

Chapter 7

Anti-Money Laundering Regime and Its Challenge to Law Enforcement

7.1. Introduction

As elaborated in the previous chapter, it is obvious that the acts of money laundering transcend the boundaries of national jurisdiction. In this case, the defendants, the proceeds of crime, and documentary evidence might move from one jurisdiction to another. This in turn leads to the movement of criminal law beyond the boundaries of sovereign states. On this issue, a single country cannot deal with the problem in a unilateral action, but it needs to call upon interstate cooperation at an international level. This condition requires some degree of cooperation in engaging law enforcement. This chapter reviews the internationalization of law enforcement, the significance of international cooperation in encouraging these efforts, and the challenges associated with law enforcement authorities in conducting international cooperation. It begins with a brief description of money laundering as a transnational crime in which it draws the need to conduct international cooperation in countering the crime.

7.2. Transnational Dimension of Money Laundering Offence

The term ‘transnational’ is defined as ‘extending or going beyond national boundaries’.¹ A number of references, which refer to the terminological issues of the word ‘transnational’, involve transnationalism, transnational actors, transnational organizations, and transnational corporations.² In the late 1970s and 1980s, the study of these terminologies introduced the concept of ‘transnational crime’.³ The notion of transnational crime, initially, was not a legal concept but a criminological concept that described social phenomenon⁴,

¹See <http://www.merriam-webster.com/dictionary/transnational>

²David Felsen and Aris Kalaitzidis, “A Historical Overview of Transnational Crime” in Philip Reichel (Ed.), *Handbook of Transnational Crime and Justice*, (London-New Delhi: Saga Publication, 2005), p.3.

³*Ibid.*

⁴Gerhard O.W. Mueller, Transnational Crime: Definition and Concept, in Phil Williams and Dimitri Vlassis (eds), *Combating Transnational crime: Concept, Activities, and Response*, (London, Portland: Frank Cass, 2001), p.13.

a sociological concept that concerned criminal groups or networks⁵, and also a political concept that delineated transnational actors by nation-states or non-state entities.⁶ Although transnational crime is frequently confused with international crime, these two terms have different meanings and scope. Bassiouni⁷, for example, distinguished the two by giving an explanation that international crimes are crimes prohibited by international laws, norms, or treaties; whereas transnational crimes are concerned with acts criminalized by the laws of more than one country.

To put it simply, the term ‘transnational crime’ applies when two or more countries mutually agree on an activity being classified as a criminal offence. It can also refer to criminal acts that violate the laws within other countries. With regard to money laundering, this type of crime can be considered as an international crime as well as a transnational crime. As an international crime, it was initially recognized by the United Nations Convention, which asked participating states to criminalize the act of money laundering.⁸ As a transnational or cross-border crime, money laundering is a crime that is specifically concerned with acts criminalized by the laws of more than one country.⁹ Here in this context, transnational money laundering arises

⁵Serano, Transnational Organized Crime and International Security: Business as Usual?, in M. Bardel & M. Sareno (eds), *Transnational Organized Crime and International Security: Business as Usual?*, p.p.13-36 (Boulder, CO: Lynne Rienner, 2002), p.16.

⁶*Ibid.* See also P.R. Viotti & M.P. Kauppi, *International Relations Theory: Realism, Pluralism, Globalism* (New York: Macmillan, 1987).

⁷M.C. Bassiouni, “The Penal Characteristics of Conventional International Criminal Law”, Case Western Reserve Journal of International Law, 1983, p.15. Quoted from David Felsen and Aris Kalaitzidis (2005), *Supra* note 2, p.6. Morais points out that ‘international crime’ refers to ‘crimes against international law, that is, conduct that has been criminalized under an international treaty, convention, or customary international law’. See Herbert V. Morais, “Fighting International Crime and Its Financing: The Importance of Following Coherent Global Strategy based on the Rule of Law”, Vill Law Review, 2005, p.584. In the United Nations Convention against Transnational Organized Crime (2000), ‘transnational crime’ was given a set of descriptors: it is committed in more than one state, it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state, it is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state, and that it is committed in one state but has substantial effects in another state. See The United Nations Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 3(1)(b).

⁸The United Nations Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 3(1)(b). See also Herbert V. Morais, “Fighting International Crime and Its Financing: The Importance of Following a Coherence Global Strategy Based on the Rule of Law”, Villanova Law Review, Vol.50, p.584. he pointed out that the term ‘international crime’ refers to the crime against international law, that is, conduct that has been criminalized under an international treaty, convention, or customary international law.

⁹In the perspective of the United Nations, money laundering is categorized as a transnational crime. Within this context, the United Nations established 18 categories of transnational crime, the list being topped by money laundering and terrorism. The 18 categories are money laundering, terrorism, theft of art cultural object, theft of intellectual property, illicit arm traffic, airplane hijacking, sea piracy, hijacking by land, insurance fraud, computer crime, environmental crime,

if one of the two conditions has been met: firstly, if the jurisdiction where the illegal proceeds are laundered differs from the jurisdiction where the predicate offence took place; and secondly, if financial transactions that facilitate laundering span multiple national jurisdictions.¹⁰

In term of practice, as a transnational crime, money laundering is committed across the boundaries of national jurisdictions. This is because in the process of money laundering operations, criminals easily move the illicit money through several financial institutions worldwide in an attempt to distance the funds from their illegal sources. Transnational criminal activity of money laundering might cause more than one jurisdiction 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, or forfeited.¹¹ These categorizations show us that the cross-border dimension of money laundering is immensely problematic in conducting law enforcement. The problems faced by law enforcement include the challenging issues in tracking the proceeds of crime and collecting other evidence located in foreign jurisdictions. What follows is an analysis on the response of law enforcement to the cross-border money laundering practices.

7.3. Law Enforcement Responses to the Money Laundering Offence

The most basic objective of law enforcement is ‘to immobilize the criminals’.¹² The immobilization of criminals involves identifying the suspects, finding and arresting them, gathering evidence, seizing criminal proceeds, and imprisoning the defendants.¹³ For achieving this objective, law enforcement authorities need to conduct three things: obtaining information, gathering evidence, and retrieving criminals. On this issue, it is presumed that interstate cooperation between law enforcement authorities is essential and inevitable. This section elaborates on the dynamic aspects of law enforcement efforts in countering money laundering offence. Here in this context, it analyzes the changing

trafficking in person, trade in human body parts, illicit drug trafficking, fraudulent bankruptcy, and infiltration of legal business. *See* David Felsen and Aris Kalaitzidis, *Supra* note 2, 2005, p.p.3, 16.

¹⁰W. Clifton Holmes, “Strengthening Available Evidence-Gathering Tools in the Fight Against Transnational Money Laundering”, *Northwestern, Journal of International Law & Business*, Vol.24, 2003-2004, p.200.

¹¹R.E. Bell, “Prosecuting the Money Laundering Who Act for Organized Crime”, Department of the Director of Public Prosecution for Northern Ireland.

¹²Ethan A. Nadelmann, “The Role of the United States in the International Enforcement of Criminal Law”, *Harvard International Law Journal*, Vol.31, 1990, p.45-6.

¹³*Ibid.*

character of law enforcement from a domestic function to an international sphere.

7.3.1. The Notion of Law Enforcement

Law enforcement stands for upholding and enforcing laws, statutes, or legislations that are in force in a given jurisdiction. In the perspective of criminal law, the term ‘law enforcement’ refers to a state’s action to detect violations, to stop them, and to prevent further violations from occurring in the future. Law enforcement can also concern the use of governmental agents to respond, detect, investigate, prosecute, and give a sanction to the perpetrators. From these perspectives, there are two kinds of activities that law enforcement undergoes, namely, detecting criminal conducts and imposing sanctions on the perpetrators.

Broadly speaking, law enforcement refers to the duties of police officers. James Q. Wilson classified three styles of police duties, namely, legalistic, watchman, and services.¹⁴ However, law enforcement can also refer to the broad concept of a criminal justice system, which involves the police, prosecutor, criminal proceeding, and correction. In this case, law enforcement is part of the criminal justice process that refers to the system of practices in arresting, investigating and prosecuting the criminals, gathering evidence, conducting a trial, and carrying out punishment. This means that law enforcement functions at assisting a domestic government in maintaining stability and security in a society. This function is further segregated into several groups such as police, courts, and prisons. Each of these groups has different tasks and responsibilities that play a systematic approach of their functions.

Law enforcement can be accomplished by either voluntary compliance or through punishment.¹⁵ Voluntary compliance occurs when a person or company complies with a government request before being forced into action.¹⁶ A method used in the voluntary compliance is self-imposed regulation, where individuals or corporations have certain obligations to report to a competent authority. On the contrary, punishment is a method to penalize offenders who violated laws. Punishment can be implemented through imprisonment or a fine depending on the pattern of damage affecting victims or the society at large. Punishment in this case is aimed at removing the capacity of criminals to commit a crime.

¹⁴The legalistic emphasizes on violations of law and the use of threats or actual arrest to solve disputes. The watchman emphasizes on informal means of resolving disputes. The service emphasizes on helping the community, as opposed to enforcing the law. Available at www.unt.edu/cjus/Course_Pages/CJUS_2100/2100chapter6.ppt

¹⁵Katharina Pistor, *Law Enforcement: Suggestion for Future Research*, p.1.

¹⁶See <http://financial-dictionary.thefreedictionary.com/Voluntary+Compliance>

In the context of money laundering, both voluntary compliance and punishment are also used in controlling the crime. Voluntary compliance refers to a self-imposed regulation on private sectors such as banks, non-bank financial institutions, and professionals. Three broad categories of self-imposed regulation include customer identification, record keeping of financial information, and the reporting of suspicious transactions. Meanwhile, punishment can be imposed on the perpetrator of money laundering as well as its predicate offences. This sanction is aimed at removing the incentive to commit the crime of money laundering by pursuing illegal money, forfeiting instrumentalities of the crime, and confiscating the proceeds of crime.

7.3.2. Domestic Function of Law Enforcement

Originally, the nature of a crime was either a local or national issue. As long as the crime was regarded as a local or national issue, criminal law remained territorial. Criminal law, under these circumstances, only takes into account the territory where the crime has occurred. John Blum commented that ‘Our criminal justice system is based on territory. If something happens in my territory, I have jurisdiction. If it does not, I have to deal with other nation states in order to retrieve information...’.¹⁷ Based on the territorial nature of the crime, criminal law can modify the way in which law enforcement is pursued.¹⁸ Law enforcement at a national level refers to the enforcement of criminal law within the borders of a country. In this case, law enforcement follows a territorial jurisdiction. This model shows us that the investigation of a crime focuses on a specific geographical area surrounding the site where the crime occurred.¹⁹ Indeed, offences committed abroad were not a concern of national authorities. As a consequence, the states in question might be reluctant or

¹⁷Lesley M. Bain, “Money Laundering: Hide and Seek; An Exploration of International Cooperation between Law Enforcement Agencies”, PhD Thesis. Simon Fraser University, August 2004, p.9.

¹⁸‘Criminal law evolved as an expression of the sovereign will of independent states. Under the criminal law, the state assumes responsibility for maintaining peace and order within its boundaries. It discharges this responsibility by investigating and prosecuting crimes committed within its borders. The power or ‘jurisdiction’ of the state to charge, arrest, prosecute and ultimately punish those who commit crimes is founded on the connection between the crime and the state’s territory, usually the fact that the crime was committed, in whole or in part, within the state’s boundaries’. See Beverly McLachin, “Criminal Law: Towards an International Legal Order”. Hong Kong Law Journal, Vol.29, 1999, p.448.

¹⁹‘Crime is a deviation from the law-abiding conduct that constitutes the prevailing pattern of behavior in a society. This assumption derives not from the physical characteristics of real-world crime but from the nature of criminal law: the function of criminal law is to maintain an acceptable level of social order within a society’. See Susan W. Brenner, “Toward a Criminal Law for Cyberspace: A New Model of Law Enforcement?”, Rutgers Computer & Technology Law Journal, Vol.30, 2004, p.15.

unwilling to carry out international cooperation or to assist another state in bringing the offenders to justice.

Regarding the ability of domestic law enforcement authorities in conducting interstate cooperation, there are two impeding factors: the need to respect sovereignty and the difficulty in harmonizing different legal systems.²⁰ The need to respect the sovereignty of another state means that the jurisdiction of domestic law enforcement cannot extend beyond its national boundaries. If there is no treaty or agreement between the states, it is difficult in gathering evidence and collecting information located abroad. Difficulty in harmonizing different legal systems involves the different considerations to criminalize or not certain conducts, the different techniques law enforcement can utilize, the legal procedures for obtaining evidence, and the infrastructures governing the evidence.

7.3.3. Globalization of Law Enforcement Efforts

As indicated earlier, in enforcing criminal law within the borders of a nation state, law enforcement traditionally focuses almost exclusively on a domestic function. In the context of money laundering, which has increasingly become transnational in scope, governments have struggled to coordinate with law enforcement authorities from other countries at receiving assistance. This led countries to expand the application and enforcement of domestic criminal laws, which can increase the need of international cooperation through several modalities such as extradition, mutual legal assistance, and confiscation of the proceeds of crime. In this setting, the characteristics of law enforcement have evolved from a domestic to a globalized scope.²¹ The globalization of law enforcement, therefore, refers to the application of domestic law to criminal activities occurring beyond the territorial limits of the state concerned.

The globalization of law enforcement allows for national laws to be applied on criminal activities occurring beyond its territorial boundaries. It also indicates a realization that crimes have expanded to a worldwide operation, and as a consequence, are becoming an international affair.²² In the context of

²⁰L. Song Richardson, "Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem", *Berkeley Journal of International Law*, Vol.26, No.1, 2008, p.80. See also Ethan A. Nadelmann, *Cops Accross Borders: The Internationalization of U.S. Criminal Law Enforcement*, 1997, p.324.

²¹'Globalization of law enforcement entails an expansion of criminal jurisdiction to conduct invariably occurring beyond the borders of a country and constituting the sort of conduct historically prosecuted where it occurred, not in a place having a limited, if any, physical nexus to the crime.' See Frank Tuerkheimer, "Globalization of U.S. Law Enforcement: Does the Constitution Come Along?", *Houston Law Review*, Vol.39, 2002-2003, p.309.

²²Baverley McLachin (1999), *Supra* note 19, p.448.

money laundering, several international conventions, such as the Vienna Convention of 1988, the Strasbourg Convention of 1990, and the Palermo Convention of 2000 have attempted to address money laundering through the internationalization of particular national law enforcement efforts. In this case, there are several provisions that govern international modalities of cooperation. Such modalities include extradition, mutual legal assistance, and confiscation of the proceeds of crime. What follows is an analysis on these modalities in countering cross-border money laundering criminalities.

7.4. Establishing International Modalities of Cooperation in Countering Money Laundering Offence

It is apparent that when dealing with the acts of money laundering which has a transnational character, a high degree of international cooperation in law enforcement is essential.²³ Such cooperation plays a significant role in determining the successful prosecution of the crime. After providing a brief description on international cooperation, this section analyzes international modalities of cooperation involving extradition, mutual legal assistance, and the confiscation of the proceeds of crime. This section examines how countries attempt to enforce their own criminal law internationally, hampering interstate cooperation in law enforcement matters.

7.4.1. The Notion of International Cooperation

Following Robert Keohane, numerous scholars found that policy coordination through country cooperation leads to the acceptance of a country's specific preference.²⁴ Milner²⁵, for example, points out that cooperation can be achieved by conducting one of these actions: it can occur without communication or explicit agreement; it can be negotiated in an explicit bargaining process; and it can be forced by stronger parties. Cooperation can be held in either a bilateral agreement where two countries are bounded or a multilateral agreement where

²³'If law enforcement remains passive in the face of transnational crime, this will only encourage offenders to continue to commit crime. For the investigator and prosecutor confronted with modern organized crime, relying on international cooperation has become a necessity, and extradition and mutual legal assistance in criminal matters have become two key tools', *See* Matti Joutsen, "International Cooperation against Transnational Organized Crime: The General Development", Resource Material Series No.59, Work Product of the 19th International Training Course: Current Situation of and Countermeasures against Transnational Organized Crime, UNIFEI, p.364.

²⁴This definition cited in Helen Milner, "International Theories among Nations: Strengths and Weaknesses", *World Politics*, Vol.44, 1992, p.467.

²⁵Helen Milner, *Ibid*, p.469.

more than two countries form a treaty document. Cooperation must be rational both individually and collectively.²⁶ It is individual rationality because the choice to be a party is voluntary.²⁷ It is collective rationality because states negotiate and exploit fully for the potential unity in a treaty.²⁸ With regard to interstate cooperation, the methods involves inter alia, extradition, mutual legal assistance, transfer of proceedings, confiscation and forfeiture, information exchange, memoranda of understanding, and disposition of criminal proceeds.

Brown argued that in carrying out international cooperation in criminal matters, it needs an appropriate strategy of law enforcement.²⁹ Within this context, he proposed a proper foundation with appropriate structures that needs to be developed at a national level before it can be launched into an international sphere. Accordingly, he identified four main factors that can influence the environment for international cooperation in criminal matters. These factors are politics, law, culture, and capacity.

Regarding the issue of politics, the importance of political support for law enforcement cooperation is that it enables the negotiation of international agreements and the creation of national laws that implement those agreements. Hence, it can be said that international cooperation in law enforcement matters does not exist without the political support of any state. The issue related to the laws focuses on the body of rules that are designed to regulate human behavior in a society. In the context of international cooperation, laws function to negotiate international agreements and its implementation at a domestic level. Countries through the enactment of domestic legislations will adopt international standards and other concepts described in the treaty. Here in this context, laws contribute to perform the framework of cooperation and implement it at a national level. With regards to culture, it comes into play in two respects: sharing and building cooperation.³⁰ Culture can influence politicians and legislatures. It can also influence the mindset of the investigators and prosecutors. Even more so, culture can influence the opinion of a society in preventing and responding to the emerging trends of any crime.³¹ As a consequence, organizational and management culture of a state may affect the effectiveness of international cooperation in law enforcement matters. Finally, the issue related to capacity, the success of international cooperation in law enforcement matters can be predicted by measuring the capability of all elements that support a judicial, prosecutorial, or law

²⁶Scott Barret. "A Theory of International Cooperation", London Business School, 1998, p.1.

²⁷*Ibid.*

²⁸*Ibid.*

²⁹Steven David Brown, "Ready, Willing and Enable: A Theory of Enablers for International Cooperation" in Steven David Brown, *Combating International crime: The Longer Arm of the Law*, Routledge-Cavendish, London & New York, 2008, p.29.

³⁰http://www.uwec.edu/bonstemj/Intro/Spring04/Culture.Structure_files/v3_document

³¹See Steven David Brown (2008), *Supra* note 29, p.36.

enforcement personnel of the requested country. In this sense, Heymann identified three capabilities that must exist in carrying out international cooperation in law enforcement matters.³² These are the capacity to acquire information in foreign states, the capacity to bring it back to the forum state as usable evidence, and the capacity to bring the defendant and witnesses to the forum state.³³

7.4.2. The Main International Modalities of Cooperation in Countering Money Laundering Offence

There are several modalities that have been used recently in conducting international cooperation for countering money laundering offences. However, this study will cover the major and common modalities of international cooperation. Those modalities include pursuing the suspect (extradition), pursuing the evidence (mutual legal assistance), and pursuing the profits (forfeiture and confiscation). Pursuing the suspect is the process where any country is asked to locate and return a person who is accused of or has been convicted of a crime committed in the requesting country. Pursuing the evidence is the process of obtaining evidence or information in a foreign country where the evidence is located. Pursuing the profits, finally, is the process in obtaining criminal proceeds located abroad in which the forum state asks a foreign country to forfeit or to confiscate the illegal proceeds that allegedly derive from criminal activities. What follows is an analysis on the form and detail of basic instruments used for conducting international cooperation.

7.4.2.1. Extradition - Pursuing the Suspect

Extradition refers to the transfer of offenders to another state for prosecution. Extradition in this context is aimed at preventing the criminals from finding a safe haven and escaping punishment. Before the 1800s, extradition was directed to the return of fugitives sought for political or religious offences.³⁴ Here in this age, extradition was viewed as a means to protect the political order of states. However, in modern times, the focus of extradition has changed substantially to cover common serious crimes.³⁵ Throughout its existence, it is

³²Philip B. Heymann, "Two Models of National Attitudes towards International Cooperation in Law Enforcement", *Harvard International Law Journal*, Vol.31, 1990, p.99.

³³*Ibid*

³⁴Kimberly Prost, "International Cooperation in Combating Transnational Crime", Paper, Senior Counsel, Department of Justice, Canada, 1988, p.4.

³⁵*Ibid.*

obvious that extradition has an important role in combating money laundering that has international dimensions. Extradition can be organized through bilateral or multilateral treaties. The European Convention on Extradition of 1957 is one such multilateral treaty that concerns countries with Europe. Its main goal is to achieve a greater unite between its members by having them comply to the same set of extradition rules.

In carrying out extradition, there are several basic principles that function as rules of extradition. These principles are designed to protect the rights of suspects and defendants. The existence of these principles might be incentives or disincentives for the success in conducting international cooperation in law enforcement matters. The first principle is the principle of dual criminality. This principle requires an act to be a crime in both the requesting and requested countries. In other words, the crime must be punishable in both countries. This principle reflects the doctrine of *nulla poena sine lege* (no punishment without law). The reasoning for dual criminality is to protect someone from extradition if the act is not unlawful in the country that is requested an extradition and in the country that demands the extradition. As such, the principle of dual criminality is aimed at protecting the fugitive from unjust punishment. The principle of dual criminality for extradition was mentioned in Article 2 of the European Convention on Extradition of 1957, wherein extradition is granted when offences are punishable under both the laws of the requesting and requested parties. This is applicable however when the crime leads to an incarceration period that is greater than one year.

It is recognized that the principle of dual criminality is important to protect the fugitive from unjust punishment. However, the implementation of the principle in a given case is not an easy task. The most challenging issue in establishing dual criminality for extradition flows from technical differences in how states define, name, and prove criminal offences.³⁶ Regarding this issue, it is difficult to determine whether the conduct is a crime in a foreign jurisdiction. In overcoming this difficulty, there are two methods in applying the dual criminality requirement, namely, *in concreto* and *in abstracto*.³⁷ Under the first method, the court applies a strict analysis of its elements to the parallel law of the requesting state. If the elements match, the court then applies domestic law to the action of the extradition. By contrast, in the second method, a court reviews the criminal conduct regardless of the label and elements of the crime. In this case, it is not necessary for the wording of the offence to be identical. The conduct simply considers the crime under the laws of both jurisdictions.

The extradition could fail due to the distinct concept in applying the dual criminality requirement. Within this context, double criminality may cause

³⁶Kimberly Prost (1988), *Supra* note 34, p.4.

³⁷*Ibid*, p.11. See also Jonathan O Hafen, "International Extradition: Issues Arising Under the Dual Criminality Requirement", Brigham Young University Law Review, 1992, p.199-200.

legal and practical difficulties.³⁸ Legal difficulties may arise if the requested state expect more or less similar wording of the provisions. Meanwhile, practical difficulties may arise when the requesting state seeks to ascertain how the offence is defined in the requested state. Due to the transnational nature of money laundering offence, it is necessary for courts to consider not being too rigid in applying the dual criminality requirement. The United States of America follows the *in abstracto* method in establishing dual criminality. In some cases the United States follows the liberalization of judicial interpretation of the dual criminality requirement. The case *Wright v. Henkel* has proved the use of this method. The case reads as follows:

'Wright involved a request by the British government to extradite a man who had participated in a fraudulent scheme in England and then fled to New York. The extraditable offence listed in the treaty was fraud. The problem arose from the fact that the elements for a prima facie case of fraud differed in the two jurisdictions, raising dual criminality concerns. The elements of the English version of the crime differed only slightly from a similar New York provision. Nevertheless, the defendant, Wright, claimed that his extradition was precluded by the dual criminality requirement. In rejecting Wright's claim, the Court noted that the elements of the British and United States version of the crime were different but held that because the two were substantially analogous, the dual criminality requirement had been satisfied'.³⁹

The second principle is the principle of specialty. This principle reflects the rule that once a person is extradited, that person can be prosecuted only for the charges on which he was extradited. Here in this context, the principle of specialty stipulates that the requesting state may not, without the consent of the requested state, try or punish the suspect for an offence not referred to in the extradition request.⁴⁰ Subsequently, according to the principle of specialty, the materials obtained through international cooperation in criminal matters may not be used for other purposes and proceedings other than those for which the cooperation was requested.

The third principle is the principle *aut dedere aut judicare* (to extradite or to prosecute). Under this principle, where a requested state refuses extradition on the basis of nationality, the case should be referred to its competent authorities for prosecution. This principle is intended to ensure that the criminals will not escape justice and find safe haven on the basis of nationality. In many states, particularly of civil law tradition, the extradition of nationals is prohibited.⁴¹ In most instances, countries that do not extradite

³⁸Matti Joutsen, *Supra* note 23, p.260.

³⁹Jonathan O Hafen, *Supra* note 37, p.200. See also Matti Joutsen, *Supra* note 24, p.260.

⁴⁰Matti Joutsen, *Supra* note 23, p.260.

⁴¹The reasons of non extradition of nationals, according to Nadelmann, are the obligation of a state to protect its citizens, a lack of confidence in the fairness of foreign legal proceedings, the many disadvantages that defendants face when defending themselves in a foreign legal system,

nationals will have domestic jurisdiction to prosecute for offences committed in the territory of a foreign state. In the context of money laundering, international instruments such as the 1988 Vienna Convention, the 1990 Strasbourg Convention, and the 2000 Palermo Convention follow the principle to extradite or to prosecute. However, it is increasingly evident that a domestic prosecution of offences committed outside the country is a process replete with problems. The following description is taken from the report on extradition by the United Nations expert working group:

'It was noted that the use of the principle *aut dedere aut judicare* would in theory be an alternative to the extradition of nationals and had on some occasions proved effective. There were, however, several significant practical problems in its application, including the low priority assigned to such prosecutions by overburdened requested States. The difficulty and costs of obtaining evidence from the requesting State, and the serious burdens imposed by such trials on the victims, witnesses and other persons, were cited as examples. These problems significantly impeded the effectiveness of this alternative to extradition'.⁴²

The available international conventions allow countries to refuse extradition in a variety of circumstances. These include if there is no bilateral extradition with the requesting country; if there is a suspicion that the person will be prosecuted for reasons of gender, ethnicity, nationality, race, religion or political opinion; or if domestic laws prohibit the extradition of their own nationals. Extradition can further be refused in the absence of dual criminality. Alternatively, the requested country can surrender the person under the condition that person will return to serve the sentence. Furthermore, extradition may be refused if the requested country considers the offence 'political' or 'military', or if it does not consider the alleged offence sufficiently serious to warrant extradition and severe penalties.

7.4.2.2. Mutual Legal Assistance - Pursuing the Evidence

Taking into account the advantages of globalization, criminal conducts have been increasingly crossing national boundaries and expanding into worldwide operation. In this setting, it is increasingly evident that there is no single country with the capability to prevent and control this type of crime in a unilateral action. Most of them frequently need interstate cooperation in foreign discovery such as the exchange of information, documentary evidence, or witnesses. They also need to conduct international cooperation in returning an

and the many disadvantages of being in custody in a foreign state. See Ethan A. Nadelmann (1997), *Supra* note 21, p.427.

⁴²Convention on the Prevention and Punishment of the Crime of Genocide, 9 December, 1948 78 U N T S 277).

escaped criminal to the origin's country. In the legal perspective, the modality refers to 'legal assistance' in criminal matters.

Legal assistance occurs when one state receives assistance from another state to prosecute a criminal case. It is also a complex measure where one state utilizes its public services of judicial bodies in another state for investigating the case, court examinations, or for enforcing the court decisions. Regardless of the definitions proposed by scholars, in essence, legal assistance focuses on the cooperation in the administration of the criminal justice process. The nature of legal assistance can be differentiated into two groups, namely, information sharing and criminal procedure.⁴³ The first is directed against criminality as a whole by providing relevant information necessary for combating the crime. The second is directed to the process of criminal justice with respect to a particular offender.

Referring to the perspective of law enforcement, legal assistance between or among countries may be defined as a process in providing and obtaining assistance in criminal matters. From this standpoint, the so-called 'mutual legal assistance' is intended to provide a framework of cooperation. This condition enables law enforcement authorities to obtain evidence located abroad. Hence, the purpose of mutual legal assistance is to assist each other in obtaining information and gathering evidence that need to support in criminal trials. A broad range of mutual legal assistance covers the providing of information and documents, the locating or identifying of persons or items, and the taking of evidence, testimony or statements of persons. As well, mutual legal assistance can also be rendered at any state to search and seize documents, forfeit criminal proceeds, transfer the person, and return the proceeds of crime to the origin's state.

Mutual legal assistance is implemented into the framework of bilateral or multilateral treaties or agreements. Mutual legal assistance treaties (MLATs) involve the obligation to provide assistance, the scope of assistance, and the content of the requests. Under MLATs, each state party is obliged to assist each other in the fields of investigation, prosecution, and criminal proceedings. The difference with extradition is that MLATs usually provide for assistance without regard to whether the matters under investigation would be a crime in both countries. There are several advantages to states having mutual legal assistance treaties in dealing with transnational criminal cases. To date, Richardson identified at least six such advantages:

Firstly, evidence can be obtained quickly because requests bypass the courts and diplomatic channels. Secondly, mutual legal assistance treaties establish a procedural framework for ensuring that the evidence will be admissible in domestic courts. Thirdly, they can provide a mechanism for circumventing the financial secrecy laws that so often frustrate investigators. Fourthly, mutual legal assistance treaties can require that the

⁴³Philip B. Heymann (1990), *Supra* note 32, p.130.

request and the evidence provided be kept confidential, preventing suspects from learning of the request and attempting to hide, obscure, or destroy evidence. Fifthly, they can permit requests to be made prior to the institution of criminal proceedings. And finally, mutual legal assistance treaties can require the provisions of evidence in cases where no 'dual criminality' exists.⁴⁴

In the context of money laundering, the basic legal framework of mutual legal assistance is the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Article 7 provides a broad range of mutual legal assistance in dealing with the criminal conducts of drug trafficking and money laundering. The convention requires that each member afford the widest measure of mutual legal assistance in the investigation, prosecution, and judicial proceedings. Mutual legal assistance in this context is divisible into three broad categories: investigative assistance to identify and trace property to obtain documents; provisional measures to freeze or seize property located in the territory of the requested party; and enforcement of another state's confiscation orders. For mutual legal assistance to be carried out smoothly, article 7(5) obliges parties not to decline it on the ground of bank secrecy.

Furthermore, article 18 of the Palermo Convention of 2000 and article 46 of the Convention against Corruption of 2003 are international legal instruments that enumerate a wide range of mutual legal assistance in the investigation, prosecution, and judicial proceeding. These assistances involve, *inter alia*, collecting documentary evidence, statements of a person, effect service of judicial documents, execute searches, seizures and freezing of assets, and obtain expert evaluations. The document must always identify the authority making the request, the nature of the investigation, a brief summary of all the relevant facts, details of assistance, and so on. Both conventions also established the need to create a central authority to process all the mutual legal assistance received from state parties.

Even though there are complete regulations regarding mutual legal assistance and countries declare their commitment to cooperate with each other in tackling money laundering offences, in operational reality, there are a lot of challenges faced by law enforcement authorities in conducting mutual legal assistance. The following two cases illustrate the essential elements and also the complication of mutual legal assistance in conducting money laundering investigations.⁴⁵

- In Luxembourg, a legal challenge was successfully made to the process by which the evidence was obtained and given to the Royal Canadian Mounted Police (CRMP). The Luxembourg Court of Appeal held that the seizure of the record was invalid because the letter of request from Canada to Luxembourg had not been signed by a judge, as required

⁴⁴*Ibid*, p.83-84.

⁴⁵Lesley M. Bain (2004), *Supra* note 17, p.10.

by Luxembourg not Canada. Since this evidence was crucial to successful prosecution of Good, Crown made a request to the Supreme Court of British Columbia to take commission evidence in Luxembourg. This request was denied due to a perceived timeless issue. The Supreme Court of British Columbia held that the Crown should have been able to anticipate the problem with gathering and obtaining evidence from Luxembourg and should have made their request earlier in the process. Crown was forced to enter a stay of proceedings against Good.

- In the Cruickshank case (1992), the challenge to the evidence obtained and given to the Royal Canadian Mounted Police (CRMP) in Switzerland was unsuccessful and the bank in question agreed to let one of its employees travel to Canada to provide evidence in court. Cruickshank was in the business of selling cannabis and transport some of the proceeds to offshore havens. In that case, Cruickshank's conviction of 16 counts of possession of the proceeds of crime is primarily due to the cooperation with the Swiss.

7.4.2.3. Forfeiture and Confiscation of Criminal Proceeds – Pursuing the Profits

The term 'confiscation' stands for taking private property for public use without compensation.⁴⁶ This is done through the courts as penalty or measure after the completion of proceedings. As a noun, confiscation is similar to the term of seizure, appropriation, impounding, forfeiture, expropriation, sequestration, and takeover which may be seen as being seized by a government or by taking possession of something through the legal process.⁴⁷ The FATF in its Guide Document explains that confiscation or forfeiture orders are linked to a criminal conviction or a court decision.⁴⁸ In this context, the confiscated or forfeited property is determined to have been derived from or intended for use in a violation of the law. The question to be asked is why confiscation or forfeiture is essential in reducing the incentive to commit a crime. From a moral perspective, there is an ideological assumption that no one should be allowed to profit from a crime. In other words, no person shall be allowed to unjustly enrich oneself in the expense of another individual or a society at large.

In the context of money laundering, confiscation is an important part of an effective anti-money laundering regime. A core element of Recommendation 3 of the FATF (2003) is that there should be measures in place to identify, trace and evaluate property that is subject to confiscation. Likewise, Recommendation 38 requires that there be authorities to take expeditious action in response to requests by foreign countries to identify property that may be subject to confiscation. Furthermore, Article 5 of the Vienna Convention provides details of the term confiscation at both national

⁴⁶See <http://definitions.uslegal.com/c/confiscation/>

⁴⁷See <http://www.thefreedictionary.com/confiscation>

⁴⁸FATF, Confiscation: Best Practice, FATF Guide Document, 19 February 2010.

and international levels. Firstly, the convention requires that state parties enact laws allowing for the confiscation of all forms of property used in or derived from offences listed in article 3(1) and proceeds of these offences. Measures to identify, trace, and freeze forfeitable assets must also be adopted by the parties. Secondly, the Convention requires that each assist the others in identifying, freezing, or confiscating property within its territory that was used in or is the proceeds of an offence that occurred in the territory of the requesting state.

7.5. The Challenges to Effective International Cooperation in Countering Money Laundering Offence

As stated above, some efforts have been taken by the domestic as well as international community in responding to the acts of money laundering. The establishment of international conventions supported by the United Nations, the expansion of domestic criminal laws and law enforcement beyond its territory, and the establishment of international modalities of cooperation are some evidence of these efforts. In practice, however, some obstacles that hinder the effectiveness in conducting international cooperation are inevitable. Three factors that affect the effectiveness of interstate cooperation in dealing with money laundering offences involve traditional view of sovereignty, the diversity of national legal systems, and the capability to perform international cooperation. What follows is an analysis on the form and detail of these challenges that can be a disincentive to the effectiveness in conducting interstate cooperation. This will be followed by an examination how states attempt to reduce and overcome these challenges.

7.5.1. The Traditional View of Sovereignty

Sovereignty can be an obstacle to the international enforcement of criminal law.⁴⁹ The way any state understands the notion of sovereignty can affect the effectiveness of interstate cooperation. Some states are very sensitive with their sovereign right whilst others are not. The former follows the traditional notion of sovereignty while the latter concerns a new form of sovereignty. With regards to the traditional view of sovereignty, a state is solely responsible for the creation and implementation of international law. It is the highest level of authority for the state and no other state is allowed to interfere in the way the

⁴⁹Ethan A. Nadelmann, "The Role of the United States in the International Enforcement of Criminal Law". *Harvard International Law Journal*, Vol.31, 1990, p.41. *See also* Ivan Simonovic, "State Sovereignty and Globalization: Are Some States More Equal?", *Georgia Journal of International and Comparative Law*, Vol.28, No.3, 2000, p.384.

state treats its inhabitants.⁵⁰ This perception discourages states in conducting international cooperation. Here in this context, the state feels that its sovereignty is threatened by another state. The following is an example of this condition.

Sovereignty threatens in two ways in connection with extraterritoriality problem. First, when State A seeks to apply its laws to conduct that occurs in State B, State B may feel its sovereignty is threatened. Its sovereignty is threatened by the projection of State A's sovereignty into its territory. Second, State A may feel its sovereignty threaten by virtue of rules of State B law or of international law that purport to restrain its regulation of foreign conduct that affects State A.⁵¹

The lack of bilateral as well as multilateral agreements is one reason for the hesitation of nation states to cooperate with each other. The way nation-states understand the notion of sovereignty can encourage or discourage in conducting interstate cooperation. On the contrary, nation-states that are concerned with the new sovereignty are actively conducting international cooperation in law enforcement matters. This is due to the fact that the state is seen as having a partial role within a network of countries that help address global and regional problems.⁵² Pursuing international cooperation actually is a manifestation of modern states which take into account sovereignty as a process to support each other in combating crimes. In other words, new sovereignty focuses on the dependence of one state to cooperate and collaborate within the international community.⁵³

7.5.2. The Diversity of National Legal Systems

According to Nadelmann, a crucial obstacle that discourages cooperation in international law enforcement efforts is the differences in legislation among countries.⁵⁴ Ronderes added that sovereignty takes precedence over any possible homogenization of international law enforcement, which results in differences between legal traditions, procedures, evidence-gathering mechanisms, bureaucracies, legal cultural norms, and methods used in criminal

⁵⁰Ivan Simonovic, "State Sovereignty and Globalization: Are Some States More Equal?", *Georgia Journal of International and Comparative Law*, Vol.28, No.3, 2000, p.384.

⁵¹Joel P. Trachtman, "Reflections on the Nature of the State: Sovereignty, Power, and Responsibility", *Canada-United States Law Journal*, Vol.20, 1994, p.405.

⁵²Abram Chayes & Antonio Handles Chayes, *The New Sovereignty: Compliance with International Regulatory Agreement*, (Cambridge: Harvard University Press, 1995). Cited in Anne-Marie Slaughter, "Sovereignty and Power in a Network World order", *Stanford Journal of International Law*, Vol.40, 2004, p.286.

⁵³*Ibid.*

⁵⁴Nadelmann (1990), *Supra* note 12, p.44.

investigations.⁵⁵ These conditions lead to obstacles in conducting interstate cooperation: firstly, it leads to the conflict between those countries in question; and secondly, the difficulties encountered in fighting transnational money laundering. By way of example, the following is an elaboration by Eser on the difficulties that heavily impede on the effectiveness in conducting international cooperation in criminal matters.

'The Common Law countries take the territoriality principle very seriously, so that their substantive criminal law extends to extraterritorial offences only in exceptional cases, whereas most Continental European countries take the territoriality principle merely as an initial principle, with the consequence that, by using supplementary principles (like the active and passive personality principle, the protection and universality principle and reliance on the "vicarious administration of criminal justice"), they are able to extend their national criminal law almost worldwide - if they do not actually claim worldwide application of their national criminal law from the outset - and then merely view the above principles at most as reasons for making certain restrictions'.

'In some Continental European countries, the extradition of a country's own nationals is prohibited even by the constitution - although any prosecution gaps may be closed by the far reaching applicability of national law to cover offences committed abroad - whereas the American continent sees nothing unusual in extraditing its own nationals and even regards this as necessary to allow convictions to be made by the authorities of the place where the offence was committed, whenever the country's own national criminal law cannot be applied to extraterritorial offences'.⁵⁶

To counter the problems of diversity in national legal systems, Eser proposed one of two alternatives that can be considered.⁵⁷ The first alternative concerns a country's ability to create its own substantive criminal law for its own territory. In this case, the nation-states must be prepared to support the prosecuting authorities of the country where the offence was committed by giving as much legal assistance as possible at the procedural level, including the extradition of their own nationals. The other alternative is for a country to accept and tolerate the substantive criminal law of other countries by means of restrictive arrangements in order to avert any invasion of sovereignty.

7.5.3. The Capability to Perform International Cooperation

Another obstacle that is present in cooperating internationally for law enforcement matters is the inability of the requested state to perform requests

⁵⁵Juan G. Ronderes, "Transnational Drugs Law Enforcement: The Problem of Jurisdiction and Criminal Law", *Journal of Contemporary Criminal Justice*, Vol.14, Vol.4, 1998, p.384.

⁵⁶Albin Eser, "Basic Issues Concerning Transnational Cooperation in Criminal Cases: A Problem in Outline", Paper presented on the Prevention of Crime and Treatment of Offender, 8th United Nations Congress in Havana – Cuba, 27 Aug – 7 Sept 1990, p.17.

⁵⁷*Ibid.*

of the requesting state. This is particularly true for several states that lack of financial and technical resources, administrative and language barriers, lack of necessary expertise, and lack of clarity on the nature and relevance of the information that is requested. The lack of coordinated law enforcement efforts can also impede the successful of cross-border information-sharing in prosecuting transnational money laundering. Furthermore, lack of political will of the requested countries is also a loophole that impede to efficient international cooperation for fighting money laundering.

7.5 Final Remarks

As elaborated earlier, it becomes apparent that any acts of money laundering transcend the boundaries of national jurisdiction. In this case, criminal law has extended beyond the boundaries of sovereign states. As a consequence, law enforcement has also become increasingly internationalized. The internationalization of law enforcement refers to the application of domestic law to criminal activities occurring beyond the territorial limits of the state in question. In this case, interstate cooperation in countering the cross-border nature of money laundering is extremely important. This means that any country cannot solely deal with the problem of transnational money laundering using unilateral action, but rather needs interstate cooperation in law enforcement matters. In other words, the problem of cross-border money laundering cannot be solved without effective international cooperation.

The main modalities in conducting international cooperation involve pursuing the suspect (extradition), the evidence (mutual legal assistance), and the profits (forfeiting and confiscation). Unfortunately, effective international cooperation and mutual assistance arrangements between or among countries are few. Due to the absence of such arrangements, it is very difficult or even impossible for law enforcement authorities to hold effective cooperation with other countries. Further, other obstacles that affect the effectiveness in conducting international cooperation through those means are traditional view of sovereignty, the diversity of national legal systems, and the capability to perform international cooperation.
