' could be understood as a particular set of norms, standards, procedures, and rules of conduct that constrain and shape state behavior in preventing, detecting, and controlling money laundering practices.

1.5. Research Methods

Sources of data used in this study are primary[17] and secondary[18] legal resources. Primary legal resources involve conventions, agreements, statutes,

[11] Collins English Dictionary, HerperCollins Publisher, 1991, at 64.

[12]*See* http://www.wordrefference.com

[13]Financial Action Task Force on Money Laundering, Basic Facts about Money Laundering, 2003, http://www.oecd.org/fatf.

[14]http://www.dictionary.refference.com

[15]D. Krasner, *International Regimes,* Ithaca: Cornell University Press, 1983. *See* also Mark W. Zacher, "Toward a theory of international regimes", *Journal of International Affairs*, Spring/ Summer, Vol.44, 1990, p.139-57.

[16]Karl Alexander, "The International Anti-Money Laundering Regime: The Role of FATF", Journal of Money Laundering Control, Vol.4, No.3, 2001, p.231. *See* also K. Jayasuriya, "Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance", Int. J. Global Legal Stud, 1998-1999, p.430.

[17]Primary legal resources consist of the authoritative records of the law made by law-making authorities. *See* Enid Campbell, E.J. Glasson, Ann Lahore, *Legal research: Materials and Methods*, 2nd Edition (Sydney: Law Company Book Limited, 1979), p.1. *See* also J. Mayron Jacobstein, Roy M. Mersky, and Donald J. Dunn, *Fundamentals of Legal Research*, Sixth Edition (New York: the Foundation Press INC, 1994), p.10; Suzanne E. Rowe, "Legal research, Legal Writing, and Legal Analysis", 29 Stetson L. Review, 1999-2000, p.1197-8.

[18]Secondary legal resources comprise all the publications that pertain to law but which are not themselves authoritative records of legal rules. *See* Enid Campbell, *Ibid*; *See* also J. Mayron Jacobstein, Roy M. Mersky, and Donald J. Dunn, *Ibid*..

legislations, and regulations. Secondary legal resources include textbooks, journal articles, periodicals, commentary of cases, and encyclopedias. To uncover the progress of money laundering and the development of its countermeasures in responding to this crime, the present study will analyze the report of the Financial Action Task Force on money laundering (FATF). These include reports on the changing typology of money laundering practices, reports on the implementation of the Forty Recommendations in the member and non-member states, and the report on Non-Cooperative Countries and Territories (NCCT). From these reports, numerous amounts of data and information can be used to analyze relevant finding to the main problems of this study.

This study tries to uncover wide array of theories, state practices, and opinions of jurists to figure out the conceptual and practical challenges in countering money laundering. The focus of the problems is analyzed in a comprehensive interdisciplinary which combines international law, criminal law, criminology, political science, and financial regulation. The international law discipline will be used to analyze some aspects of international legal instruments and the problems of jurisdiction and international cooperation. The criminal law discipline analyzes the constitutional elements of money laundering offence and some aspects of law enforcement in the realm of criminal justice system. The criminology focuses on the behavior of money laundering that has come to be defined as a crime and seeks explanation for that behavior. Political science literature concerns some aspect of state compliance, state sovereignty, and its relation to the interstate cooperation. Finally, the analysis also covers issues concerning financial regulations in respect of the prevention and detection of money laundering practices.

1.7. Outline of the Study

This study sketches out the nature and emerging trends of money laundering, explains the broaden scope of the AML regime towards the establishment of an international standard that internationalize and criminalize money laundering, and analyzes the challenges of such developments on the basic principles of sovereignty, jurisdiction, and law enforcement.

Chapter 1 and 2 of this study aims to answer the question: what is the nature of money laundering and how are these acts conducted and developed over time. The nature of money laundering refers to the basic understanding of its concept, definition, scope, and process. Emerging trends of money laundering address to the complexity and professionalism of this type of crime. These two issues are essential to understand in detail in order to be able to create countermeasures that are needed to prevent, detect, and control money laundering.

In chapter 3 and 4, the development of the AML regime towards internationalization and criminalization will be analyzed. These developments are intended to response the changing typologies and trends of money laundering as discussed in the previous chapters. These chapters set out analytical approach on the establishment of international standards which internationalize and criminalize money laundering. Here in this point, it covers the process of internationalization and criminalization of money laundering, potential problems that will arise, and some of the key issues surrounding these developments.

The last three chapters focus on the challenges of the AML development to the longstanding principles of sovereignty, jurisdiction, and law enforcement, respectively. Regarding the challenge to sovereignty, this study analyzes how such effects have come about and how they affect the existing rules of state sovereignty *(chapter 5)*. In relation to the challenge to criminal jurisdiction, this study analyzes the dynamic aspect of jurisdictional theory in responding to the cross-border nature of money laundering *(chapter 6)*. With regard to the challenge to law enforcement, this study examines the development of law enforcement and some of the key issues in responding to a cross-border character of money laundering. Here in this case, law enforcement has shifted from a domestic to an international level *(chapter 7)*.

Lastly, this study concludes by drawing on the analysis of the previous chapters, highlights the trends that are seemingly manifested in the current model of global governance, and suggests directions for future research. This study also concludes with a discussion on some of the key implications of the analysis. Furthermore, it will provide recommendations for both academic studies as well as public policies****