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MANAGING GLOBAL ECONOMIC CRIMES AS HUMAN RIGHTS VIOLATIONS IN A WORLDWIDE PERSPECTIVE

A Study of the Money Laundering Process in the International
Market

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A Nonno Michele e a Nonno Alberto, mia ispirazione e mia guida

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ABSTRACT

The thesis provides an overview of the challenges brought about by money laundering in the present globalised world.

The policies led to date at the international level for fighting economic crimes present shortcomings in national and international criminal law. Indeed, they tend to make abstraction of the fact that money laundering implies undoubtly, either in its performance, or as a consequence, human rights violations. Therefore, the main purpose of this study is to propose a ground-breaking approach with a human rights lens to the fight of both money laundering and its predicate offenses.

This thesis examines money laundering impacts over an economic, legal and social dimension. The drawbacks of the “Double Track” system of policies implemented to date worldwide are analysed, namely: the AML/CFT criminal/punitive approach, and the AML/CFT preventive/regulatory approach. The conclusions suggest to reshape the present framework.

The findings of this thesis point at the necessity to draft and implement a new instrument that would specify the criminalisation of money laundering, establish a direct link between this crime and the perpetration of human rights violations, securing a right to be free from money laundering, and finally establish in parallel an international tribunal for money laundering.

ACRONYMS

AML	Anti-money laundering
AML Convention	Convention on Preventing and Combating Transnational Money Laundering
AU Anti Corruption Convention	African Union Convention on Preventing and Combating Corruption
CoE	Council of Europe
DNBPs	Designated non-financial Businesses and Professions
EU	European Union
FATF	Financial Action Task Force
FATF 2011 Report	Financial Action Task Force Report: Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants
FIUs	Financial Intelligent Units
FT	Financing of Terrorism
First Directive	Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering
HR	Human Rights
KYC	Customary Due Diligence (Know Your Customer)
ICC	International Criminal Court
ICCML	International Criminal Court on Money Laundering
IML	International Monetary Fund
ML	Money Laundering

MS	Member States
NOCTs	Non Cooperative Countries and Territories
Palermo Convention	United Nation Convention against Transnational Organised Crime
PEPs	Politically Exposed Persons
Proposal Directive	Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing reporting of suspicious activities
SARs	Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 Amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering
SOM	Smuggling of Migrants
SOM Protocol	Protocol against the Smuggling of Migrants by Land, Sea and Air
SPs	States Parties
Strasbourg Convention	Council of Europe Convention of laundering, search, seizure and confiscation of the proceeds from crime
Third Directive	Directive 2005/60/EC Of The European Parliament And Of The Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing
THB	Trafficking of Human Beings
THB Protocol	Protocol on Prevent, Suppress and Punish

	Trafficking in Persons, Especially Women and Children
UN	United Nations
UNCAC	United Nation Convention against Corruption
UN Convention against FT	United Nations Convention for the Suppression of the Financing of Terrorism
UNODC	United Nation Office for Drugs and Crime
UNODC Report	Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes: Research Report
Vienna Convention	United Nations Conventions against illicit traffic in narcotic drugs and psychotropic substances
Warsaw Convention	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

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CHAPTER I

Introduction

1. Overview

In the past 25 years, the necessity to fight against the crime of money laundering (hereinafter ML) has infiltrated the agenda of the international community. International and regional organisations, study groups, scholars, states, non-government organisations and other international actors started to perceive globalisation not only as an economic development and an opportunity to increase the economic growth of third world countries, but also as a danger for the economic stability due to the possibility to move easily colossal capitals, both legal and illegal, outside national borders. The 1990's have been characterised by the beginning of new technological systems and the chance to move money easier and faster. Capital fluxes started to flow inside *tax heavens countries*¹ and the possibility for national prosecutors to apply the national judicial system to transnational economic crimes became tougher. Money laundering started to embody international dimension, to become an international problem.

The real issue in fighting ML derives from the crime *per se*. the performance of ML is threefold. The first phase of the process is called *placement stage or pre-wash stage*. The purpose here is to eliminate cash, often composed by very low denomination banknotes, resulted from the criminal activity, to transform it in the so-called “scriptural money”.² The second phase is the *layering stage or main wash stage*, whilst assets are completely camouflaged and tracks are covered. It is at this point of the process that the paper tracing of the money transfers gets broken. The last phase of money laundering is called *integration stage or after wash stage*. In this step, assets are introduced legally inside the economic flow, and they are ready to circulate freely in the economic system.

¹ For tax heaven countries, we refer to those countries in which dominates both a low taxation for foreign investors and the possibility to apply the bank secret to hide the source of capitals. These mechanisms will be developed specifically during the remainder of the thesis.

² Scriptural money is a type of currency in the form of accounting entries that do not circulate neither in the form of banknotes nor of coins.

In this moment, the source of illicit profits is impractical to track down. The major reason is that illicit capitals are not moved altogether, but criminals prefer either to displace them in small amounts into different investments around the world³, or to use them cash⁴. Once they started circulating in the legal economy it is almost impossible to arrive at them anew. Transnational criminal organisation underwent a metamorphosis into the structure of financial institutions. Systems to “clean” illicit profits changed with the development of new economic opportunities and new forms of investments.

Predicate offences of ML hit arrogantly the world of Human Rights (hereinafter HR) and the international community does not see their implications in a globalised world. At national level, crimes as human trafficking, smuggling of migrants, exploitation of natural resources, remain completely detached from the crime of ML. Only in recent years, international institutions as the United Nations⁵ (hereinafter UN) - and the Financial Action Task Force⁶ (hereinafter FATF) first, and regional organisations after,

³ On that point can be useful to observe the Euroshore Final Report, *Protecting the European Union financial system from the exploitation of financial centre and offshore facilities by organized crime*, realised by the University of Trento in collaboration with the institute CERTI Institute of Tax Research for Enterprises of the Bocconi University of Milan and the Erasmus University of Rotterdam, financed by the European Commission for the 1998 Falcone Annual Programme, January 2000. The Report analyses how the so called *tax heaven countries* can produce risks and detrimental effects on developments of European financial markets. The study examines three different forms of *off shore systems*. The first group is characterised by the “*financial centres and European off shore jurisdictions*”, those countries that geographically, economically or politically in contact directly with the European Union (i.e. Andorra, the Republic of San Marino, the Principality of Monaco, and the territories situated in the Caribbean Archipelagos and formerly part of the Netherlands). A second group is constituted by the “*Economies in Transition*”, those countries that were formerly part of the URSS before the end of the Communist Regime and, in the last years, either started to have economic relations with the European Union or entered inside the EU (or presented a formal request to become part of the EU, as Albania). At the last there is a third group of countries comprised in those that represent the “off shore jurisdiction outside the European Union”. These countries do not have any kind of connection with the European Union (i.e. Honk Kong, Bahamas, Barbados etc....). The risk is that European criminals would invest their proceeds in these jurisdictions to reintroduce them in a second moment inside the European market, with the consequence to pollute them.

⁴ Unger, Brigitte, *The scale and impacts of money laundering*, Edward Elgar Publishing, 2007

⁵ I refer both to the “*United Nation Convention against Transnational Organised Crimes*” and its two protocols, 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*”, and the “*United Nation Convention against Corruption*”.

⁶ The FATF elaborated strategies and published reports to combat money laundering in relation to serious transnational predicate offences. FATF Report, *Financial Action Task Force- Money Laundering and Terrorist Financing Typologies 2004-2005*, 10 giugno 2005.

introduced as predicate offences related to money laundering some transnational crimes that are serious violations of HR⁷.

1.1 The Transnational Nature of Money Laundering

The nature of the crime of money laundering evolved in symbiosis with the internationalisation of financial markets. Before the expansion of economic globalisation ML was a local phenomenon, and ML transactions happened more often inside national borders, rather than at international level. Whereas, to date the world assists to an impressive capacity of men to create a worldwide political, economic and social connection; in the meantime threats coming from external agents have improved exponentially. Facilities to move people and capitals, rights derived from the harmonisation of national needs, the economic dependencies between super-powers countries and second world economies, incubated this virus until it exploded at the end of the 1980's. Even if ML is an international problem, it belongs to that category of crimes defined transnational crimes, rather than "international crimes" *strictu sensu*. This distinction must be underlined here, because the conclusions of this work will support the idea that the institutionalisation of an International Tribunal on Money Laundering, in the shape of the International Criminal Court (hereinafter ICC), might constitute an effective remedy in the anti-money laundering (hereinafter AML) framework. Scholars enlightened the category of transnational crimes only recently⁸, when big criminal *cliques* started to benefit of the new opportunities provided by the globalisation, and crimes, which for their nature had a national dimension, appeared in the international panorama.

⁷ UN Office for Drug Control and Crime Prevention (UNODC), *Report on Financial Events, Bank Secrecy, and Money Laundering*, New York, 1998. Based on the creation of modern structures to prevent, and not only to repress, money laundering; to the implementation of the FATF recommendations and to the establishment of international police task forces to exchange data and information, the state parties undertook more seriously also the creation of a national anti-money laundering legal framework.

⁸ Mueller G.O, *Transnational Crime: Definitions and Concepts*, in P. Williams, e D. Vlasits, *Combating Transnational Crime, a Special Issue of Transnational Organized Crime*, Vol. 4, 1998, p. 18.

According to the legal doctrine of Cassese, international crimes are defined as “[those behaviours that] *are breaches of international rules entailing the personal criminal liability of individuals concerned as opposed to the responsibility of the State of which the individuals may act as organs*⁹”. Some of the main components of international crimes are: i) the recognition as violations of customary rules¹⁰, ii) the purpose to hit the fundamental legal structure posed at protection of a nation and on the entire international community; iii) and the application upon them of the principle of universal jurisdiction.

The same cannot be said for the category of transnational crimes. According to the definition furnished by G. O. Mueller, they are those offences “*whose inception, prevention and/or direct or indirect effects involved more than one country*¹¹”. The evolution of this category over years suggests today that the conception presented by Mueller could be amplified, to cover all series of crimes that display their effects in more than one single country. They must possess three qualities: i) the capacity to trespass national boundaries; ii) the recognition as crimes at international level, iii) and the purpose to obtain a personal advantage even if their effects are so detrimental to hit considerably the legal structure of a country, or the entire international community.

Regarding the first quality, this capacity can cover persons, both criminals and victims (an example could be smuggling of migrants or human trafficking), any tangible movable items (weapons, or any other tool used to commit or finance a crime, such as cash or drug), and the conduct itself (the most common can be telematics fraud, in which an order or an input transmitted from a certain country is received in another one).

More complicated is the recognition at international level. According to the customary law *nullum crimen, nulla poena, sine lege*, until a legal provision is not set, behaviours

⁹ Cassese A., *International Criminal Law*, p.23, Oxford University Press, Oxford, 2003.

¹⁰ In the sense that to be considered as such they go against values considered fundamental for the entire international community. *See supra Cassese n.*

¹¹ See supra n. 8.

considered blameworthy by society cannot be punished. In this context to be considered as transitional crime, a conduct must be considered punishable at least inside two different judicial legal systems. This recognition can come either from the international legal framework (international treaties, bilateral agreements, extradition rules etc...) either from various different national legislations that equally criminalise a certain behaviour.¹²

In addition, the nature of transitional crimes is to be directed against a state, although they do not involve the state as such. Even if criminals collaterally damage the internal or external structure of the state, the scope intended to achieve is obtaining a “private wage” from the commission. In other words these actions violates norms fundamental to preserve the integrity of the state institution as such, and they must be envisaged as crimes in at least two states to be considered transnational, but they do not have the purpose to, as happens with international crimes. The United Nation Convention against Transnational Organised Crime (hereinafter Palermo Convention), in the December of 2000, finally introduced¹³ these category of crimes, with ML as part of them, inside the international criminal legal framework.

1.2 International Money Laundering: A Genetic Disease of Globalisation

To define the phenomenon of Globalisation, modern scholars refer to different notions, based either on qualitative or quantitative¹⁴ elements. In the context of this dissertation,

¹² Nedelmann stigmatised this interpretation sustaining that in the first case the recognition of the “*international hook*” is easier, more concrete and more appreciable, because it consists in a factual element, phenomenologically relevant under a transnational perspective. Differently, in the second option, there is the need that two states agree on the basis that the specific conduct must be recognised on a supranational level and that only international instruments can be concretely able to sanction it because ““*each is an evil in and of itself*”. E. Nadelmann, *Global Prohibition Regime: The Evolution of Norms in International Society*, in *International Organisation*, pp. 479-526.1990,

¹³ An analysis of the Palermo Convention will be part of Chapter III (2).

¹⁴ Quantitative approaches emphasize how the result of a globalised world is no more than the supremacy or the triumph reached by a certain model of particularism – as the Western Model imposed by the U.S. – that created a situation of unequivocal (inter)dependence between a pluralism of elites, composed by persons, groups, and entities, both public and private. This model trespasses national border by ending in a sort of natural dominance. The final result is a global economic integration, with the detrimental effect

the qualitative is preferable because takes into consideration the dynamic aspects of globalisation, although the quantitative approach results basically correct. This study will not go in depth on the definition and the implications of globalisation, although should be specified that this term refers to, based on a qualitative approach, in a contraction of both spatial and temporal dimensions, in which human activity are expressed.¹⁵ Translating this process inside the model of money laundering, the phenomenological manifestation of globalisation brought two detrimental effects: i) the capacity of criminals to move instantaneously cash flow over national borders and, thanks to the liberalisation process of financial markets, to transfer it easily abroad; ii) the legislative disharmony at international level, due to the lack of a proper international cooperation caused by the unwillingness of states to restrict their sovereign power for the benefit of the global order¹⁶.

An example of what explained above is represented by *forum shopping*. It is a system that helps the accomplishment of legislative disharmony. It consists in the capacity for one of the litigants to choose the court that provides him the most favourable jurisdiction. The maintaining inside international community of different jurisdictions allows criminals to join asymmetries at national levels, even toward the existence of a uniform international legal framework. Some jurisdictions have, for example, become known as “*plaintiff-friendly*” and so have attracted litigation even when there is little or no connection between the legal issues and the jurisdiction in which they are to be litigated. During years, both the obsolescence and the lack of legislative uniformity in national systems obliged countries, regional organisation and the international community to engage in both the research and the adoption of substantives anti-money laundering measures to avoid such “*black holes*”. At international level, fundamental in this sense has been the Bangkok Declaration “*Synergies and Responses: Strategic*

of creating economic interdependencies and/or the fusion of national economies. A. Giovanoli, “*Storia e Globalizzazione*, p. 87, Roma-Bari, Laterza, 2003.

¹⁵ For a deeper analysis consult J.E. Stiglitz, “*Globalization and its Discontents*”, New York, 2002, pp. 219-256.

¹⁶ H. Shams, *Legal Globalization. Money Laundering Law and Other Cases*, London, 2004.

Alliances in Crime Prevention and Criminal Justice”¹⁷. The originality and the innovation of the Bangkok Declaration reside in the light given to money laundering as a new – and fundamental -frontier of transnational crime: in other words the meaning of the Bangkok Declaration is that criminals do not care about the nature of the crime if it brings money, and recently these sums are invested to fund terrorist groups¹⁸ too.

This study will rely on some fundamentals passages inserted in the above-mentioned Declaration, as they highlight the direct link between money laundering and human rights. In the welcome of the entry into force of the Palermo Convention and its Two Protocols¹⁹ Member States call upon those who did not ratify yet the Palermo Convention, the United Nation Convention against Corruption, and the instruments to fight international terrorism, to hurry in the ratification process in order to create a harmonic cooperation in which everyone can contribute to fight against organised crime. “*We commit ourselves to full compliance with our obligations under international law, in particular **international human rights law, refugee law and humanitarian law**. We support every effort to facilitate the implementation of those instruments*”. Problems related to post conflict countries are also taken into consideration. The assembly is aware of the difficulties that these countries face during peace building operations, especially in transition to democracy for the chances to be more easily affected by corruption and organised crime. The Declaration stresses the importance that Member States, regional organisations and international entities

¹⁷ This Declaration analyses the aspects of legislative disharmony during the rise of both international criminal organisations and terrorists groups. It has been adopted during the “*UN XI Convention of the United Nations on the Prevention of Crime and Criminal Justice*” held in Bangkok between the 18th and the 25th of April 2005. The Declaration poses the aims to study all the aspects of new transnational organised crime: the rise of international criminal organisations, their complexity in terms of structures and specialisation, and their relations with terrorist groups.

¹⁸ It is important to underline some passages stressed in the Preamble of the Declaration. The fears and anxieties of international community are expressed in these words: “[*We, the States Members of the United Nations*] **Greatly concerned** by the expansion and dimensions of transnational organized crime, including illicit drug trafficking, **money-laundering**, trafficking in persons, smuggling of migrants, illegal arms trafficking and terrorism, and any existing links between them, and by the increasing sophistication and diversification of the activities of organized criminal groups,” . it continues saying “*Alarmed by the rapid growth, geographical extent and effects of **new economic and financial crimes**, which have emerged as significant threats to national economies and the international financial system...*”.

¹⁹

“provide more effective responses to these problems, in order to re-establish, strengthen or sustain the rule of law and deliver justice in post-conflict situations”. Another issue stressed by the Declaration, which is directly related to money laundering, regards the protection of fundamental human rights, as the right to life, the right to a private life, and economic and social rights. In accordance to this, the Declaration affirms that *“we note with concern the rise of kidnapping and trafficking in persons as serious, profitable and inhumane forms of organized crime, often committed with the objective of funding criminal organizations and, in some cases, terrorist activities...”*, and moreover *“we note that, in the current period of globalization, information technology and the rapid development of new telecommunication and computer network systems have been accompanied by the abuse of those technologies for criminal purposes”*. The international community recognised the problems related to the new frontiers of economic crimes. In particular, ML and corruption, are economic crimes committed from making profits, that are however closely intertwined with violations of HR. Final provision 26 is clear to define the efforts that Member States shall undertake to implement national legislation respecting international standards: *“we call upon Member States to strengthen policies, measures and institutions for national action and international cooperation in the prevention, investigation and prosecution of economic and financial crimes, including money laundering, and such crimes conducted via, or facilitated by, information technologies, in particular in connection with the financing of terrorism and trafficking in illicit drugs”*.

2. *Scope and Research Questions*

“Money laundering is not simply a problem faced by the banking community and other mainstream financial institutions”. The President of the FATF Robert Noble has pronounced this sentence during the meeting of Courmayeur in 1994²⁰. What is the meaning of these words? The strength of this crime dwells in its multi facial nature and

²⁰ *The Financial Action Task Force Recommendations and their implementations* is a document presented during the *International Conference on Preventing and Controlling Money Laundering and the Use of Proceeds of Crime: A global Approach*, Courmayeur, Italy, 18-20 giugno 1994.

in its capacity to adapt to time and situations. It must be understood that ML is not only a crime *per se*; it is a gangrene affecting the entire global economy. ML cannot be defeated; it can be prevented and repressed, but never completely eliminated. ML appears like the Hydra: for each head cut the double grow. Heads are the predicate offences: for instance drug and weapon trafficking, human trafficking, smuggling of migrants, corruption, gambling, and exploitation of natural resources. ML cannot be seen as the tail of this monster. ML is the entire body and ancillary offences are just part of it.

The strength of the crime of money laundering is its chameleonic nature. Therefore, the capacity of criminals to find daily new systems to hide and to untrack the illicit source of proceeds of crimes is almost infinite, as infinite are the crimes that can produce illegal profits. Due to this, international institutions created over the years a legal framework, based both on the criminalisation/repression of the conduct and its ancillary offences, and on the creation of regulatory/preventive mechanisms directed to financial institutions, Designated non-financial Businesses and Professions (hereinafter DNFBPs), and Politically Exposed Persons (hereinafter PEPs).

The scope of this thesis is to examine ML from a new point of view: the violation of HR. I will try to answer two questions: how ML affects fundamental rights considered as such by the international community? How can the international cooperation improve the mechanisms settled during the years? These questions carry more sub-questions and issues, which will be highlighted during the research

The conclusions will lie on the need to give more importance to ML *in se*, rather than in connection with its ancillary offences, and to speculate on the possibility that drafting a new Convention on Preventing and Combating Transnational Money Laundering and establishing an International Criminal Court on Money Laundering could trespass the problems related to the limits on the level of international cooperation.

3. Methodology, Materials and Limits

ML deals with a very broad number of issues. A complete discussion of all the problems connected to ML is out of the target of this thesis. The study will adopt a human rights based approach founded mainly on the analysis of the phenomenon of ML in connection with two specific predicate offences: human trafficking and smuggling of migrants. Therefore, due to economic and social globalisation these markets have become very attractive and profitable for transnational criminal organisations, and the current international AML legal framework does not seem able to properly face the problem. ML has also a negative impact on sustainable development of the poorer countries, especially due to the fact that often they are the country-sources of trafficked and smuggled persons. At the contrary, developed countries are the country-destinations, which suffer from a lack of appropriate means and measures to contrast it. Moreover, the colossal amounts of money moved into this system are detrimental for the entire international community; a high percentage is allocated in the legal economic system affecting it, and so violates people's political, social and economic rights.

The limits of this work concern the impossibility to cover entirely all the perspectives that such a topic require. Three different dimensions, methods, materials will be used:

- Economic dimension: the methodology concerns the analysis of the international economic dimension of ML to enlighten the scale of the problem. Academic literature will be the main source used in this chapter. The analysis will not take into consideration neither the principal methods to launder the proceeds of crimes, nor the microeconomic and macroeconomic effects of ML – the attention is on the economic effects of ML on international dimension;
- Legal dimension: the analysis will follow a legal approach, concentrated on the main modern instruments to combat ML. The connections between ML and the two offences mentioned above do not allow the conduction of an analysis on the entire AML panorama. The documents used will be either hard law instruments, either soft law norms, both at international and at European level. The hard law instruments are: i) the *Palermo Convention, its Two Protocols: Protocol on Prevent, Suppress and Punish Trafficking in Persons, Especially Women and*

Children, and Protocol against the Smuggling of Migrants by Land, Sea and Air (hereinafter Protocol on THB, and Protocol on SOM); ii) the *Council of Europe Convention of laundering, search, seizure and confiscation of the proceeds from crime* (hereinafter the Strasbourg Convention); iii) the *Directive 2005/60/EC Of The European Parliament And Of The Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing* (hereinafter the Third Directive). The soft law instruments will be basically the FATF 40 Recommendations, as amended in 2012. Other conventions, regulations, or directives related to ML will be mentioned for reasons of logic, but they will not be part of an accurate analysis. The analysis on the relation between ML and Financing of Terrorism (hereinafter FT) is out of the purpose of this thesis, as well as a deep analysis on ML and corruption. Anyway, these two topics will be mentioned during the dissertation.

- Social dimension: the methodology will start from a theoretical analysis of the two predicate offences of trafficking in human beings and smuggling of migrants as forms of slavery, to turn into an empirical analysis of the *Financial Action Task Force Report: Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants* (hereinafter the Report).

A final chapter will lead to the conclusion that a possible solution could be the adaption of a new convention on money laundering, which will adopt a human rights based approach, will reconsider the criminalisation of ML, and will establish an international special tribunal on ML.

CHAPTER II

The International Economic Dimension of Money Laundering: between Criminals' and States' Responsibility

1. Overview

The introductory chapter of this thesis consists in the first fold of analysis bringing the light on the economic dimension of ML.²¹ This chapter will highlight the two different roles played by economy in the area of ML: i) the internationalisation of organised crime, by analysing the internal barriers that criminals need to face to operate at transnational levels, ii) and the international economic dimension of the phenomenon, in relation with the so-called *network effect*. These two matters can appear *prima facie* completed detached from a human rights based approach, but if we observe deeply the new trends of transnational organised crime, it will be possible to arrive at different conclusions. In fact, every criminal acts as any other economic agent. His purpose is the maximization of the profits. The only difference is that normally, those who launder money maximize their profits at the risk of being caught²². This means that criminals prefer to invest in a market that is “*less risk/high profitable*”. Globalisation allows the possibility to move easier and faster both people and goods. If from one side it carried beneficial effects to economies, thanks to freedoms of movement, on the other side it opened the world to criminal organisations, facilitating the possibility either to commit the predicate offence abroad and then to launder money inside national borders, either to commit a crime inside national borders and then to launderer abroad, either to both

²¹ I suggest to watch a short video called “Circulation” prepared by the United Nation Office of Drug and Crime and available on YouTube at this link: <https://www.youtube.com/watch?v=nV2cYC9lfNc>

²² This private optimum is socially inefficient, because recycling produces significant externalities in terms of costs imposed on society and coming as well as by the offense itself, even from his predicate offence. It can happen, that the costs related to the latter type of crimes are not even put in evidence, although for the majority of these crimes they are clearly manifest. J. Mc Dowell, G. Novis, “*The Consequences of Money Laundering and Financial Crime, in Economic Perspectives. The Fight against Money Laundering*”. The Electronic Journal of the U.S. Department of State, Vol. 6, No. 2, May 2001, at. 7.

commit the ancillary offence and the launder conduct in different jurisdictions. So, keeping in mind the equation **risk/profits** and combining it with new trends such as migration flows, and the global development, studies demonstrated how trafficking in human beings, smuggling of migrants, exploitation of natural resources, and other crimes affecting the fundamental right of the individual, became the most profitable markets where to start a business for criminal organisations²³. The profitability of a market not only depends from its natural capacity to generate money flows. Every market is in abstract profitable. Profitability also stems from the possibility offered by a state to an economic actor to deliberately act in a specific market. A number of factors (analysed in Chapter IV) enlighten how states play a determinant role in the execution of these conducts. The analysis of the network effect will enlighten how on an international economic dimension, states can often be directly responsible for the violation of HR by ML and its ancillary offences.

2. The Economic Dimension of the Internationalisation of Criminal Organisations

Following this analysis it is necessary to take a look at the reality of criminal groups diffused over the world. These structures have grown to reach nowadays the dimension and the complexity of the biggest multinational industries and to imitate slavishly their business dynamics. Even the economic doctrine hazarded to explain that the activities of criminal organisations could be explained by looking at the classical economic theories, and that the behaviours of these groups follow exactly the main scopes of every legal company: to maximise their profits with a subsequent minimization of costs²⁴. The internationalisation of markets, as well as the internationalisation of criminal groups, requires a fundamental factor without which this process cannot even start: the capacity to create connections between the local activity and the new market in which an

²³ This subject will be developed in chapter IV, for the moment it is worth to say that an activity as human trafficking is the third most profitable criminal economic market after drug and weapon trafficking. UNODC, “*Estimating illicit financial flows resulting from drug trafficking and other transnational organised crimes*”, 2011, available at http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf.

²⁴ See supra n.4.

entrepreneurial business desires to be began. There are always some internal barriers that necessitate be overcoming, composed both by other players in the same market share²⁵, and by the state. This study will apply the Porter's *Diamond Model* to big criminal organisations that during years internationalized their activities and covered new market sectors. This model is composed by six elements (or barriers):

- *Factor conditions*: concern all the resources related to the concrete capacity of a firm to move in a foreign country. Capitals, human resources, *know how*, infrastructures, are the basis to create a competitive environment. Criminal organisations use illegal profits to move abroad. As big as the proceeds of crimes are, as better would be the capacity of a criminal firm to internationalise. The *know how* comes from the activities in which every organisation is specialised (i.e. Italian 'Ndrangheta, specialised for drug trafficking, is to date is the biggest world organisation dominating this market²⁶);
- *Demand conditions*: are the factors that determine the kind of product requested in the foreign market. Better will be the capacity of the firm to innovate the demand with more sophisticated or new products, better will be the approach in the new market. Criminal organisations understood this mechanism and for this reason they start the process of internationalization by introducing new exchangeable products in the same market sectors. For instance the market of European prostitution "*changed*" from African to eastern Europe women, due to the capacity of criminal organisations coming from the Balkans first, and from the ex URSS countries after, to enter successfully inside this sector, by changing the "quality of the goods" offered;
- *Related and supported industries*: are important to produce inputs to accelerate the process of internationalization and to set the basis for the innovation process,

²⁵ Following the theory of the *Diamond Model* typed by Michael Porter, a firm to internationalize and to be competitive in a foreign market must consider 6 fundamental elements: factor conditions, demand conditions, related and supported industries, firm strategy, structure and rivalry, government, and chance. The Porter thesis is that these factors interact with each other to create conditions where innovation and improved competitiveness occurs. To a more detailed understanding of Porter thesis, it is possible to consult M.E. Porter, *The competitive advantage of nations*, New York: Free Press, 1990.

²⁶ N. Gratteri, A. Nicaso, *Fratelli di sangue*, Mondadori, Milano 2009.

thus they could push other firms to innovate as well. If a criminal organisation acts already inside a foreign market even covering a small percentage of the sector, this could help in the way of differentiating the activity to become more competitive (passing from exploitation of prostitution to smuggling of migrants);

- *Firm strategy, structure and rivals*: this is the fourth element of competitiveness and, differently from a situation where enterprises work legally, in the criminal world rivals can be threaten in two different ways: through alliances, following either the scheme of *do ut des*²⁷ or *do ut facies*²⁸, or by trying to physically eliminate the concurrent. Although inside national borders internal wars are more frequent, in an international context big organisations prefer not to “waste blood”, adopting the way of cooperation to cover as much sectors as they can;
- *Government*: it is one of the crucial factors of competitiveness and most important it influences the first four factors. In a globalised world, national legal barriers still play an important role in the possibility enter in a determinate market. States, in the shape of PEPs, often play a determinant role in the link between criminality and access to resources and market sectors. In that sense corruption is the main instrument used by criminals;
- *Chance events*: in every sector of the market there is a certain percentage of unpredictability, even in criminal markets. This last factor considers the uncertainty of a firm either to succeed or to fail.

In the last twenty years globalisation accomplished the appearance on international criminal panorama of new criminal groups, before confined in their belonging countries. Groups from North and Central Africa, from East Europe and even from Caribbean

²⁷ In the first option the opportunity given by foreigners criminal organisations to enter inside a specific sector of the market, in which the concurrency of another big local or foreigner organisation is already strong, can come from the necessity or the willingness of the latter to expand its activities. In such a context both the firms can agree in giving to each other means, know how, products or dividing by themselves geographical areas of “*non- concurrency*”, in which every criminal company can work freely. It is natural that in the moment when one of the two organisations will start to grow in a specific area of activity, agreements can be broken, creating new panoramas.

²⁸ In this second scenario the dominant organisation in a commercial sector will ask to whom ready to start the same business some “personal favours”, in order not to treat their future activities. They can go from the physical elimination of another group concurrent with the first to the payment of some sort of “*peace bill*” as the cost to enter inside the market.

countries started to appear at international level becoming today the lords of sectors as smuggling of migrants, exploitation of prostitution, weapon trafficking and, camouflaged under the habits of Islamic terrorist groups, financing of real terrorists organisations²⁹. The gravity of the threat represented by the bloom of these new groups matches with the internal legal framework of these countries and in many cases with the events occurred inside these territories. The internal war of Balkans as the violent military and paramilitary revolutions, related to dictatorship regimes established in Africa facilitated both the birth and the growth of these new groups. Also permitting further development of investments made by transnational criminal groups in these jurisdictions. When at international level the fight against ML started, almost all the countries of the world were not persecuting this crime. Even at the beginning of the new Millennium some countries – Russia was one of them – still did not have adopted AML policies³⁰. The reason is less complicated that we could imagine, and next paragraph will explain it.

3. *The International Economic Backlash Of Money Laundering*

As said ML is an economic phenomenon by nature. Consequently the perception of microeconomic, macroeconomic and international economic effects plays a primary role in the orientation of criminal behaviours. Despite this, a scheme illustrating exhaustively the economic aspects of money laundering has only been developed recently³¹. The detrimental economic implications caused by this crime play a central

²⁹ E.U. Savona, e M. De Feo, *Money Trails: International Trends and Prevention\Control Policies*, Paper presented to the *International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: A Global Approach*, Courmayeur Mont Blanc, Italy, 18-20 June 1994.

³⁰ These topic will be developed in Chapter IV §3.4.

³¹ Until the end of the 1990's just few economists matched money laundering and detrimental implications on economic systems. One of these scholars is Vito Tanzi, who published some interesting and innovative articles as "*Money Laundering: Scourge of International Banking?*", *Money, Finance, and Monetary Policy in the Global Economy: Challenges to National Governments and the International Monetary System*, Friedrich-Naumann Stiftung, 1997; and "*Macroeconomic Implications of Money Laundering*", *Responding to Money Laundering: International Perspectives*, Harwood Academic Publishers, Amsterdam: 1997.

role in the orientation of criminal policies. Economists affirm that nowadays the criminalisation of this conduct lies exclusively on legitimate economic interests of every country. In other words, some countries will use a blind eye in the criminalisation of transnational organised crime³², benefiting of the illegal economic investments in their territories. Influential studies of economists such as Peter J. Quirk and Vito Tanzi opened the path to an interdisciplinary approach to money laundering³³. An approach that has been used by Donato Masciandaro, Elods Takats and Brigitte Unger to compose their collective work entitled *Black Finance*³⁴. Globally, the economic perception of this crime is a very delicate issue. On the one hand, the economic perspective can help international actors shaping a legal and regulatory system well balanced. On the other side it underlines how the already existent regulatory framework must be revisited to conjugate efficiency and effectiveness with the aim of targeting specific goals, and human rights must be part of these new objectives.

For the complexity³⁵ of all detrimental effects that ML produces on economy, the study will concentrate only and briefly on two particular aspects, which took a leading role in the last years: the economic dimension of ML, and the *network effect*³⁶ on economic

Another important scholar who needs to be mentioned is Peter J. Quirk and his publication “*Money Laundering, muddying the macroeconomy*”, Finance and Development, march 1997, based on his study “*Macroeconomic Implications of Money Laundering.*”, IMF Working Paper 96/66, Washington: International Monetary Fund, 1996.

³²See supra n. 4.

³³ Ibid. n. 30.

³⁴ D. Masciandaro, E. Takats, B. Unger, “*Black Finance*”, Cheltenham, Northampton, UK, MA, USA, 2007. They analyse the economic impact of this offence (microeconomic, macroeconomic, and international economic effects), the empirical effects of the phenomenon, the direct impact on national economies related to the different techniques used for launder, the economic aspects of the fight against money laundering, and the concrete application of anti-money laundering measures.

³⁵ For a complete analysis, see *Quirk supra n. 31*.

³⁶ Network effect is a definition borrowed economy and business affairs. It can be briefly described as the effect that one user of a good or a service produces on the value of that product to other people. Higher is the network effect – the attractiveness on that product – higher will be the value of the product itself. In other words it is possible to affirm that in a circumstance where network effect is present, the value of a product or service is dependent on the number of others using it. The attraction of a market for launderers can be explained through this model too.

growth. Even if for years scholars studied this phenomenon and prepared both long term and short term previsions regarding its effects, the problem is still open. In fact ML, as any other economic crime – maybe even worse than any other economic crime because its effects are hardly tangible – does not belong to the sphere of statistic, does not belong to the sphere of “clean” economy neither³⁷. It is a phenomenon that produces “real” economy because it moves “real” capitals, but at the same time, is hard to disclose it in all its complexity. It could be compared to an iceberg: what statistical researchers see is just the top of this iced mountain. The rest of the body is hidden under the “dirty” ocean of crime. For the moment scholars took two main different positions about this issue. The first school of thought affirms that money laundering is a modern phenomenon and a critical problem for modern economy³⁸. The result is that these studies calculated that the amount of money circulating in the money laundering context can be arranged in a number varying between 200 and 500 billion dollars per year. The second states that scholars have overrated the real entity and complexity of money laundering and estimates that criminal industry would only launder between 25 and 150 billion dollars per year³⁹. For this uncertainty connected to concrete data considering the measure of capitals flown around money laundering, Masciandaro and other scholars⁴⁰

³⁷ M. Gold, M. Levi, *Money Laundering in the UK: an Appraisal of Suspicion-based Reporting*, London, 1994. pp. 39-49. The common perception inside government circles is that the amount of money laundered is very considerable. For instance, in the book mentioned, M. Gold and M. Levi use as example one of the first reports of Financial Action Task Force dated 1990. It is written that the amount of money that probably circulated at that time between USA and Italy regarding drug trafficking could have been estimated in almost 85 billions of dollars per year. It is easy to understand that even is only half of these money would have been invested in legal activities the damage would have been consistent.

³⁸ J. Walker, *Estimates of the Extent of Money Laundering in and through Australia*, document prepared for the Australian Transaction Reports and Analysis Centre Quenbeyan, 1995. Read also, L. Napoleoni, “*Economia Canaglia, il lato oscuro del nuovo ordine mondiale*”, Milano, 2007.

³⁹ The results of these evaluations come from the conviction that money laundering suffers costs of transaction too – like any other normal kind of transaction. The difference from legal investments is that money laundering is a very risky business and this means that its costs of transaction are higher than any other operation. I analysed already the risks connected to money laundering, so it is possible to say that studies supposed that the total amount of costs suffered by clients who need the services of professionals to launder money is between 5% and 15% of the globality laundered. P. Reuter, E.M. Truman, “*Chasing Dirty Money: Progress on Anti-Money Laundering*”, in Institute for International Economics”, p.2 e ss., November 2004.

⁴⁰ See supra n. 34.

believe that other investigations are necessary to find out the approximately the real entity of the crime and circumscribe as much as possible the range of results obtained.

Concerning the relation between network effect and economic growth, it is not surprising that it can produce both positive and negative effects. The positive effects are understood as the externalisation inside the national economy of the impact of foreign (criminal) investments. There is no importance whether capitals are of licit or illicit nature, as once invested for economic legal activities they produce natural benefits on national economies. This is the reason why today few states are still reticent to adopt real countermeasures against money laundering, as they benefit from these capitals⁴¹. Unfortunately for criminal organisations, detrimental effects on national economies and on the society are terrible. Collimation with criminality, destruction of every kind of fair competitiveness, lack of consideration of the normal dynamics of markets, the origin of the money invested, and the impossibility for the population to compete on a fair level, compromise the regular development of national economy and markets. According to recent studies developed by Unger, today the network effect is poor and negative. This conclusion should not mislead, because, as said above, it is not easy to calculate the total of money laundering. However, negative economic, political and social perspectives about money laundering in a long term context appear seriously dangerous and possibly growing.

A last issue must be taken into consideration: the implication of ML on international economy. Studies demonstrated how models both of international economy and fiscal completion can be applied also to problems connected to money laundering. Basically, they consist in a particular modification of the Tinbergen Rule⁴². He introduced and

⁴¹ See supra n. 4.

⁴² The explanation of Tinbergen Rule will cover a field inappropriate in relation with this topic. It is important just to mention that Tinbergen affirmed that ***there must be at least one policy instrument or tool for each policy target. If there are fewer tools than targets, then some targets and therefore some goals will not be achieved.*** W. A. Knudson, “*The environment, energy and Tinbergen Rule*”, Bulletin of Science, Technology and Society, Michigan State University, Michigan, 2008. If interested in the study of Tinbergen’s theories it is possible to consult both the original work J. Tinbergen, “*On the theory of economic policy*”, Amsterdam, 1952; and R. Cagliozzi, “*Lezioni di politica economica*”, pp. 42, 43, Edizioni Scientifiche Italiane (ESI), Napoli, 2001.

applied Newton's Theory of Gravity to economy, in order to predict trade flows between states. In a situation such as money laundering, "masses" of objects, as named by Newton, are represented by the Gross Domestic Product (from now on GDP) *pro capita* and by the amount of criminal proceeds, the hypothetic "gravity" consists in the indexes of attractiveness – calculated assuming that in the economic circuit the variety of launders act as rational investors –, and physical distance is increased from cultural and economic factors. The transposition of this theory in a non-economic idiom means that even launderers prefer investing in developed countries with low level of corruption and criminality. The reason is twofold: in these territories is easier to hide the illegal source of money; and they do not want take the risk of losing the loot⁴³.

In the analysis of international economy, Unger asks himself if for countries is convenient to compete – obviously negatively - on the level of development of criminal industries. He considers the fact that the ancillary offence remains bordered on the country where is committed⁴⁴, while proceeds of crime are invested in the international economic systems, affecting one country or more. Does this activity produce detrimental effects or benefits for the economic growth of the country in which money are introduced? Adopting the model of fiscal competition we deduce that if in the short term living standards, they can easily decrease in a second moment when other competitors – in this case other countries – adopt same policies. According to this model, a run to the bottom on the competition upon ML is the natural consequence. This model affirms that in a moment X states will decide if it is still convenient to "subject to the rules" of this game, accepting the uncontrolled increase of this virus, or if it will be preferable to adopt stricter anti-money laundering policies. In the light of this realist framework, Takàts persists in interpreting money laundering as a series of externalities, the most important lying on the assumption that governments, which do not own the responsibility of damages of crimes committed elsewhere than their national borders, in

⁴³ Unger, observed how inside the total amount of countries preferred to be used for investing illicit money, the first top twenty are stable and developed economies, and the first one is USA. See supra n. 34.

⁴⁴ This is partially true, because Unger do not consider transnational criminal offences. To agree with this theory it could be possible to say that it is not the crime, but it is the source of money (the "roots" of the crime) that remains in the country where they belong.

reality would be turning a blind eye to money laundering operations regarding foreign currency (Takàts, 2007).

4. *Conclusions*

This chapter evolved on two tracks. In a first analytical part, the internationalisation of transnational criminal groups were examined following the scheme of the Diamond Model (that M. Porter theorised and applied for legal international enterprises). It highlighted the barriers that criminal enterprises face in at the moment they decide to commit an international criminal offence. The endeavor of this study was scrutinize how criminals, as any other rational economic actor, have the ability to maximize their profits by minimizing the risk to be discovered. For this reason, some markets are highly profitable and present low risky: the smuggling of migrants and trafficking in human beings are the major markets exploited by criminals (see Chapter IV). But, to reduce the risk of ML, another factor shall be taken into account: states enforcement. Thus, in the second part, we observed how the theories of Masciandaro, Takàts and Hunger, stress that states might turn a blind eye on ML, and, consequently on the predicate offenses surrounding it. In fact, their poor economic situations leaned them to strive for attracting capitals independently of their nature. Therefore, they perform little control on the investments done, allowing both the commission of crimes, and the circulation of illicit assets. Indeed, this hypothesis could be supported by the 2011 the United Nation Office for Drugs and Crimes (hereinafter UNODC) drafted the “*Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes: Research Report*” (hereinafter UNODC Report). It estimated that in 2009 transnational organized activities produced \$870 billion - an amount equal to 1.5 per cent of global GDP.

CHAPTER III

The Legal Dimension of Money Laundering and the Double Track

1. Overview

The history of money laundering has been characterised by several ancillary offences that have been added in the last twenty years to this type of crime⁴⁵. Drug trafficking and weapon trafficking were the first crimes that the International Community considered as serious threats for the stability of legal economic markets, for their capacity to generate colossal amount of money that could be reintroduced inside the licit economic flux. After the first instruments of repressing ML and drug trafficking, other serious crimes were taken under consideration. All those crimes related to transnational organised crime. The second step was to enlarge the basket of ML offences all those crimes that could have a dimension of *transnationality*. Summarising all the arguments discussed in the previous chapter, it can be affirmed with a clear level of certainty that the international community approached to the creation of an international AML framework appealing on those problems. The result was a legal framework focused more on the economic threats that the ancillary offences provoke inside national and international markets, and their irreversible relation with ML, rather than on the crime itself. Indeed, the **entire** international legal framework is still based on the consideration that ancillary offences are more detrimental than ML itself and that ML is just the natural consequence of the necessity to conceal and disguise the proceeds of crimes collected in the perpetration of those crimes. This thesis aims to prove the

⁴⁵ William Gilmore, *“Dirty Money: The Evolution of Money Laundering Counter-measures”*, Council of Europe Press, Strasbourg 1995; W. Gilmore, *“Dirty Money: The Evolution of International Measures to Counter Money Laundering and Financing of Terrorism”*, Council of Europe Press, Strasbourg, 2004.

opposite: ML is the main crime that transnational criminals need to achieve, and it does not matter which ways they use to detect funds, or in which markets they operate. In Chapter IV I will be able to sustain this thesis thanks to the empirical results of the FATF Report analysed.

Only in recent years the international community, especially due to the implementations of the FATF international standards, set an AML apparatus that is composed by two different approaches: a **punitive/criminal approach**, which aim to hit launderers at the end of the process, but which suffer from a lack of implementation of adequate national enforcement measures, and a **preventive/regulatory approach**, much more developed by European institutions⁴⁶, which aim to act in the first two phases, but which suffer from the lack both of national and international cooperation, and the implementation by Member States (hereinafter MS) at national level. Thus, the two approaches formed a sort of double track in which money laundering travels parallel both in the direction of punish criminals through predicate offences and in the direction of obliging certain profession figures by adopting preventive measures to fight the increasing of the phenomenon. The events occurred after 9/11 and the necessity to target and repress terrorism led international actors to place side by side ML and financing of terrorism (from now on FT) merging the preventive/regulatory anti-ML regime (AML)⁴⁷ with the preventive “Countering Financing of Terrorism” system⁴⁸ (CFT). Thus, in 2000’s the

⁴⁶ The reason is, for instance, that the EU does not have competence in criminal law and so the directives always imposed to prohibit ML, but never expressed which forms these measures should have taken (Art. 5 TFUE) (i.e. criminal or administrative). From the willingness to act at least in the preventive phase of detecting illicit funds, EU and the CoE implemented significantly the AML/CFT preventive/regular regime. New Art. 83 of the TFUE modified the previous situation. Section V, will analyse what changed inside the EU regarding the criminalisation of ML.

⁴⁷ The definition come from R. Diurreu, who states that *“preventive/regulatory AML system refers to the legal order that consists in the imposition of many administrative, civil and banking legal obstacles that launderers need to overcome in order to recycle, invest, save, conceal, administer or consume criminal funds in the legal economy so they can look legitimate; and, in doing so, increase the possibility of detecting their evasive, hidden and changeable movements.”*

R. Diurreu, *“Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order”*, chapter 2, Martinus Nijhoff Publishers, Leiden-Boston, 2013. P.153

⁴⁸ Diurreu continues his dissertation by giving a definition of Countering Terrorism Financing System. *“Founded on the above description, the ‘preventive/regulatory CFT’ system can be defined as the imposition of administrative, civil and banking laws and regulations that a person needs to overcome in order to provide financial support, in any form, of terrorist groups or of those who encourage, plan or*

new preventive approach evolved forming the so-called international AML-CFT preventive-regulatory system. Corruption was the last crime to enter inside the basket of the predicate offences of ML.

This chapter will pursue the human rights based approach started in the previous chapter. As stated in the introduction the analysis will only mention the legal instruments that are not related on the binomial ML/slavery and will disentangle the international and the European legal framework. For this reason the next two sections will follow the two approaches mentioned above and will analyse deeper the UN and CoE conventions under the repressive approach, and the Third EU Directive in the instauration of an adequate AML preventive framework.

Contribute related to the 40 FATF Recommendations cannot go into the background, and therefore the last section will focus deeply on the FATF standards. These standards are not only limited to the 40 + 9 recommendations, but also to the creation of an innovative methodology composed of two mechanisms to monitor members' compliance with them: **self-assessment exercises and mutual evaluation procedures**⁴⁹. I will analyse these procedures to state that even if harmonisation is unfortunately far to happen, these systems could, at least, raise both awareness and fear against those countries not respecting the implementation of these standards.

2. Defining and Criminalising Money Laundering

This section analyses the first track mentioned: the AML punitive/criminal system. Two interrelated topics will be enlightened: the legal definition of ML and the AML repressive measures adopted. It is been said that following the red line of the human right approach the section will only take into consideration the instruments that relate ML and Trafficking of Human Beings (hereinafter THB) and Smuggling of Migrants (hereinafter SOM). Anyway an introduction based on the overview of the first binding

*engage in acts of terrorism and, in doing so, increase the possibility of detecting their transactions and movements*⁷⁷. See *supra* n. 47.

⁴⁹ A special section will be used to analyse these mechanisms.

instruments adopted at international level appears necessary for the develop of this topic.

The first instrument to contrast illicit flow of illegal capitals at international level was contained in the core framework of transnational drug trafficking. In 1988 United Nations reunited in Vienna adopted the *United Nations Conventions against illicit traffic in narcotic drugs and psychotropic substances*⁵⁰ (hereinafter Vienna Convention). The reason for such a choice was the need to find a solution to combat seriously the expansion of criminal markets in the field of illicit traffic of drugs. The core of the ML ancillary offences is contained in article 3 §1(a)⁵¹ of the Vienna Convention. The number of illicit conducts covering the area of illicit drug trafficking is very broad, and for this reason the field protected by the AML⁵² framework was quite large. In the Vienna Convention the word ML is never mentioned, but it criminalises in art. 3 (1b) and (1c,iv) for the first time anyone who would have in purpose achieved one of the following conducts: i) the conversion and the transfer of the illegal property; ii) the concealment and the disguise of the true nature, source, location, disposition, movement, rights to respect with, or property of proceeds of crime; iii) the participation in association or conspiracy in such activities.

The system of sanctions institutes a completely new discipline that will constitute the basis for the successive instruments: empowerment of the State Parties' jurisdiction (art.4), confiscation (art.5), extradition (art.6), mutual legal assistance (art.7), and other forms of cooperation (art.9).

⁵⁰ The 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance (the so-called 'Vienna Convention'). Signed Vienna, Austria, adopted 19 December 1988, entered into force 11 November 1990, Signatories: 87. Parties : 189.
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en .

⁵¹ In particular the article criminalises the production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation, cultivation for the purpose of the production, the purchase or the possession for the commission of the previous activities, the manufacture, transport or distribution of equipment, materials or of substances needed to cultivate and to perceive these activities, and the organization, management or financing of any of these offences.

⁵² For a deeper analysis it would be useful to consult M.C. Bassiouni, "*International drug trafficking and money laundering*", in American society of International law, Proceedings of the 82nd annual meeting, 1988, p.445.

2.1 The 1990's: The European Response to Money Laundering and the Introduction of Transnational Organised Crime as a Money Laundering Offence

1990s was a decade where the focus was set on fighting organized criminal groups and acquisitive crimes in general, and not only anymore transnational drug trafficking. Therefore, from 1990 to the new millennium, the international community decided to enlarge the global anti-ML legal order to address other serious crimes as predicate offences, beyond simple drug trafficking offences. The Vienna Convention was focused only on drug trafficking and crimes related to the latter, as ancillary offences of money laundering. A real definition of this crime was not provided, but logically for the purpose of that convention legislators did not have the duty to provide a rationale on this topic. Conversely, this duty rather belonged to the Council of Europe (hereinafter CoE) that in 1990 opened for signature the Strasbourg Convention.⁵³ Indeed, CoE already ten years before the entry into force of the Vienna Convention, enacted the Recommendation R(80)10⁵⁴ to stimulate the implementation of binding measures against the transfer and protection of funds of illicit origin in the Member States of the Council⁵⁵. The step forward R(80)10 was the entry into force of the Strasbourg Convention. The innovation of Strasbourg Convention resides in being the first international treaty dealing exclusively about money laundering concerning the relevance of this document for improving the ML legal panorama: its first innovation came from the establishment of a wide range of crimes as money laundering predicate offences (instead of being bordered only to drug trafficking offences).⁵⁶ The purpose of the Council of Europe was double: both to try to reach a convergence toward a

⁵³ Signed in Strasbourg, France (adopted 8 November 1990, entered into force 1 September 1993). All 47 Member States of the Council of Europe, together with Australia and Monaco, have ratified the Strasbourg Convention.

⁵⁴ “*Measures Against the Transfer and Safekeeping of Funds of Criminal Origin: Recommendation No. R. (80) 10* “

⁵⁵ Although it is an act without binding effect, the Recommendation had the merit both to enhance prevention as a strategic directive intervention, and to enlarge the scope of predicate offenses, first restricted to just drug trafficking, thus allowing the prosecution to laundering arising from other forms of crime. Cooperation between MS judiciary systems in the fight against money laundering was another measure recommended by the Recommendation.

⁵⁶ Council of Europe, *Explanatory Report to the Convention on laundering, search, seizure and confiscation of the proceeds of crime (Ets. No. 141)*.

minimum levels of uniformity of the single national legislations, and to strive for pursuing the aim of creating a stronger collaboration between States' parties in order to establish a mutual cooperation between organs of inquiry. Already in its Preamble States Parties agreed on the necessity to deprive criminals from their biggest source of investments: *“Considering that the fight against serious crime, which has become an increasingly international problem, calls for the use of **modern and effective methods** on an international scale; Believing that one of these methods consists in **depriving criminals of the proceeds from crime**”*.⁵⁷

Art. 1 calls for more precisions on the wording employed in this document. New terms as i.e. criminal proceeds and predicate offences entered officially in the new vocabulary of the Council of Europe. The definition of proceeds contained in art.1 (a) as *“any economic advantage from criminal offences. It may consist of any property as defined in sub-paragraph b of this article”*⁵⁸ is clear in betraying the real intentions of the legislators: to extend at the maximum level the scope of the convention. Letts. *b* and *c* use the word “any”, to define both the property of criminal goods and instrumentalities used to launder, but it is **let. e** the real innovation of the discipline. Art. 1 (e) affirms that predicate offence means *“any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 6 of this Convention.”*⁵⁹ For the subject matter here, a primary role is played by article 6 of the Convention which titles “Laundering offences”. The norm acts at the three stages of money laundering. The article considers as money laundering every conduct be addressed to:

- The **conversion or transfer** of property, knowing that such property is proceeds, 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 the predicate offence to evade the legal consequences of his actions;

⁵⁷ Ibid. Preamble.

⁵⁸ Ibid. art. 1(a).

⁵⁹ Ibid. art. 1(e).

- 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 proceeds;
- The **acquisition, possession or use** of property, knowing, at the time of receipt, that such property was proceeds;
- **Participation in, association or conspiracy** to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

Chapter II titled “Measures to be taken at national level” introduced already some discordant provisions that slowed the harmonisation process of the discipline. They concerned the criminalisation of money laundering at national level. In fact, in terms of substance article 6, titled “Laundering offences”, is characterised for a particular dichotomy. It operates a discrimen between the incrimination between the norms contained in art. 6 §1 (a,b) and (c,d). From one hand it obliges MS to introduce legislatives and other measures necessary to establish as offences under its domestic law when committed intentionally:

- *the conversion or transfer of property, knowing that such property is proceeds, 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 the predicate offence to evade the legal consequences of his actions;*
- *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 proceeds;*⁶⁰

On the other hand, conducts explicated in sections C and D concern both the acquisition/possession/use of property, and the participation in/association/conspiracy. It is stated that they shall be established as offences only when “*subject to [a Member State] constitutional principles and the basic concepts of its legal system*”.⁶¹ Moreover,

⁶⁰ Ibid. art. 6 (a,b)

⁶¹ Ibid art. 6 (c).

art. 6 §4 introduces an *opting out*⁶² clause that gives to MS flexibility in adapting §1, for improving difficulties of interstate-cooperation in the fight against ML. The CoE's strategy was to rather begin a broader participation of MS in the application of the provisions at the expenses of the uniformity of the contents.

Chapter III of this study examines the instruments of international cooperation. Principles of international cooperation, investigative assistance, provisional measures, confiscation, refusal and postponement of cooperation, notification and protection of third parties' rights, and procedural and other general rules will be rigorously analyzed in depth. If the focus will be on stimulating cooperation between MS, the accent will equally be posed on: the obligation to assist (art. 8), to take provisional measures (art. 11⁶³), to confiscate (art. 13), and to assist third parties victims of both the ancillary offences and ML (section 6). Section 5 will express the possibility to refuse or to postpone the cooperation.

After the Vienna and the Strasbourg Conventions, the response of the European Union was launched in 1991 with the Directive 91/308/EEC titled "Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering" (hereinafter First Directive) introducing anti money laundering measures inside the European legal framework. The method was there different from the one adopted by the UN and the CoE, especially as criminal law is not a matter of competence of the EU, but also because Member States still benefit from their national prerogative regarding this field of law. While the First Directive requires that Member States ensure that the laundering/concealment of the proceeds of any serious crime is treated as a criminal offence (article 2), its main purpose is equally to ensure that credit and financial institutions adopt a system which allows effective supervision of their

⁶² Art. 6 (4) affirms: "Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that paragraph 1 of this article applies only to predicate offences or categories of such offences specified in such declaration".

⁶³ Art. 11 (1) disposes that "At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request."

customers.⁶⁴ Hence, its emphasis was very much on the preventive/regulatory AML approach rather than on the criminal or punitive approach⁶⁵. What is important to stress here is the definition per se of money laundering and the problems posed by ancillary offences. Both of them are dealt with art. 1 of the First Directive. Firstly, the definition of money laundering is copy/paste from the Convention of Strasbourg with only one difference: the use of the formula “derived from criminal activity or from an act of participation in such activity” instead of the word “proceeds”.⁶⁶ This definition introduces the second topic, as criminal activities are the crimes-source of ML. Having regard to the ancillary offences, European Economic Community (hereinafter EEC) at art.1 §5 stated that “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.” The logic for such a choice is clear: at that time Vienna Convention was still the pillar for anti-money laundering law and the Strasbourg Convention opened the door to welcome any other crime that could compose a predicate offence to ML. EEC left the choice to Member States.

The lack of harmonisation spurred European Union (hereinafter EU) to promulgate the “Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 Amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering” (hereinafter Second Directive). The Second Directive modified some aspects concerning the previous discipline of ML and, for what interests us, the definition of ancillary offences, that was reshaped by introducing the category of serious crimes.⁶⁷

⁶⁴ Diurreu affirms that “Hence, its emphasis was very much on the preventive/regulatory AML approach rather than on the criminal or punitive approach”. See *supra* n. 47. p. 107

⁶⁵ Paragraph 3 will be concentrated on the preventive/regulatory approach.

⁶⁶ *Ibid.* art. 1.

⁶⁷ *Ibid.*

It is worth noting that, on 26 October 2005, a third amendment was done so that it covers the financing of terrorism and does not modify substantially the definition of ML (the EU Third Directive 2005/60).⁶⁸

At the end of 1990's was clear to the entire international community that money laundering could not be related anymore only to transnational drug trafficking, especially in the light of the Coe and EEC new AML disciplines. The problem was to target international organised crime as a whole. In 2000 the adoption of the United Nations Convention against Transnational Organized Crime (from now on the Palermo Convention)⁶⁹ opened the doors to a brand new range of ancillary offences, and it became the main legal framework in the fight against transnational organised crime. This concept is clearly defined in art. 1 that affirms: "the purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively". Thus, the Convention deals both with criminal/repressive and preventive/regulatory measures, even if the first approach remains the favourite. For the first time the Palermo Convention introduces the word transnational inside the international legal vocabulary. Art. 3 §2 affirms that a conduct is transnational if:

"For the purpose of paragraph 1 of this article, an offence is trans- national in nature if:

(a) It is committed in more than one State;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

⁶⁸ This Directive will object of an accurate analysis in the next paragraphs.

⁶⁹The Palermo Convention was adopted by the UN General Assembly in Resolution 55/25 of 15 November 2000. According to art. 38, it entered into force the 29 September 2003. Signatories: 147. Parties: 179.

*(d) It is committed in one State but has substantial effects in another State. In particular, article 3 §1 mentions the scope of the Convention”.*⁷⁰

The ancillary offences covered by the Convention are: i) criminalisation or participation in an organised criminal group; ii) money laundering; iii) corruption; iv) obstruction to justice; v) and “serious crimes”, as defined in art. 2.⁷¹ The instrument applies both to money laundering, corruption, participation in an organised group, obstruction to justice, and to “serious crimes as defined in article 2⁷²”, but only where an offence is **transnational** by nature and – here lies one of the weaknesses of this Convention – involves an organised criminal group. ML offence is criminalised in article 6. Art. 6 §1 (a,b) requires each State Party to adopt, in accordance with fundamental principles of its domestic law, the criminalization of ML activities in almost identical terms to the ones adopted by the Vienna Convention, although including the “widest range of predicate offences”, not just those offences associated with drug trafficking.⁷³ Moreover, while art. 6 §2 (b) affirms that predicate offences of ML shall be all those included in art. 3, letter c points out how the commissions of such offences are not subject to territorial limitations. Before illustrating the repressive and cooperative measure that State Parties (hereinafter SP) should adopt, it is important to stress that the Palermo Convention is amended with Two Protocols that concern human trafficking and smuggling of migrants (Chapter IV will go deeper on this issue). Those conducts are part of those serious crimes highlighted in art. 2.

The regulatory framework concerning the repressive measures such as empowerment of the State Parties’ jurisdiction, confiscation, extradition, mutual legal assistance, and other forms of cooperation follows the same principles enhanced in the Vienna Convention. Article 12 in § 1, (a,b) says that SP should endeavour to pursue policies

⁷⁰ Ibid. art 3(2).

⁷¹ It defines serious crimes as “Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty” Ibid.

⁷² Art. 2 defines serious crimes as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.

⁷³ Ibid. art 6(2)

that allow the confiscation of property that derived from the proceeds of crime, including proceeds that have been used or were intended to be used for the commission of the predicate offence (even if they have been transformed or converted, in part or in full, into other property).⁷⁴ Art. 13 titles “International cooperation for purposes of confiscation”. It describes the conduct of international cooperation to implement the measure of confiscation. Two reasons support this policy. On the one hand, it aims to hit the "gains" of criminal group before they can enter the pre wash stage. Secondly, it targets the goods that come directly from ML, with the advantage of eliminating all the beneficial effects that criminal organizations expected to receive from them. Bank secrecy cannot be opposed during investigations in the frame of international cooperation.⁷⁵

Articles 18, 19 and 20 constitute the main body of international mutual legal assistance. There are many provisions that aim to make more effective and timely mutual legal assistance. First, it can also be requested when the "state requesting" has reasonable grounds to suspect that the offense was transnational in nature (Article 18 §1). Moreover, States cannot refuse to provide legal assistance due to banking secrecy (Article 18 §8). Thus, the possible causes of rejection of collaboration (which must be justified in accordance with art. 18, §23) are only limited to prejudice to state's sovereignty, public order, fundamental interests of the state, lack of jurisdiction, or contrast with their own judicial system.⁷⁶ Regarding the preventive measures it is possible to say that they compose the real innovation inside the UN panorama, and they set a series of principles that follow the FATF 40 Recommendation, in particular the constitution by SP of Financial Intelligent Units (hereinafter FIU) with the purpose to act at the first two stages of ML.

⁷⁴ Ibid art. 12 (1,3).

⁷⁵ Ibid art 12(6)

⁷⁶ Ibid 18.

2.2 *The Last Step: Financing of Terrorism and Corruption as Predicate Offences to Money Laundering*

The last step in the criminalisation of ML occurred after the events of “11 September 2001”. The United Nations Security Council Resolution 1373⁷⁷ entitled ‘*Threats to International Peace and Security caused by Terrorism Acts*’ was adopted only few days after the 9/11 attacks⁷⁸. The Resolution elaborated steps and strategies to be embraced for the purpose of preventing and prosecuting international acts of terrorism. In this sense, the Resolution characterized acts of terrorism, such as the terrorist attacks happened in the United States as threats to international peace and security. From now on, the crime of financing of terrorism will be inserted in the number of predicate offences to money laundering. For instance, at regional level, in 2002 the Organization of American States drafted the 2002 Inter-American Convention against Terrorism⁷⁹. Article 6 of this convention, titled “*Predicate offences to money laundering*”, obliges SP to criminalise or those conducts included in this provision, among others financing of terrorism. It is worth noticing that actually an international treaty concerning terrorism and FT was already been adopted at the time terrorists attacks happened. I refer to “*The United Nations Convention for the Suppression of the Financing of Terrorism*⁸⁰” (hereinafter the ‘UN Convention against FT’). Even though this Convention does not cover the criminalization of money laundering, it is important to introduce at least the definition of FT, to better understand the reason why the international community decided to fund AML preventive measures with CFT system, creating the AML/CFT preventive/regulatory system. Article 2 §1 affirms that “*any person commits an offence within the meaning of this Convention if that person by any means, directly or*

⁷⁷ UN Doc S/RES/1373 (2001) adopted by the Security Council at its 4385th meeting, on 28th September 2001. For a deeper analysis of the resolution it is possible to consult W. Perkel, “*Money laundering and terrorism: informal value transfer system, in American criminal law review*”, vol. 41, p. 183, 2004.

⁷⁸ This Resolution followed the UN Doc S/RES/1368 (2001) unanimously adopted by the Security Council at its 4370th meeting, on 12th September 2001.

⁷⁹ Signed in Bridgetown, Barbados, adopted 3 June 2002, entered into force 7 October 2002.

⁸⁰ Signed in New York, the US, adopted 9 December 1999, entered into force 12 April 2002. Signatories : 132. Parties : 186.

indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, [to commit a terrorist attack]". On May 2005 the CoE opened for signature the "2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism⁸¹" (hereinafter the "Warsaw Convention"). The two innovations of the Warsaw Convention lie from one side on the transposal of the new 40+9 FATF Recommendation as amended in 2003 – with the introduction of a more detailed preventive discipline especially focused on FIU– and on the other side on the introduction of the crime of FT⁸² as a predicate offence of ML. It is to say that the norms of this convention apply both to ML and to FT as stated in article 2: "each Party shall adopt such legislative and other measures as may be necessary to enable it to apply the provisions contained in Chapters III, IV and V of this Convention to the financing of terrorism". Few months after the Warsaw Convention, the EU adopted a new directive on ML, which aims to solve two problems: update the last Directive introducing the new international standards, in particular the 2003 FATF 40+9 Recommendation, creating a harmonic and innovative EU legal framework in the light of both ML and FT. As already mentioned above, the new discipline is based more on the preventive/regulatory system and will be object of a deep analysis in the next paragraph. \$

To finish the criminal/punitive international of AML legal framework, I must refer to corruption. In 2003 UN opened for signature the *United Nation Convention against Corruption*⁸³ (hereinafter UNCAC). The Convention criminalises ML in article 23 in identical terms to article 6 of the Palermo Convention with the only difference to identify corruption as a serious crime and thus, as a predicate offence to the ML offence.

⁸¹ Adopted 16 May 2005, entered into force 1 June 2008.

⁸² For a better understanding of the Warsaw Convention it is possible to consult B. Unger, "The Scale and Impacts of Money Laundering", EE Publishers, Massachusetts 2007.

⁸³ Signed in Merida, Mexico, adopted 1 October 2003, entered into force 14 December 2005. Signatories : 140. Parties : 171.

3. *The AML/CFT Preventive/Regulatory System: a Eurocentric Approach*

At the beginning of this second chapter, I asserted that AML is like a train that moves on a two tracks: the criminal/punitive track and a preventive/regulatory one. I affirmed also that international community used more the first approach rather than the second, while the EU, especially for the limits expressed in its jurisdiction, developed intensively the latter. For this reason, and considering the limitations imposed by a master thesis, this paragraph will not study the whole international AML/CFT preventive/regulatory approach, but only the European one, in particular the Third Directive. For the same reasons just mentioned, the analysis neither will consider the AML and CFT as two separate systems, nor will remark the criminal measures that have been already addressed in Chapter 2 §2. The AML/CFT European system as amended by the third Directive is characterised for posing on five main pillars: i) obliged agents; ii) customer due diligence (hereinafter KYC system); iii) reporting of suspicious activities (hereinafter SAR's) and FIU; iv) record keeping and statistical data; v) enforcement measures. The purpose of this paragraph will be to raise the question whether or not such measures violate the **right to privacy**.

3.1 *Obligated Economic Agents and FIU's*

Article 2 delimits the field of application of the Directive. Except for the classical figures already inserted in the number of the agents even in the previous disciplines the Third directive follows the new standards of the FATF as amended in 2003⁸⁴. The basket comprehends both the classical economic actors as credit and financial institutions, and that all range of figures composed by legal or natural persons acting in the exercise of their professional activities. They are auditors, external accountants, tax advisors, notaries and other independent legal professionals⁸⁵ when they participate in the planning or the

⁸⁴ *Ibidem* Recital 5.

⁸⁵ Even if these two figures are touched by the provisions of the directive, Recital 20 provides for them an alleviation of the discipline concerning the professional secrecy. The violation of the right to privacy in correlation with the professional secrecy will constitute the object of part about human rights violations.

execution of some economic transactions listed in the Directive⁸⁶ – even if they act on behalf of or for their clients – other trust or companies service providers, real estate agents, casinos, and “*other natural or legal persons trading in goods, only to the extent that payments are made in cash in an amount of EUR 15 000 or more, whether the transaction is executed in a single operation or in several operations which appear to be linked*”.

If the economic agents mentioned above are the passive subjects of the discipline, another actor, which covers an active role in the normative framework, is introduced by the Third Directive: the FIU. The role of the FIUs covers all the preventive AML system. Recital 29 disposes that “*suspicious transactions should be reported to the financial intelligence unit (FIU), which serves as a national centre for receiving, analysing and disseminating to the competent authorities suspicious transaction reports and other information regarding potential money laundering or terrorist financing*”. The FIU is the heart of the preventive system. The FIUs can be classified by their nature: i) those under the control of the administrative/executive power; ii) others that are autonomous and composed of an extra-power legal structure; iii) and a third model composed by FIU are those under the control of the judicial power. The nature of FIU’s is irrelevant because they all perceive the same objectives and have the same duties as defined in most of the articles of the Directive. Their role in the fighting against ML and FT is so important that Recital 41 prescribes that “*coordination and cooperation between FIUs [.....] including the establishment of an EU FIU-net, should be encouraged to the greatest possible extent*”. I will refer to the role of FIUs during the entire disclosure of this normative.

3.2 Customer due diligence: KYC system

Chapter II of the Third Directive focuses on the obligations for the actors targeted to establish all those instruments necessary to operate an appropriate customer due diligence. Articles from 7 to 19 constitute the customer due diligence legal framework. Conducts such as the first contact with the customer and the knowledge of the person who is going

⁸⁶ *ibidem* art.2 (1b)

to realise a financial or an economic operations constitute crucial moments for the enforcement of AML countermeasures. The discipline of the Third Directive is different for the two previous legal instruments, is more articulated. Indeed, if the disciplines of 1991 and 2001 have imposed only the simple duty to know the customer, the new normative framework relegates it to one of the elements part of a broader procedure concerning the duty to verify the “legality” of the customer. A procedure so fundamental in the fight against money laundering that the European legislator decided to tripartite it, adopting three different levels of customer due diligence: a normal (art. 6-10), a simplified (art. 11), and an enhanced (art. 13). It would be useful to proceed following the structure of the Directive.

The primary step to take regards the situations in which customer due diligence must be applied. Article 7 lists four different cases. First of all it applies every time one of the abovementioned actors establishes a business relationship⁸⁷. If the first case contained the element of the duration, the second situation is constituted by the value (15.000 euros) of an occasional transaction without taking into account if “[it] is carried out in a single operation or in several operations which appear to be linked”. The last two cases in which customer due diligence is required concern circumstances that can reveal a particular risk: letters *c* and *d* concern the “*suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold*” and “*doubts about the veracity or adequacy of previously obtained customer identification data*”⁸⁸. If these cases occur, obliged economic agents can activate the due diligence procedure. It has been said already that the Directives introduces three different modalities of due diligence: the normal, the simplified, and the enhanced. Now, it must be understood why a single

⁸⁷ Art. 3 (9) identifies a business relationship as “*a business, professional or commercial relationship which is connected with the professional activities of the institutions and persons covered by this Directive and which is expected, at the time when the contact is established, to have an element of duration*”.

⁸⁸ This approach is not exempt from critiques regarding the violation of the right to privacy. In particular must be underlined how the lack of objective elements to consider the risk or the suspicion of money laundering is an element in favour of a possible violation of human rights. For a more detailed dissertation on article 7 consult P. Costanzo, L. Criscuolo and G. Lupi, “*L’attività dell’Unione Europea nel campo della prevenzione e del contrasto del riciclaggio e del finanziamento del terrorismo*”, ed. by M. Condemi e F. De Pasquale, Lineamenti della disciplina internazionale di prevenzione e contrasto del riciclaggio e del finanziamento del terrorismo, Quaderni di Ricerca Giuridica della Consulenza Legale, n. 60, febbraio 2008.

procedure was not enough. The answer lies on the evaluation of the risks that a conduct can hide a ML operation, on the application of the so-called *risk based approach* to customer due diligence. The three configurations of the procedural due diligence are distinct in relation i) to the conditions relevant to their application, ii) to the type of the applicable measures, and iii) to the different intensity applicable. This means that the higher is the risk that the transaction might constitute laundering of the proceeds from the performance of any illegal activity, the more severe will be the manner in which it will be necessary to identify the client.

Starting with the **ordinary** due diligence procedure, article 8 §1 establishes which are the conducts that must be adopted. First, it is important the person obliged to conduct the due diligent identifies the customer and verifies his identity on the basis of legal documents. It can happen that the client would not be the real beneficial owner. In this case, according to art. 8 §1 (b), the real beneficiary must be identified and his identity shall be disclosed. The next step concerns the obligation to “[obtain] *information on the purpose and intended nature of the business relationship*”. When the business relationship is set, the agent must periodically monitor the business relationship to ensure that the “*transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date*”. Article 11 introduces the discipline of the **simplified customer due diligence**. It lists an entire series of conducts, cases and particular business relationships that shall not be subject to the requirements provided for in the previous article. In the complete opposite direction article 13, which enucleates the enhanced measures that must be adopted in the case one of these three situations will happen: i) the client is not physically present and so he cannot be identified⁸⁹; ii) exist cross-frontier correspondent banking relationships with respondent institutions from third countries⁹⁰; or iii) transactions or business relationship

⁸⁹ *Ibidem* art. 13 (2)

⁹⁰ *ibidem* art 13 (3)

are entertained with PEPs⁹¹ residing in another MS or in a third country⁹². To conclude the analysis of customer due diligence obligations, articles from 14 to 19 provide the possibility for States to permit the institutions and persons covered by this Directive to rely on third parties to meet the requirements laid down in the discipline.

3.3 Reporting of Suspicious Measures (SAR's) and Report Keeping And Statistical Data

Obligated agents are compelled to pay special attention to any suspicious transactions that their customers may undertake during their commercial relationship. Chapter III enunciates an entire series of measures that the obliged subjects under the Third Directive must undertake to report suspicious activities. The aim is to avoid as much as possible those operations which could hide a money laundering activity. Article 20 refers to those transactions “*as particularly likely, by [their] nature, to be related to money laundering or terrorist financing and in particular complex or unusually large transactions and all unusual patterns of transactions which have no apparent economic or visible lawful purpose*”. Article 21 is extremely important because it introduces the discipline of the FIU. In fact, all the operations that could look suspicious must be reported to the competent national FIU, with some exceptions. This article is clear in defining both the rule of FIUs and the obligations upon MS in the implementation of the AML/CFT preventive/regulatory approach. On the one hand it prescribes that the tasks of the FIUs manifest in “*receiving (and to the extent permitted, requesting), analysing and disseminating to the competent authorities, disclosures of information which concern potential money laundering, potential terrorist financing or are required by national legislation or regulation*”. On the other hand, it obliges MS both to establish adequate resources for the FIUs and to guarantee on a timeline basis the access to the financial, administrative and legal enforcement information that it are required to properly fulfil its

⁹¹ Art. 3 (8) defines politically exposed persons as “*natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates, of such persons*”.

⁹² *Ibidem* art. 13 (4)

tasks⁹³. According to article 22 MS shall ensure that the institutions and the persons subjecting to the obligations of this chapter will fulfil cooperation with the competent territorial FIU⁹⁴ in particularly both by informing promptly the FIU every time there is a suspicious operation that could conceal a ML activity, and in transmitting all the necessary information in the respect of the legislative national procedure. Article 23 introduces an exception to these measures in regard of a particularly category of persons: notaries, independent legal professionals, auditors, external accountants and tax advisors⁹⁵.

A particular provision is inserted in article 27. The logic lies on the possibility for the institutions and the persons covered by the Directive to be, after the disclosure of suspicious information, in danger, to receive threats or to be blackmailed, or to suffer any other kind of injustice by criminals who want to use them to pursue their illicit conduct. Thus the Directive asks to MS to adopt appropriate measures in order to protect those subjects. Article 28 introduces the prohibition for the passive agents to transmit or to refer to customer concerned or to other third persons the fact that information has been transmitted to the FIU.

Chapter IV contains the measures that deal with the cooperation between institutions/agents obliged and FIU's. It concerns the obligations to keep recording of operations and statistical data. Article 30 provides that the subjects covered by this discipline have an obligation to keep these documents in order to allow consultation of the investigating authority or the national FIU and to use it for any investigation relating to money laundering or financing of international terrorism. However, the obligations of conservation of the recording of transactions and statistical data are subjected to term. In fact, the second part of this article provides that, due regard to obligations of customer due diligence, it shall be kept a copy (or the references) of the evidence required, for a period

⁹³ *Ibidem* art. 21.

⁹⁴ art. 22 (2): *"The information referred to in paragraph 1 shall be forwarded to the FIU of the Member State in whose territory the institution or person forwarding the information is situated"*.

⁹⁵ The examination of this discipline will be conducted in the part concerning the violation to right to privacy.

of at least five years after the end of the business relationship with their client. With regard to business relationships and transactions, the supporting evidence and records, consisting of the original documents or copies admissible in court proceedings under national law, the obligation to retain extends for a period of at least five years following execution of the transactions or the termination of the business relationship.

3.4 Enforcement Measures

Chapter V of the Third Directive aims to raise awareness in MS implementing AML/CFT preventive/regulatory measures described above. Internal procedures and training, supervision, cooperation, and penalties are the four sections in which enforcement measures are divided. The peculiarity of this discipline lies in the subjects to which is directed: Member States, which shall adopt adequate measure implementing their internal legal framework and assuring a correct training to recognise suspicious ML transactions. Articles 34 and 35 compose the first section. Firstly, it is required that MS impose to those covered by this Directive the adoption of adequate and appropriate measures of due diligence, risk control, risk assessment and all the other duties to which they are subjected⁹⁶. Besides this, MS “*shall [also] require that credit and financial institutions covered by this Directive communicate relevant policies and procedures where applicable to branches and majority owned subsidiaries in third countries*”⁹⁷. Moreover, Article 35 targets the relevant employees of the institutions and the persons covered by the Directive. The latter shall adopt all the necessary measures and policies to raise awareness between their employees on the obligations stated under the Directive. These measures shall include the predisposition of appropriate training programs to “*to help them recognise operations which may be related to money laundering or terrorist financing and to instruct them as to how to proceed in such cases*”⁹⁸.

⁹⁶ *Ibidem* art. 34 (1).

⁹⁷ *Ibidem* art. 34 (2).

⁹⁸ *Ibidem* art. 35 (1).

In terms of supervisory tasks, assigned to national competent supervisory authorities, Article 36 §1 states that casinos, currency exchange offices, service providers and trusts shall be licensed or registered. In order to perform these activities, it is appropriate that the subjects that require authorization or registration possess the requirements of integrity and professionalism required by MS national standards. In addition to standard measures that national authorities must take to ensure that they can adequately supervise the actual compliance with the rules of the Directive by the persons to whom they apply, Article 37 §3 provides that, when referring to casinos and credit or financial institutions, competent authorities can adopt enhanced measures as the possibility to conduct on-site inspections.

The last two sections regard cooperative measures (article 38⁹⁹) and penalties (article 39). In particular art. 39, provides that MS shall apply penalties that are appropriate in the event to infringements of the national provisions implementing the Directive. They shall also ensure that legal persons can be held liable for infringements of duties regarding record keeping, customer identification and reporting of suspicious transactions as provided by the Directive, which are committed for their benefit by any person, acting either individually or as a member of an organ of the legal entities, who has a leading position within the institution itself (Article 39 § 3). Therefore, states shall ensure that natural and legal persons subject to this Directive can be held liable for infringements of national provisions adopted in the implementation of the Directive. Penalties must be effective, proportionate and dissuasive.

4. The Financial Action task Force: overviewing of the 40 Recommendations and analysis of the evaluation mechanisms

The Financial Action Task Force was instituted during the G7 Paris Summit in the July of 1989. At that time State Parties decided to create an organism composed by economic and financial experts, and which had the specific role to compile an analytical report on the situation regarding the diffusion of ML at international level. This international organ also had the task of evaluating the international and national

⁹⁹ Art. 38 affirms that “The Commission shall lend such assistance as may be needed to facilitate coordination, including the exchange of information between FIUs within the Community”.

instruments to prevent the use of the banking and financial system, and create a number of preventive measures that were appropriate to combat the phenomenon and strengthen the collaboration between states. In 1990, the Group presented a document containing the first 40 Recommendations, designed to ensure an effective international action against money laundering. The Recommendations, at first sight, turned out very comprehensive and convincing. Hence, the state parties, gathered for the occasion in Houston, expressed their intention to extend its mandate for another year, to evaluate the actual implementation of the recommended measures. Due to its temporary nature, the FATF is not issued from a treaty or an international convention. However, this characteristic does not have a negative impact on the tasks that it performs as part of the prevention of ML (even if the adoption of this model carries some problems, related, mainly, to finding a formal qualification and a binding value¹⁰⁰).

This section will provide an overview of the 40 Recommendations as modified in February 2012 and will concentrate on the mechanisms of evaluation of Member States and Non-Cooperative Countries, to observe how the lack of application (or implementation) of these international standards can be detrimental for the fight against ML. This section will constitute a vehicle between Chapter II, in which the economic aspects of ML has been analysed, and Chapter IV that will underline the social dimension of the phenomenon related to smuggling of migrants, trafficking of human being , and corruption.

¹⁰⁰ Not being born from an international binding document, but taking shape, as an autonomous group compared to the G7 that has created it for a limited and well-defined objective, the Recommendations that it produces have no binding force neither for the member countries, nor for external ones. They stand, rather, in the activity of *moral suasion* typical of non-regulatory instruments, and become binding only when they are subsequently retrieved and taken up by acts which are legally binding by nature. The presence in this organism, within the various delegations, of representatives' ministries of finance, interior, justice, central banks and supervisory authorities of investigative bodies, assured effectiveness of its action in the course of time through a qualified and consistent translation of the principles established in the individual countries at the international level.

4.1 The 40 Recommendations¹⁰¹

FATF during all its regulation process never promoted the adoption of international legal binding documents, suggesting only the implementation of the national legal regime and international cooperation. The uniqueness of this choice is a practical response to the fact that, from the moment of its inception, it has only ever pursued the chief purpose of “*the establishment of standards in the form of recommendations that could be endorsed by national authorities and applied internationally in a consistent manner*”¹⁰². Therefore, the purpose of creating a harmonious framework of AML procedures and methods, has led to rely on an approach that was different from the context of the measures already taken at international level. On the one hand, it is intended to contribute to a strengthening of the legislative instruments internal, with a particular focus on techniques of enforcement aimed at diminishing the economic and financial power of the big criminal groups. On the other hand, the innovative nature of the task force was to make participate in the struggle to combat money laundering directly those working in the financial sector (i.e. credit and financial institutions first, and operators of the private sector later on). The 40 Recommendations are characterized by the attribute of flexibility inherent their application. Moreover, they merely establish a set of principles, which leave a high range of freedom to countries in taking all necessary measures more specific and more detailed on the subject.

The original FATF Forty Recommendations were drawn up in 1990 as an initiative to combat the misuse of financial systems by persons laundering drug money. In 1996 the Recommendations were revised for the first time to reflect evolving ML processes and techniques and to amplify the scope well beyond drug trafficking. In 2003 the FATF expanded its mandate to deal with the new CFT system and took the important decision to create 8 (later became 9) Special Recommendation on Financing of Terrorism. A second amendment was adopted in 2003 and the Recommendations remained unchanged until February 2012, when the last amelioration took place.

¹⁰¹ “*International standards on combating money laundering and the financing of terrorism & proliferation. The fatf recommendations*”, FATF, 2013 FATF/OECD, February 2012.

¹⁰² What is the FATF?, in http://www.1.oecd.org/fatf/AboutFatf_en.htm.

Recommendations 1 and 2 are new, and were not part of the old framework. R1, in addition with its interpretative note, suggests that countries in criminalising and preventing money laundering will apply the so-called *risk based approach* “to ensure that measures to prevent or mitigate money laundering...are commensurate with the risk identified”. Countries must organize their AML policies taking into account the “assessment risk” as general indicator, and, whether necessary, assess both a “higher risk” for some kind of operations that are particularly suspected, and a “lower risk” in the case that certain transactions could be subject to a more simplified regime. R2 recommends that countries should settle policies that allow policy-makers, FIUs, law enforcement authorities, supervisors and other competent authorities to cooperate and to coordinate domestically with each other in the implementation of the efforts to combat ML.

R3 affirms the necessity for countries to criminalise ML having regard to a double spectrum of ancillary offences. In the first place, it recommends to consider as ancillary offences all those conducts inserted in the Vienna Convention and the Palermo Convention. In addition, “countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences”. In this sense, the interpretative note offers a great help, as it identifies three different methodologies to implement the range of AML offences:

- *All crimes approach*: that identifies all crimes as predicate offences to ML;
- *Threshold approach*: that circumscribe the basket of crimes only to those that belong to a certain level of gravity;
- *List approach*: that is limited to a list of specific offences and ancillary to ML.

Another important provision is settle in R10, concerning the Customer Due Diligence. Indeed, the provisions related to CDD obligations require banks and other financial institutions to maintain the highest quality standards, concerning the identification of the customer and the actual beneficial owners. According to the RBA, financial operators can calibrate the level of enforcement of obligations they must perform in the identification. In order to achieve these criteria and comply with the CDD, the FATF provided number of additional safeguards measures concerning different figures

including, for instance, politically exposed persons¹⁰³ (R12). They enucleate, for instance, in disposing of risk management systems to determine whether the customer is a politically exposed person; obtaining senior management approval for establishing business relationships with such customers; taking reasonable measures to establish the source of wealth and source of funds; constant monitoring and maintain business relationships.

Recommendations 18, 19 specifically target at all those countries that have not complied sufficiently with the provisions introduced by the FATF.

Recommendations 20 and 21 concern the reporting of suspicious transactions. In particular, R20 states, “*financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, directly by law or regulation, to report promptly its suspicions to the financial intelligence unit (FIU)*”. Also in relation to these measures, the FATF states that, even against lawyers, notaries, accountants, and other independent legal professionals, countries are obliged to comply with the obligations of RSP, and to extent these measures to the rest of the professional activities of accountants, including auditing too (R23)¹⁰⁴.

Recommendations from 26 to 35 are titled “*powers and responsibilities of competent authorities and other institutional measures*”. These recommendations identify the regulatory provisions that each State should take to combat money laundering, the methods of creation and the competences ted to the FIU. R27 requires that each jurisdiction assigns appropriate functions to the supervisory authorities. In particular, they should be able: to monitor and ensure the compliance of financial institutions with requirements to combat ML; conduct inspections; be vested with powers which would require financial intermediaries to provide any information that may be relevant to the

¹⁰³ The Glossary defines PEP as “[...] *individuals who are or have been entrusted with prominent public functions* [...]”.

¹⁰⁴ The 2003 R16 prescribed also that “*Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.*” This provisions has been deleted from the new formulation of R23 (ex R16)

assessment of compliance; ensure that adequate administrative sanctions in cases of non-compliance.

Recommendation 29 requires that countries should establish a FIU that serves as a national center for receiving, analyzing and dissemination of alerts suspicious transactions, and other information regarding potential money laundering. The FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law necessary information to carry out its functions, including the analysis of suspicious transaction reporting.

Recommendation 34 states that each country should be supported in its activities by competent authorities, which should supports the persons work in financial activities, non-financial businesses and professionals, to provide general assistance in respect of the full range of anti-money laundering provisions.

Finally, Recommendations from 35 to 40 regard international cooperation systems. These provisions refine *mutual legal assistance* in administrative and judicial matters, especially in the field of freezing, confiscation and seizure of goods, and the blocking of suspicious funds, and in investigative requests for extradition.

4.2 Evaluation Mechanisms: High Risk and Non-Cooperative Jurisdictions

Even if countries can be reliable in the application and implementation of the international standards set by the 40 Recommendations, FATF has also the task to verify the actual status of implementation: in the first analysis, within the member countries themselves. In this regard, two mechanisms are normally used for evaluation:

- The first mechanism is called *self-assessment*. It is a process of self-evaluation, based on a questionnaire with synthetic answers focused on the legal and financial aspects of the implementation. The exercise of self-assessment allows FATF to update annually the situation of the various countries, providing a comparative picture of immediate evidence, which can also be useful for further studies and thematic analysis;

- The second mechanism is a more analytical procedure based on a mutual evaluation, and is called *mutual evaluation*. This method is structured in the appointment of three experts from each of the areas of legal, financial and investigative. The prerogative is that these persons, called *assessors*, come from a different country than the one in which the evaluation is conducted. Although they have different tasks, they must always cooperate and coordinate and participate as a group at the completion of the final evaluation. Normally, two representatives of the FATF participate in the evaluation process with functions of coordination and support. The evaluation is done through meetings with the authorities responsible for the compliance of the laws of the country to the 40 Recommendations. At the end of this phase, the evaluation report is the subject of discussion in plenary session for the final approval.

Unfortunately neither FATF can always easily monitor the adequacy of countries to 40 Recommendations, nor do these two procedures assure a real efficacy. Therefore, it is expected to be spontaneously each State to indicate what were the measures adopted in order to reduce and eliminate any gaps in the system. This phase is called *follow-up*, and is as important as the two previous mechanisms. In fact, it is precisely in the execution of this procedure that it is possible to observe if a state has or has not the will to adopt the recommendations prepared by the FATF.

In addition to these assessment tools, the FATF in collaboration with the International Monetary Fund (hereinafter IMF) has drawn a procedure that aims to define the **criteria** under which a country should be evaluated. In this regard, on the FATF's website is available a "*Handbook for Countries and Assessors*¹⁰⁵", which defines the stages of assessment and contains all the documentation to be used. There are four areas that have been taken into consideration by the working group during the drafting process of the 25 criteria: banking law, corporate law, international cooperation, and resources

¹⁰⁵ *AML/CFT Evaluations and Assessments. Handbook for countries and assessors*, GAFI , April 2009.

allocated to combat money laundering. Every area contains a certain number of criteria that are used as indicators of non-cooperation during the evaluation process¹⁰⁶.

The first phase of the evaluation process starts with the request to a state, to fill out a questionnaire concerning all the aspects covered by the recommendations. The state is also required to provide all necessary documentation for the purpose of the analysis: we refer to legislation and regulations, statistics and information materials of any kind. After reviewing completed the questionnaire, begins the main phase: the phase of one site visit. By this time, the assessors may come inside the country under analysis and discuss personally with the institutions, in the guise of representatives of government, economic public body, trade associations. Therefore, the assessors have the opportunity to carry out an analysis on the field that goes beyond the simple normative data and that consider the effective impact in the application of anti-money principles on the social substrate. After the inspection, the assessors shall prepare a first draft of the evaluation report. This document is sent to the country, in order to start a negotiation phase, leading to the drafting of an official document, and as uniform as possible to the draft report, which will be presented and discussed during the Plenary. The report can be approved by the Plenary and the latter, especially in cases where the assessment of the country is particularly satisfactory, may require subsequent updates, in order to subject the country itself to a continuous monitoring of the evolution of its anti-money laundering system. If the report is not considered adequate or complete, evaluators will have to proceed with integration.

There are several levels of compliance that can be attributed to each country in relation to each recommendation, which constitutes an essential criteria: compliant, largely

¹⁰⁶ So, for instance the banking law sector contains criteria regarding the possibility to oppose the bank secrecy to the administrative or judicial authorities involved in the fight against ML; the possibility of establish a bank or another financial institution without requiring any authorization or registration in public registers; the inadequacy of a banking regulation and the deficiencies in the supervision. Concerning corporate law two criteria refers to the existence of legal instruments that, by the interposition of a company or other body, admit the possibility to conceal the real beneficiary of the transaction or of the people involved in the management of a company. The third area concerns the criminalisation of ML only with a very limited number of predicate offences, or internal norms and policies that forbid to the local authorities, in particular to the national FIU, to exchange information with other FIUs abroad. The last area covers criteria as the adequacy of the resources used by the state in the fight against money laundering, both in terms of financial, technical and human resources, both with reference to the requirement for the establishment of a Financial Intelligence Unit.

compliant, partially compliant, non-compliant, non-applicable¹⁰⁷. As said, not all the countries apply the 40 Recommendations, and not all the countries implement their national and cooperative policies even after the mutual evaluation process. For this reason, since the beginning of the application of those two mechanisms, the FATF compiles a *black list*, in which are inserted the so-called *Non Cooperative Countries and Territories*¹⁰⁸ (*hereinafter NCCTs*). In the attribution of the status of NCCT a fundamental role is played by those 25 criteria listed above. In fact the assessors consider them as essential criteria to be taken into consideration during the evaluation process. The process of inclusion and exclusion of a country in the *black list* follows three different steps:

- A first phase called *review process* has the purpose to observe if the countries taken into consideration respect the standards and the criteria established by the FATF. If the evaluation process end with a majority of non-compliance judgments the country will be considered as a NCCT;
- A second step occurs when the FATF verifies, after a country has been inserted in the black list, if it operated the necessary policies to introduce adequate AML standards inside its legal framework;
- If the answer is positive and the country has been removed from the list, the FATF starts the third phase called *monitoring process*, in which provides a continuous monitor in the correct and effectual application of the new AML standards.

Unfortunately the restrictions imposed by this thesis do not allow me to analyse deeply all the compilations of black lists occurred from 2000 until today. So, I will only

¹⁰⁷ They evaluate the magnitude of the correct implementation of the recommendations. The level “non-applicable” refers to the impossibility to concretely apply the recommendation in the legal framework of the country.

¹⁰⁸ The term NCCTs would think of as relational, that is, the ability (or rather inability) of some countries to become part of an international cooperative mechanism aimed at the prevention and suppression of money laundering and its offenses. However, the concept is much broader. The parameters taken as a reference for the award of this special status not only concern the possibility of cooperating on the international stage, but also the efficiency of the internal anti-money laundering safeguards and standards.

compare the first black list, dated 22 June 2000¹⁰⁹, with the last one, of the 27 June 2014¹¹⁰. This analysis will consider the differences occurred at international level in the last fifteen years in the application and implementation of AML standards. At the end of the Plenary of the February 2000 a first list of NCCTs was drafted. The countries resulted in the black list were Bahamas, Cayman Island, Cook Island, Philippines, Israele, Lebanon, Liechtenstein, Marshall Island, Nauru, Niue, Panama Republic, Dominican Republic, Russia, St. Kitts and Nevis, St. Vincent and Grenadines. The distinguishing feature of all the countries included in the list was the lack of a systematic anti-money laundering legislation. In this regard, in almost half of the states the criminalisation of ML was not even part of the legal system. This gap was followed also by the absence of mechanisms for SARs, as well as the non-establishment of a FIU. Many of the non-cooperative countries defined by the first report, have been characterized, in addition to the main profiles listed above, also by the lack of attention that applied in the controls on banking institutions and corporations, especially when these activities were carried out by persons (natural or legal) non-residents. Neither company law has remained immune from the judgments of the FATF. In fact, the provision of financial services has often been characterized by opacities and has noted the inadequacy regards certain establishments, typical of the law in analysis, such as the Trusts or the International Business Companies¹¹¹.

If the first black list dealt more with the financial aspect of ML, rather than with its criminal approach, the last list of NCCTs dated 2014 seems to take a different direction. First of all it must be addressed that in the first list the 40 Recommendations did not have the same structure as today. Financing of terrorism was not part of them, and especially it was not considered as an ancillary offence of ML neither by FATF nor by international binding measures. For this reason the new list accomplish also the purpose

¹⁰⁹ FATF, *NCCT Annual Report 1999-2000 (First Review)*.

¹¹⁰ *High risk and non-cooperative jurisdictions*, FATF public statement 27 June 2014. <http://www.fatf-gafi.org/media/fatf/documents/statements/Public-Statement-27-June-2014.pdf>

¹¹¹ According to data collected in the first round of evaluation of non-cooperative countries and territories, the IBCs present in the Bahamas were approximately 109,000, 40,000 in the Cayman Islands, in the Cook Islands about 1200, about 3000 in the Marshall Islands, Niue approximately 5500, in St. Kitts and Nevis 15,000, St. Vincent and the Grenadines approximately 7,000. *Ibid.* n. 130.

to “sanction” those countries who did not respect the new standards settled in the AML/CFT system¹¹². FATF divides these countries in two categories: i) those that did not apply at all an appropriate AML/CFT system; ii) and those jurisdictions which have a broad number of deficiencies or have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies. The distinguish feature of the new countries in the black list, is not anymore the lack of an AML/CFT regime, but is connected with deficiencies that all these countries have in implement international AML standards. In fact, only Iran and DPRK suffers from a lack of criminalisation of financing of terrorism, while the second range of countries has introduced this crime in the criminal legal system. Even if FATF analyse them separately, they contain some characteristics in common: the necessity to adequately criminalise FT; the need to establish and implement adequate procedures to identify and freeze criminal assets; the establishment of a fully operational and effectively functioning FIU; and the amelioration of the procedures of customer due diligence.

In conclusion, if the first black list was focused more on an effective lack of the recognition of ML as a crime, after fifteen years it can be said that this behaviour is considered a real offence in almost all the countries around the globe, while the real problem lies both on the impossibility for the international community to proper cooperate within those countries, and the incapacity of these legal systems to furnish adequate protection to its citizens, alimenting even more the expansion of the ML phenomenon.

¹¹² The countries inserted in the new list are Iran, Democratic People’s Republic of Korea (DPRK), Algeria, Ecuador, Indonesia, and Myanmar. The public statement leaves space for a little remark concerning some of the previous countries in the black list by saying “*Ethiopia, Pakistan, Syria, Turkey and Yemen are now identified in the FATF document, "Improving Global AML/CFT Compliance: Ongoing Process" due to their progress in substantially addressing their action plan agreed upon with the FATF*”. Ibid, n. 131.

5. *Conclusions: The International and European Response to a Fragmentary Anti-Money Laundering Panorama*

The findings of this study made clear that the enforcement of the international provisions regarding the AML legal framework at international and European level is not efficient enough. From the lack of harmonization in the definitions of ML, serious problems of cooperation and law enforcement arise. The purpose of this thesis is not to examine in depth theoretical matters, but rather to stress upon the problems deriving from the application of the repressive/criminal approach chosen at the international level. As aforementioned, both hard law and soft law instruments left a broad choice to single countries in the criminalisation of the ML offence. The FATF Recommendations never took a clear position, leaving to states the possibility to opt between three different approaches. Neither the UN conventions, nor the UE directives, were able to give a serious response on shaping a univocal definition of ML. In particular, at the international level, the multiplicity of choices is elevated to enlarged: four instruments were enacted. Further, each of them recalled the provisions inserted in the previous ruling. The definition of the international crime of ML, as it is drafted in the mentioned international conventions and EU Directives is too ambiguous, and unclear, leading to a lack of double criminality.¹¹³ The definition offers too much malleability on key elements for the state parties. Thus, following the terms of hard law instruments, country A may define the offence of ML in a way at the opposite of country B. *“If the act for which the international cooperation is sought does not constitute the same offence of ML under the law of the requested State, then, a mutual legal assistance or extradition request could be refused on the basis of absence of “double criminality””*.¹¹⁴

¹¹³ Robert Diurreu explains the limit of the dual criminality in the harmonisations of AML provisions as such: *“...in light of the principle of dual criminality, the crime in the country asking for mutual legal assistance and/or extradition has to be also a crime in the country where a suspect is being held. But a broad interpretation of the requirement of dual criminality means that it is not essential that the two statutes be perfectly harmonious. Dual criminality exists if the necessary character or the criminal acts of each country are the same and if the laws are ‘substantially’ similar [...].Therefore, the decisive point is the coincidence in the ‘substance of the offence’.”* See supra n. 48, pp. 180,181.

¹¹⁴ See supra Diurreu n. 48, p 435.

In such a fragmentary panorama, both the UN and the EU tried to give a proper response.

At International Level, the UNODC in 2005, in collaboration with the International Monetary Fund, elaborated the *Model Legislation on Money Laundering and Financing of Terrorism (herein after UN Model Legislation¹¹⁵)*. The introduction of this Model contains provisions in its introductions that seem to finally recognize for the stability of both economy and society HR related issues to ML. The introduction states that it “*is a legislative tool designed to facilitate the drafting of specially adapted legislative provisions by countries intending to enact a law against money laundering and the financing of terrorism or to upgrade their legislation in those areas*”. However, this instrument's major drawback is that it does not urges the harmonisation of the definition of ML. On the contrary, it is limited to provide a number of possibilities for the states to improve their internal legal systems, without considering the lack of international cooperation.

The European Union started undertaking regulation on ML and its surrounding issues with delay. However, the perspective of cooperation in the short term seem brighter in between member states of the EU than of the UN. Problems concerning the collaboration between FIUs and internal law enforcement agencies do not appear as serious issues to take under consideration as, in the preventive sector, data circulate smoothly and bring satisfying results¹¹⁶. Indeed, instead of investing efforts in a preventive approach, the EU concentrated on a punitive approach. The necessity to enforce the punitive system emerged in the report published by the European Commission in April 2012, two months after the new FATF 40 Recommendations have

¹¹⁵ United Nation Office for Drug and Crime, and the International Monetary Fund, “*Model Legislation on Money Laundering and Terrorism Financing (for civil law legal systems)*” (Report) (IMF, UNODC, 1 December 2005) 1.

¹¹⁶ It is interesting to just mention the FIU.net project. It is a project began in 2000 by the coordination of Italy, France, UK, Luxembourg, and Netherland to coordinate national FIUs in a sort of European network aimed to enforce the displacement of proceeds of crimes. <https://www.fiu.net/home/history> .

been disclosed.¹¹⁷ One of the three main objectives of this Report is to “*examiner la nécessité de modifier éventuellement le cadre compte tenu des conclusions de la Commission comme des nouvelles normes internationales récemment adoptées*”.¹¹⁸ This goal recognises that a revision of the EU criminal legal framework can be achieved.¹¹⁹ In the October, the European Commission elaborated a Roadmap for a future harmonisation of the ML crime¹²⁰. This instrument carries *in se* the willingness to provide a real harmonisation of the crime of ML, considered a necessity for overcoming these difficulties of cooperation and cross-borders investigations.¹²¹ “*Article 83(1) TFEU identified money laundering as one of the crimes with a particular cross-border dimension. However, there is currently no common definition and scope of this crime given in the EU. Member States apply diverging definitions of money laundering which have caused the above described difficulties in cross-border investigations and co-operation. Only one common understanding of the crime at EU level can help to overcome these difficulties*”¹²². In February 2014 these efforts have led to a *Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing*¹²³ (hereinafter Proposal of Directive).

¹¹⁷ “*Rapport de La Commission au Parlement Européen et au Conseil concernant l'application de la directive 2005/60/CE du Parlement européen et du Conseil relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux et du financement du terrorisme*”, Commission Européenne, Bruxelles, le 11.4.2012 COM(2012) 168 final.

¹¹⁸ Ibid. p. 3.

¹¹⁹ “*Une criminalisation au niveau de l'UE pourrait être envisagée*”. Ibid. p. 5.

¹²⁰ “*Proposal to harmonise the criminal offence of money laundering in the EU*”,

¹²¹ “*In particular, different views on what crimes can lead to money laundering (predicate offences) make it difficult for those in charge of preventing financial transactions related to money laundering and those that prosecute cross-border money laundering to identify whether money laundering took place.*” Ibid. p. 2.

¹²² Ibid.

¹²³ “*Report on the proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing*”, Committee on Economic and Monetary Affairs, Committee on Civil Liberties, Justice and Home Affairs, (COM(2013)0045) – C7-0032/2013 – 2013/0025(COD)), Rapporteurs: Krišjānis Kariņš, Judith Sargentini, RR\1021502EN.doc.

It is too early to date to assess whether the Proposal of Directive will become reality, and if eventually, harmonisation at EU level will be achieved. Although the Proposal of Directive is surely innovative in the panorama of ML fight at international level, it must be said that no references to human rights – except regarding the remand to the Charter of Fundamental Rights and the ECHR (protection of the right to privacy) – have been inserted by the European Commission. The next chapter will stress that harmonizing the definition of ML is not sufficient enough, but will examine the relevance of considering ML in the light of HR.

CHAPTER IV

Money Laundering and the Protection of Fundamental Rights: A Call for Regulation

1. Introduction

The previous chapter analysed both the economic and the legal dimension of ML. In particular it has been observed how the economic dimension has been unconsidered for many years before relating the detrimental effects that ML produces at the global stage with economic theories. In fact, since Globalisation has started producing its effects, international community tried to give an answer creating a legal global framework that could act either at the last stage of ML – enforcing punitive/criminal measures such as the criminalisation of ML conducts and the confiscations of the proceeds of crimes – either at the first two stages of the ML process – instituting an AML (now AML/CFT) preventive/regulatory system, which aimed to institutionalise FIUs at national level and international cooperation between them, and was also directed to financial institutions and DNBD in the reporting of suspicious transactions. Thus, the possibility for transnational organised crime to benefitiate from the disparities between the national legal systems, and the protection of some fundamental rights (such as the *nullun crimen sine lege* and the *ne bis in idem principles*) played a fundamental role in the difficulties for international cooperation to properly fight ML.

Only evaluation mechanisms proposed by the FATF analysing the implementation of the 40 Recommendations at national level raised awareness at international level. In fact being inserted in the black list of the FATF means to be seen as a Non-cooperative country, and this can produce difficulties in the economic relations with other actors at international level. Anyway, this is not enough, because, even if the standards settled by the FATF, are considered important for the implementation of a constructive AML policy framework, at the same time they remain non-binding measure and they do not

prescribed the adoption of a specific and unique model of criminalisation of ML, but leave to countries the possibility to choose between a threshold approach, an all crime approach, or a list approach – the consequences are once again related to the applicable jurisdiction. Another problem is that all the international legal framework connects ML to its ancillary offence, instead of considering ML as a transnational crime *per se*. What states seem not have clear, is that ML does not produce its effects only at national level, but also (I would say especially) on an international dimension. And the nature of ML as a separate transnational crime than its predicate offences cannot be avoided anymore. The predicate offences are part of the ML system and no *vice versa*.

This chapter will analyse the effects that ML produces in relation to two categories of predicate offences: human trafficking¹²⁴, smuggling of migrants, and corruption¹²⁵. The aim is not to discuss deeply about the different forms of ancillary offences related to ML (an entire thesis would not be enough), but simply to understand that those crimes are committed with the only purpose to wage money. The reasons for criminals and PEPs to pursue these crimes are different regarding THB/SOM and corruption:

- Human trafficking and smuggling of migrants are **seen as relatively “low risk – high reward” crimes**, especially because often the prosecution is for the crime itself and not for ML;
- Often ML conducts related to those predicate offences does not pass through criminalisation and sanction because judicial systems need to prove that the proceeds of crime come from the perpetration of such offences. This produces a vicious circle: if it is not possible to punish THB and SOM, it will neither be possible to punish ML¹²⁶;

¹²⁴ Office of the High Commissioner of Human Rights, “*Recommended Principles and Guidelines on Human Rights and Human Trafficking*”, 2002. Text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add.1).

¹²⁵ V. Tanzi, “*Corruption Around the World: Causes, Consequences, Scope and Cures*,” in Abed G.T. and Gupta S. (eds.), *Governance, Corruption and Economic Performance*, International Monetary Fund, 2002.

¹²⁶ The example of Norwegian AML legal framework will be used in the conclusions as an example that other countries shall follow.

Thus, states are involved in the lack of implementation of an appropriate AML legal system. They remain blind in front of the effects that ML produces in the society. It must not be surprised the study conducted in this chapter will lead to the same findings expressed at the beginning of this work: ML cannot be seen anymore as the tail of its predicate offences, and cannot only be criminalised in relation to them. This is the reason why the proceeds of crime that are produce and circulate every year inside the global market trespass the limits of the concrete imagination. This is why ML affects HR so easily. What I will try to prove is that ML in relation with HR violations as ancillary offences violate those norms that constitute the base of every modern civil society: *Jus Cogens* norms. The basket of predicate offences that can cover this area is much broader than only THB and SOM, but due to technical restrictions the thesis decided to take under consideration only these two crimes. The result of such a point of view is to consider ML as detrimental also for a fair development of the poorest countries. In addition, the last section of this chapter regarding the detrimental effects of ML in the area of sustainable development will just mention other criminal conducts relevant for this research. I will affirm that ML shall be introduced in the post-2015 Development Agenda¹²⁷. This study will be conducted following the social dimension of the problem by disclosing the results of one report redacted by the FATF¹²⁸ on the relation between trafficking in human being and smuggling of migrants.

2. *Trafficking in Human Beings and Smuggling of Migrants as “Serious Crimes That Concerns The International Community”¹²⁹*

A careful examination of the activities associated with crimes perpetrated by organized crime in relatively recent times conducts to observe that the interest has shifted to a

¹²⁷ For a complete analysis of the topic regarding the Post-2015 Development Goals please consult <http://www.un.org/en/ecosoc/about/mdg.shtml> .

¹²⁸ These reports are: FATF, “*Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants*”, FATF/OECD, July 2011.
FATF, “*Laundering the Proceeds of Corruption*”, FATF/OECD, July 2011.

¹²⁹ Deliberately the title of this section refers to the Rome Statute, to stress the importance to establish an International Criminal Court for Money Laundering.

previously uncovered field than the classic smuggling or drug trafficking: the violation of fundamental rights. The result of this new trend has been to expand the already consistent *basket* of ML's predicate offences. For this reason, before starting the analysis of the report mentioned above, it is important to begin with a brief study of THB and SOM. In fact, the evolution of the phenomenon of ML must be observed to date in relation with those offences that are the result of the globalisation process and that do not affect anymore only the freedom of an individual or a group, but are detrimental for all¹³⁰. In fact, the entire international community recognised the importance to consider these crimes as predicate offences to ML, and as seen in Chapter III they have been introduced in the framework of international binding and non-binding legal instruments to repress this conduct. The strategy for criminal organisations to achieve them originates from a very simple strategy: these conducts are more profitable and less risky¹³¹, and consequently these actors are more interested in their perpetration¹³². This phenomenon is strictly reconnected to what express in Chapter II §2. The internationalisation of criminal organisations created a sort of "international network"¹³³, a net in which criminals cooperate to find the best connections and canals in the management of illicit markets.

THB and SOM are often confused; especially some scholars identified the second category as a sub-area of the broader scheme of THB¹³⁴. Anyway, it is clear that these two crimes must be seen as new forms of *slavery*¹³⁵. A mere analysis of this conducts at

¹³⁰ I suggest to read the volume of L. Ferola, "*Il riciclaggio dei proventi illeciti nel diritto internazionale*", edizioni Giuffrè, Milano, 2005. The scholar is one of the first who talked about the connection between ML and HR.

¹³¹ The relation between risks and profits has been already analysed in Chapter II §2.

¹³² "2009 European Union organised crime situation report", Europol, Lussemburgo, 2010, p.11.

¹³³In this sense P. L. Vigna, "*La cooperazione internazionale contro il traffico di esseri umani*", in AA. VV, Atti del Convegno "*Traffico di esseri umani. Alla ricerca di nuove strategie d'intervento*", Rome, 24-25 ottobre 2001, p. 43.

¹³⁴Ibid. n. 124. For instance, L. Ferola, in her book affirms that Human Trafficking can be tripartite in smuggling of migrants, trafficking of minors, and trafficking of women for the exploitation of prostitution.

¹³⁵http://www.ungift.org/doc/knowledgehub/resourcecentre/2014/Trafficking_in_Persons_Report_June_2_014.pdf .

the material level clears that they possess those characteristics that the international community has outlined to create an internationally recognized notion of slavery: “*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*”¹³⁶. The international community has sought to categorize slavery as one of those human rights violations that constitute an offense against the international social conscience. The UN defined slavery as crime against humanity and a violation of international customary rules¹³⁷. According to the principle of international customary law *consuetudo est servanda*, a state that violates the obligation to repress this crime is considered responsible too, even apart from its acceptance to binding international agreements of any kind. The problem that must be considered once dealing with this issue is to provide proper instruments of repression against those who physically raise these conducts. Due to the extreme gravity of this crime, the international community recognised that the principle of universal jurisdiction can be applied against criminals who perpetrate slavery. Therefore, each State is entitled to raise a well-founded punitive claim and be able to judge and punish perpetrators, independently of any juridical connection between the state and the criminal¹³⁸. So, universal jurisdiction can be applied to THB and SOM too. This concept is very important to sustain the thesis of the application of universal jurisdiction also to ML.

The Two Protocols of the Palermo Convention contain the definition both of THB and SOM. Trafficking of Human Beings¹³⁹ is defined as “*the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of*

¹³⁶ *Convention to Suppress the Slave Trade and Slavery*, signed in Geneva in on 25 september 1926, entered into force on 12 march 1927.

¹³⁷U. N. Sub-commission on Prevention of Discrimination and Protection on Minorities on its 45th session, 1993.

¹³⁸ For a deeper analysis of universal jurisdiction read Chapter III §5.

¹³⁹ Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". Instead, for Smuggling of Migrants¹⁴⁰ is intended "*the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident*". Keeping in mind the two definitions and the connection of these conducts with ML, is time to analyse the 2011 FATF Report titled "*Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants*".

3. *The Connection between THB, SOM and ML: the FATF 2011 Report*

"There is growing evidence that criminals are turning to trafficking in human beings (THB) and the smuggling of migrants (SOM) to a greater extent as these crimes are seen as highly profitable". This is the introductory sentence of the Report in analysis. The meaning of these words is the implicit recognition by the FATF of the connection existent between violation of HR and ML. The reason why this thesis will analyse the results disclosed by the FATF in this Report come from the necessity to add both empirical data and an effective value to what said during the entire dissertation: international community suffers from a lack of recognition of ML as a HR violation, and undervalue the criminalisation and the persecution of this phenomenon considering it only as part of the predicate offence. This document highlights that criminals violate HR with the only purpose to wage money, and beneficieate from the lack of a proper international cooperation to act freely¹⁴¹. Even the FATF in the conclusions suggests that states will take appropriate internal and international countermeasures both to assess the real impact of the problem and to introduce a more "*money-laundering*

¹⁴⁰ Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁴¹ "making a profit is the main goal of both traffickers and smugglers" affirms the FATF in the Report. Ibid. p. 6.

centric” legislation. Furnishing some data – not always complete, due to the serious lack of information flowing around THB, SOM and ML – on the real measure of the problem in the globalised world, FATF aims at raising awareness at international level and provide some suggestions that are different from the same research questions that this research posed at the beginning. In fact the main objectives of the FATF are: i) assessing the problem; ii) identify from case studies where ML acts and what forms launderers prefer to use to clean the proceeds of these two crimes – in particular to analyse if they are different from the ones already use for other ancillary offences; iii) increasing the possibility that the accomplishment of these conducts would be considered in the next years as “*high risk/low profitable*”, rather than “*low risk/high profitable*” as it is today.

The Report is structured in four chapters: the scope of the study, the analysis of the questionnaire and the case studies, the key findings, and the issues for consideration.

3.1 The Scope of the Study

FATF affirms that the scope of the study is “*the laundering of proceeds arising from trafficking in human beings and the smuggling of migrant*¹⁴²”. To achieve this purpose Chapter I¹⁴³ begin by defining what THB and SOM are in accordance with the international legal framework, in particular the Two Additional Protocols to the Palermo Convention. The differences between THB and SOM are underlined based on three different dimensions: the consent (required for SOM and completely irrelevant for THB); the exploitation (not required in SOM, but required in the THB); and the transnationality (basic element of SOM, and not required for the THB). If the differences lie on the factual profiles of the conducts, the similarities are observed taking into account the structure and the purpose of the criminals. Indeed, in both the crimes criminals constitute a well organised productive chain, where everyone plays his

¹⁴² Ibid p. 8.

¹⁴³ Ibid. p. 10.

role, and they aim to maximise the profit minimising the costs of the transaction (in this case the SOM or the THB)¹⁴⁴. The profiles of smugglers and traffickers and the risk sectors are not important for this dissertation. On the contrary, the scale of the problem must be taken into analysis following the Report. “*The globalisation of the world economy has increased the movement of people across borders, legally and illegally, especially from poorer to wealthier countries. International organised crime has taken advantage of the increased flow of people, money, goods and services to extend its own international reach*¹⁴⁵” is written in the Report. Unfortunately, as the FATF underlines, measuring the scale of the problem is almost impossible. The data written in the Report are approximates and come from other international organisations such as ILO, OSCE, or UNODC and other organisms¹⁴⁶. The data disclosed underrepresent the actual scale of the phenomenon, and the problem is the difficulty to persecute criminals who perpetrate these conducts. At least around 2.5 million¹⁴⁷ of persons are currently suffering from exploitation due to THB, and around 55.000¹⁴⁸ persons every year are smuggled¹⁴⁹. If the data representing (approximately) the number of people suffering from THB or SOM is impressive, the scale of the economic profits that would be laundered is simply unbelievable. The total illicit profits of all forced labour resulting

¹⁴⁴ *ibid.* p. 11,

¹⁴⁵ *ibid.* p. 14

¹⁴⁶ For instance the reading of the 2014 Report on Trafficking in Persons, written by the US Department of State, can furnish a more detailed overview of the data collected during the last year and concerning THB. Available at: http://www.ungift.org/doc/knowledgehub/resource-centre/2014/Trafficking_in_Persons_Report_June_2014.pdf.

¹⁴⁷ International Labour Organization, *A Global Alliance against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva, ILO, 2005). Available from: www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081882.pdf.

¹⁴⁸ To consider the variability of these data we can say that for instance from the beginning of the 2014 already more than 5000 migrants reached Italian costs as migrants smuggled. This means that the number of 55.000 as Reported in 2011 can easily be increased.

¹⁴⁹ “*The Globalization of Crime: A Transnational Organized Crime Threat Assessment*”, United Nations publication, Sales No. E.10.IV.6. Available from www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf.

from human trafficking is estimated to be about USD 32 billion per year (4 USD billion dollar for working exploitation, and 28 USD billion dollars from sexual exploitation), while the amount of money circulating around SOM is estimated in around 6,75 USD billion per year¹⁵⁰, with an average of smuggling fees that vary between 1.500 USD and 70.000 USD for migrant. Considering the colossal amount of money circulating around these crimes, FATF never stops to underline how the lack of appropriate instruments to fight ML is detrimental for the international economic stability. In fact within the data concerning the amount of persons suffering from this crimes and the money flowing around them, another data is impressive...negatively. It concerns the number of STRs reported by countries and concerning THB and SOM Considering the money involved, the number of STRs reports is impressively low. FATF cites some figure from the questionnaire fulfilled by countries: “The *Spanish FIU received in 2009 84 STRs related to THB/SOM out of a total of 2 764 STRs. The Colombian FIU received 8 STRs relating to migrant smuggling between 2007 and 2009 and 14 STRs relating to human trafficking. In 2009-2010, of 579 cases disclosed to law enforcement authorities by the Canadian FIU Fintrac, 8 were with migrant smuggling or trafficking suspected predicate offence*¹⁵¹.” The last section is dedicated to the analysis of the countries of origins, transit, and destination. This data are useful to support the argument that an inadequate international cooperation, combined with the proliferation of ML, impede the possibility for developing countries to improve and achieve the UN Development Goals. In fact, it must not surprise the fact that the geographical areas of origin for THB are regions of the Commonwealth of Independent States (former Soviet republics), Central and South-Eastern Europe, Western Africa and South-East Asia, while the countries of destinations are usually Western Countries and Western Asia. The same can be said for SOM, even if data are more difficult to report. Anyway, the major trends are from Africa to Europe and from Latin America to North America.

¹⁵⁰ <http://www.unodc.org/toc/en/crimes/migrant-smuggling.html> .

¹⁵¹ Ibid. p. 17.

3.2 Analysis of the Questionnaire and Key Findings

After the empirical generic data concerning the scope of the study, in the second chapter FATF analyses two important features: the questionnaire to which all the members of FATF should have answered and the practical cases that jurisdictions provided to communicate to FATF as examples¹⁵²(Question 6 of the questionnaire). The questionnaire, composed of 9 questions (hereinafter Q.), went through a broad series of topics that the different jurisdictions involved analysed and to which they answered: *“the main sources of detection of the laundering of the proceeds, the ML trends, the investigations led and convictions pronounced, the obstacles met, and the indicators observed”*.

Questions 1 and 2 deal with the competent authorities both in the sphere of the detection and investigation of THB and SOM cases, and in connection to ML. Q1 deal with the issue of the law enforcement agencies for THB and SOM only. Answer given demonstrated that in many countries there is more than just one authority competent for these cases. In particular, police services, immigration services, custom police, prosecution services and coast guard. They cooperate to investigate and detect cases bot of THB and SOM. Q2 is murky, because it asked whether there is a competent AML authority that deals only with these two ancillary offences. It is not surprising that that all the answers where negative in this sense. States affirmed that in the majority of the cases the services specialised in AML were dealing also with cases of THB and SOM, without the addition of specialised forces focused only of these issues. Only Spain and USA declared that they created specialised agencies in addition to the already existent FIUs.

Question 3 and 4 deal with both the source to detect ML and the new trends detected in the different jurisdictions. Q3 focuses on the sources of the information in cases of ML in connection with THB/SOM. The STRs received by the FIUs, which should constitute the first element in detecting ML, came in second place. Indeed, the first source of information was constituted by investigative operations of law enforcement authorities.

¹⁵² Ibid. p. 26.

The Report¹⁵³ adds that “*this confirms the conclusion drawn by Moneyval that THB and SOM remain law enforcement issues*”¹⁵⁴. Q4 regards the new trends detected by the jurisdictions involved. Without the aim to enter too much in detail, it can be said that each region of the world presented different trends. Thus, for instance in Europe trafficking occurs mainly for sexual exploitation and forced labours, and traffickers often use their victims as cash couriers to launder money. In Asia was detected that trafficking and SOM come more from the poorer countries, and that Nepalese¹⁵⁵ trafficking victims are forced to beg in Indian cities. Weather the Americas showed a variegated number of trends detected depending on the country, the African continent, especially Sierra Leone and South Africa, detected the new trends of the resettlement of the young people displaced from the civil war (Sierra Leone), and investments in night clubs, restaurant, hotels, real estate and off shore countries (South Africa).

Questions 5 and 6 are related to the analysis or the investigation into the financial aspects of THB and SOM and to the possibility to furnish some examples related to this topic. Out of 41 countries, 19 did not answer saying that the information were not available. Q6 concerned the possibility to report some cases as examples of concrete connections between ML and THB/SOM to facilitate the emerging of trends in ML investment activities. The case studies will not take part to this analysis. However, it is important to precise that the majority of cases of THB regarded sexual exploitation and forced labour¹⁵⁶. The trends that emerged from the analysis of case studies stress that the main systems launderers use consist in an extensive use of cash; frequent transfers through money remitters to common recipients (often in risk countries); use of bank accounts with frequent cash payments incoming and outgoing the account; use of front companies; use of straw persons; use of cash to invest in real estate/high value goods;

¹⁵³ Ibid p. 27

¹⁵⁴ http://www.coe.int/t/dghl/monitoring/moneyval/typologies/THBTypo_Rep%282005%29.pdf .

¹⁵⁵ A new trend in the exploitation of Nepalese workers began with the preparatory works for the World Cup of Football in Qatar in 2022. In fact a very high number of Nepalese are recruited directly in their country and once they arrived in Qatar they became forced labours, with a salary of less than £74 per month. <http://www.theguardian.com/world/2013/oct/02/nepalese-migrants-qatar-exploitation-home> .

¹⁵⁶ It is obvious that the cases concerning SOM can only have as object the facilitation of the entrance of undocumented migrants. Ibid. p. 31 and Annex A.

repayments of loans or other debt burdens; casinos, import/export trades etc; use of the *hawala* (informal banking) or other informal banking systems¹⁵⁷.

Question 7¹⁵⁸ is probably the most relevant question to this study, as it concerns the obstacles to conduct this analysis. Amongst this sample of countries, 15 jurisdictions did not answer to the question, and 4 of them affirmed that they did not face any obstacles. The FATF affirmed that “*the statements of the jurisdictions corroborate fully the conclusions of the UNODC in its Human Trafficking, an overview published in 2008*¹⁵⁹”. The conclusions are that the problems faced by countries to set appropriate measure to combat THB/SOM are the same faced in the fight against ML. In particular they concern all the conclusions that the thesis analysed in the previous chapters: lack of knowledge of the real entity of the problem; lack of an adequate national legal framework; limited cooperation; lack of resources; corruption; etc... In addition, the three main concerns and obstacles found regarded a limited cooperation at international level; a lack of awareness or concern from law enforcement/prosecution authorities; the difficulties in detecting funds. The limited international cooperation could consist in the major concern deriving from the analysis of Q7. 19 countries answered that they faced problems related to an effective cooperation: time delays, effectiveness, special issues relating to the information required to other FIUs, the need for an effective system of mutual legal assistance, are the main concerns of these countries. The lack of awareness at the enforcement/prosecution level is another important issue that countries face. The FATF underlines how the main issues concerning the lack of an appropriate enforcement and judicial system are based on three dimensions:

- The impossibility to starting investigating the proceeds of ML, if before the relation between them and the predicate offence has not been proven;

¹⁵⁷ Ibid. p. 37.

¹⁵⁸ Ibid p. 29.

¹⁵⁹ The document can be consulted on the website of the UNODC at the following web address http://www.ungift.org/doc/knowledgehub/resource-centre/GIFT_Human_Trafficking_An_Overview_2008.pdf.

- The “**investigative culture focusing on the predicate offence** rather than the laundering is a recurrent obstacle mentioned by the jurisdictions participating in this study”¹⁶⁰.
- The lack of financial awareness and training for investigators/prosecutors.

These obstacles conduct to a unique conclusion: ML must not be observed anymore only under the lenses of its predicate offences, bust must be fight as an offence that already contains *in se* the proof that the proceeds come from an illicit source. In this sense the Norwegian AML repressive framework play an eminent and unique role in the international panorama¹⁶¹. The last concern is related with the difficulties in detecting the illegal funds. The Reports observed that “*due to the wide use of cash in these types of offences, activities surrounding for example the prostitution sector (sometimes legal in certain jurisdictions) and the commingling of funds (stated 3 times), tracing illicit money and gathering evidence is a great challenge for financial investigators*”¹⁶².

The least two questions concerned the indicators (Q8) and other information/input on the subjects. Q8 will not be taken into consideration inside this dissertation, while Q9 has not been disclosed in the Report.

Chapter III focuses of the key findings of the research. In assessing the scale of the problem, the picture is that ML in the field of THB/SOM is an area of growing international concern. Criminal organisation are very attracted by the profits that can be realised with trafficking and smuggling of migrants, either because this is a very profitable source, either because there is a very low risk to be caught and punished, in large part because the prosecution is for the predicate offence and not for the ML¹⁶³. The lack of information about the number of persons suffering from THB and SOM combined with even less information about the incomes generated by these activities

¹⁶⁰ Ibid p. 30

¹⁶¹ The importance of the Norwegian Criminal Law as an example to be followed will be underlined in the conclusions of this thesis.

¹⁶² Ibid. p. 30.

¹⁶³ Ibid. p. 38.

and the modalities in which they are laundered emphasise the necessity to give an appropriate answer to this problem.

In the area of law enforcement, conclusions from the answers to the questionnaire outlined that information about ML arising from THB and SOM came to a greater extent from operational investigations, instead that from FIUs. The reason is that to-date the focus is still on the crime itself and not on the laundering of the proceeds of crime. There is also evidence of a connection between these two ancillary offences, ML and other transnational organised crimes: the persons trafficked or smuggled are often used as drug couriers. There are also linked between THB/SOM and corruption or FT. Evidences demonstrated how¹⁶⁴:

- *“Some source jurisdictions have not implemented the necessary legislation to ensure any control over the “trade” in humans, and those responsible for producing the legislation are often benefiting from the criminal activity, either directly or through corruption money, and are therefore reluctant to implement the legislation required³⁶;*
- *Some source jurisdictions, even if willing to take action, do not have the resource capacity to engage in the necessary enforcement action required to prosecute and seize/confiscate the proceeds of human trafficking/smuggling of migrants;*
- *Some transit jurisdictions may not attach the same priority to the allocation of resources to detect THB and SOM as the destination jurisdictions;*
- *As already noted, in many of the destination jurisdictions the emphasis is more on the crime (e.g., sexual exploitation) than on the ML risks.”*

3.3 Conclusions and Issues for Considerations

The last chapter is dedicated to drawing conclusion and compilation making of recommendations.¹⁶⁵ The Report, while acknowledging that the data collected could

¹⁶⁴ Ibid. p. 40.

¹⁶⁵ Ibid. p. 43

correspond to reality, admits the gravity of problem that is encountered in obtaining uniform values. It enhances the importance to develop a uniform and effective methodology to calculate the real percentages of persons suffering THB and SOM and the proceeds deriving as such. The judicial focus is the other issue raised by this Report. Again, the nature of the THB/SOM markets is stressed as being considered as “low risk/high profitable” areas. One of the reasons is “the difficulty in securing prosecutions due to the **practical challenge of investigating crimes across international borders**, or the difficulty in obtaining evidence from trafficking victims”. The Report suggests an implementation of the international cooperation in two issues: i) the reversal of the scheme mentioned, which might become “high risk/less profitable”; ii) a major focus on the criminalisation of ML rather than on the predicate offence itself, “*with due regard to the **protection** of the **rights** of the victims, the **rights** of smuggled migrants and of witnesses*”.¹⁶⁶

Cooperation and the prioritisation/level resourcing are the other two matters raised by the Report. Calling for the need to more cooperation between law enforcement agencies and FIUs and national and international level, especially in the informal exchange of data collection the Report underlines how both SHB and SOM can be profitable, especially because they assure high level of profits along the entire productive chain¹⁶⁷. In conclusion, the Report stresses the importance to combat ML in relation with human trafficking and smuggling of migrants. The link between these crimes and other transnational crimes is an ulterior issue that both the source jurisdictions and the destination jurisdictions must take under serious consideration. Source jurisdictions, usually less developed countries, require technical and financial assistance in the ratification of international treaties, in the drafting of internal legislation and in the resourcing of their law enforcement agencies and FIUs. Destination jurisdictions as well must focus the attention on the implementation of the resources allocated for the law

¹⁶⁶ Ibid.

¹⁶⁷ “*With human trafficking there are a number of elements that are rewarded including the recruiters in the jurisdictions of origin, the transporters who move the human beings from the country of origin to the country of destination, and the exploiters within the countries of destination. With SOM, there is also a wide range of actors retributed for the smuggling activity*”. Ibid. p. 44.

enforcement agencies and the FIUs, especially providing financial specialists in this sector adequately trained and equipped with relevant IT tools and access to necessary information.

4. Conclusion

The findings of this chapter lead to draw the following conclusion: i) THB and SOM are forms of slavery which are in addition considered as offenses against the international social conscience by the international community; ii) they are inextricably connected with ML because they represent one of the most profitable and least risky markets for transnational organised crime; iii) the international community seems incapable to furnish an appropriate answer to this phenomenon, due to efforts invested mainly in the fight against predicate offences, rather than on ML per se.

CHAPTER V

Reshaping the regulation on money laundering

1. Overview

The previous three chapters evolved on three arenas: the economic one, the legal and the social one. However, it appears that the same conclusions arise from them three:

- Issues in the harmonization of a criminalizing definition of ML;
- The lack of internal law enforcement;
- A low level of international cooperation deriving from both by the impossibility to furnish precise data on the dimension of the phenomenon, and from the priority put by states on the criminalisation of ancillary offences, rather than ML per se.
- The detrimental effects that ML has on fundamental rights supposedly guaranteed by the international community.

This chapter proposes a coherent and « tailor made » answer to these problems. ML is an gangrene that deserves to be reconsidered by the international community under new angles. The recommendations of this study regard the draft of a new Convention on Preventing and Combating Transnational Money Laundering (hereinafter AML Convention). This instrument shall be drafted under the lens of a HR based approach and criminalise ML independently from ancillary offences. This instrument provides for protection to specific human rights that are threatened by the performance of ML (namely: political, economic, social and cultural rights, but also equality rights). Further, the backbone of the convention would be « the right to be free from money laundering ». This originality of this Convention would be pushed further from the

tradition securing and establishment of rights. In addition, the AML Convention would create an International Criminal Court on Money Laundering (hereinafter ICCML).

2. *A Human Rights Based Approach: The First Step for a New AML Panorama*

The conclusions of Chapter II indicated that the colossal amount of money produced by ML affect human rights, especially in the area of economic and social rights. For this reason, the international community, in drafting a new AML Convention, should proceed with a human rights based approach. For a better understanding of this argument, this section will begin to map the AU Convention on Preventing and Combating Corruption (hereinafter the AU Anti-corruption Convention).¹⁶⁸ *“The Convention is unique amongst international anti-corruption conventions by recognizing the connection between acts of corruption and the violation of human rights”*.¹⁶⁹ On 11 July 2003, the African Union adopted the AU Anti-Corruption. The importance of this document does not lie exclusively on its referrals to HR, but also because it contains the criminalisation of the proceeds coming from the crime of corruption.¹⁷⁰ Thus, it can be said that this document, for the first time, recognise ML as a human rights violation within the crime of corruption. The aim of this section is to represent this Convention as an example for drafting a future AML Convention, and for this reasons a study on the entire framework of the rights protected by the Convention does not seem relevant.¹⁷¹

Already in its, Preamble the AU Anti-Corruption Convention refers to a series of other HR binding documents, such as the African Charter, the 1994 Cairo Agenda for Action

¹⁶⁸ The African Union Convention on Preventing and Combating Corruption was adopted on 11 July 2003, and entered into force in 2006.

¹⁶⁹ Melissa Khemany, *Corruption and the violation of human rights : the case for bringing the African Union Convention On Preventing And Combating Corruption within the jurisdiction of the African Court on Human and Peoples' Rights*, A. YUSUF (ed.), African Yearbook of International Law, 213-234. © 2010 African Foundation for International Law, p. 227.

¹⁷⁰ Ibid articles 4 and 6.

¹⁷¹ M. Khemany states that *“The AU Anti-Corruption Convention refers to human rights eight times, which is significant considering that it is only a 28-article document”* See supra n. 169, p. 228.

Relaunching Africa's Socio-Economic Transformation and the African Union Plan of Action Against Impunity adopted by the African Commission on Human and Peoples' Rights in 1996.¹⁷² The Preamble recognizes the detrimental effects that crimes such as corruption have on economic development. This point is of a significant importance and therefore should be repeated in the AML Convention.¹⁷³

Article 2 states the objectives of the convention. Amongst the enforcement provisions on combating corruption (as the promotion and strengthening of mechanisms required to prevent, detect, punish and eradicate corruption and related offences, §1), or the call for the empowerment of interstate cooperation (§2 and §3), a provision seems particularly relevant. It is Art.2 §4 that enunciates “[the objective is to] *promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights*”.¹⁷⁴ Moreover, other important provisions that could be taken as example for shaping a new AML Convention regard the inclusion of the civil society and media as an important vehicle for creating an anti-corruption conscience (articles 5 and 12) and be whistleblowers. In particular, article 5 §8 disposes that “[state parties undertake to] *adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media, and the promotion of an enabling environment for the respect of ethics*”.¹⁷⁵ In fine, the body of the AML Convention shall contain provisions referring to the African Charter and the protection of HR. M. Khermay divides them in six categories: i) rights to life, liberty and physical integrity; ii) rights to affiliation and free movement; iii) rights to political participation;

¹⁷² Ibid. Preamble.

¹⁷³ “Concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples; Acknowledging that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent”. Ibid.

¹⁷⁴ Ibid. Art. 2(4).

¹⁷⁵ Ibid art. 5(8).

iv) rights to non-discrimination, fair trial and legal movement; v) economic, social and cultural rights; vi) solidarity rights.¹⁷⁶

3. Money Laundering First: The Norwegian Civil Penal Code as a Model for a New AML Regulation

The section above explored the first stakes that should be taken into consideration when drafting the AML Convention under a human rights approach. It must be noted that the AU Anti-Corruption Convention introduces in the field of anti-corruption, a provision concerning the criminalisation of the “illicit enrichment”.¹⁷⁷ In particular, article 1 defines illicit enrichment as “*the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income*”.¹⁷⁸ This definition is important to highlight what should be the next step in the criminalisation of ML. Therefore, one of the problems stressed in the previous chapter, regarded the difficulty for countries both at national and international level to fight properly ML and its ancillary transnational offences, and to provide a more efficient enforcement cooperation. For this reason, the FATF Report highlighted the necessity for countries to give more importance to ML per se, rather than on its ancillary. This section will show how the Norwegian Civil Penal Code¹⁷⁹ could be an example for the criminalisation of ML in a hypothetical new AML Convention.

Chapter 31 of the Norwegian General Civil Penal Code titles “*Receiving the proceeds of a criminal act*”¹⁸⁰. In defining the conduct of ML, it is not dissimilar from all the other juridical orders. Indeed, it considers ML as the conduct of “aiding and abetting shall be deemed to include collecting, storing, concealing, transporting, sending,

¹⁷⁶ See supra n. 169, pp. 229, 230.

¹⁷⁷ Ibid. Article 12.

¹⁷⁸ Ibid. Article 1.

¹⁷⁹ The Norwegian Civil Penal Code is available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf

¹⁸⁰ Ibid.

transferring, converting, disposing of, pledging or mortgaging, or investing the proceeds”. The innovation lies on that to prove the illegal origin of the proceeds, the proof of the ancillary offense are irrelevant. The police and the prosecuting authority are not required to provide evidences of underlying offence the proceeds may stem from. Police authorities rather construe their assumptions on assessments of the environment, the nature and character of the case, as well as the suspect(s). In addition, to prove that a given transaction or seized cash constitute in proceeds of criminal offence, another method is employed. The prosecuting authority have the charge to prove that the proceeds are not related to any legal source. The focus of the evidence is thus to rule out any legal source of the proceeds. If the criminal will not link the assets to a legal source, they will be considered as criminal proceeds and are forbidden to deal with in any way. This handling is used as an indictment by itself.

Obviously this approach does not underestimate the value of the predicate offences that in an in an international context will cover a primarily role for the considerations of those transnational offences covered by the AML Convention.

4. Establishing an International Criminal Court for Money Laundering

This last section of this concluding chapter will describe the conceptualize the solution of introducing in the international criminal legal framework a special tribunal on ML as the only jurisdiction applicable at the international level.

Chapter III on this study emphasized on the lack of double criminality affecting seriously international cooperation in the fight against ML. The idea to institute the ICCML occur end to the author by the reading Diurreu who stated that “*many States based their jurisdiction over ML offences primarily on the territorial principle, even when the predicate offence was committed in a foreign jurisdiction*”.¹⁸¹ The combination between the need to include extra-territorial principles at international level and the protection of fundamental rights protected by the international community

¹⁸¹ See Diurreu supra n. 47, p. 416.

conducted this research to imagine the establishment of a special tribunal, in the shape of the ICC.¹⁸² Some could argue whether there should be the necessity to create a new international criminal court, if one exists already. Already in 1994, a group of experts elaborated the so-called “International Law Commission’s Draft Statute on an International Criminal Tribunal”, suggesting that serious drug trafficking offences, including drug trafficking ML (from the criminalisation coming from the Vienna Convention), could have been inserted in the jurisdiction of the “future” ICC.¹⁸³ As a matter of facts, the opposition of Northern countries resulted in the abandon of this project. An explanation of this disdain could be that the influence of ML on the economic global and national markets was not yet a hot topic and much talked about. Now that awareness has been progressively raised in the last twenty year on ML and its surrounding issues, the dialogue on the creation of this special tribunal deserves to be undertaken again.

This thesis will exclude a priori the possibility to use the already existent ICC to cover both ML per se, and ML offences. Although, the new tribunal might follow the same core principles and ruling established for the creation of the ICC: i) the criminalisations of acts that are “...*serious crimes of concern to the international community*”¹⁸⁴, ii) and the principle of complementarity.¹⁸⁵

First, the possibility that ML might enter inside the jurisdiction of ICC cannot be taken into consideration. There are at least two main reasons. First, ICC is in charge to judge “international crimes”, which, as observed in the introductory part, have characteristics completely different from transnational crimes (Chapter I §....). Second, even in the case that ML would purchase the recognition of international crime, it might be difficult for the ICC to prosecute appropriately launderers. A special tribunal on ML shall

¹⁸² The ICC was created by the Rome Statute of the International Criminal Court, adopted at a diplomatic conference in Rome on 17 July 1998, and came into force on 1 July 2002.

¹⁸³ See supra Diurreu., n. 47, p. 416.

¹⁸⁴ Ibid. Preamble.

¹⁸⁵ The principle of complementary appears in the Preamble of the statute of Rome and it is legally transposed in art. 17. It leads on the rule that the jurisdiction of the ICC only applies where there is a clear case of failure by the states concerned.

necessarily contain in its structure an international FIU with the function to receive STRs from national FIUs concerning suspects transnational operations. Further, it shall also contain a Prosecutor's office that will be able to lead with financial crimes, will be composed by experts in this sector. It is the complexity of the crime itself that calls for the constitution of a specific body that will be in charge to prosecute and judge ML and its ancillary offences.

The ICCML shall follow the basic principles set for the ICC. They appear in Article 1 of the Statute of Rome, which establishes that the Court has "*the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions*".¹⁸⁶ Therefore, it would be of common sense to specify on the fact that the Court would judge only cases where ML appears as a (a) serious and (b) transnational crime, (c) that national jurisdictions should not judge on their own due to the international character of the offenses committed. The requisite of transnationality has been already detailed in this study and will not be studied in depth. It shall only be added that transnationality, in this case, comprehends also ancillary offences. Only when ML will acquire the status of "transnational crime" related either to the criminal organisation, or to the predicate offence, or to the production of its effects outside national borders, the jurisdiction of the ICCML could be applied. The seriousness of ML, for Diurreu, occurs when ML "*when the property involved represents a significant economic value. [...], the seriousness of ML offences should be evaluated in light of the monetary value of the funds or property involved in the ML process. Large-scale ML operations may seriously and directly harm three main social interests that should be protected by criminal law: the social value protected by the predicate offence, the administration of justice and the socio-economic system. This means that ML is a 'serious' and 'multi-offensive' crime since it must protect these three main social*

¹⁸⁶ Ibid Art. 1.

interests”.¹⁸⁷ This means that the seriousness on ML derives directly by its capacity to harm these social values protected both at national and at international level.

The second and last necessary aspect is the complementarity. Inspired from the article 17 of the Rome Statute, a state in the incapacity, inactivity or unwillingness to prosecute in its national jurisdiction ML crimes shall be supported/replaced in its jurisdiction by the ICCML. This thesis explored at least four different situations in which fighting ML on a national level is made impossible. Firstly, states could turn a blind eye on ML operations on their own jurisdictions: Chapter 2 §3 observed how countries could be reticent to apply properly AML enforcement systems, being themselves the beneficiaries of these investments. Moreover, some states could simply refuse to face and invest in the problem, as their head of states could potentially be in the first line of launderers (e.g in dictatorial regimes). A third example might occur in poor/undevelopped countries, impartial in the prosecution of ML offences, or unable to establish effectives AML policies. Finally, other countries might have judicial and legal authorities well trained and with enough technical skills and means to prosecute efficiently ML, but they could suffer from serious lack of efficiency in facing transnational ML operations.

¹⁸⁷ See supra n. 47 p. 420.

CONCLUSIONS

Globalisation has let a door opened for economic financial crimes to trespass national borders. In this context, ML became a shadow hanging over the international community. At the end of 1980's, government started to feel the need take significant measures to block both international drug trafficking, and the proceeds deriving from those crimes. As a result of this various initiatives, the international community began investing in the very firsts AML instruments. Time allowed the international community to take conscience of ML not only being a problem related to international drug trafficking, also an autonomous transnational issue. Transnational ML was the first method employed by transnational organised crime groups to reinvest the proceeds of their crimes. ML took over another dimension, wider than the local or national one it used to be confined to. It became international. Three more conventions were adopted at international level. They criminalised transnational organised crime, corruption and financing of terrorism. All of them also contained the criminalisation of ML. This crime was, in this way, spread out into four different heterogeneous regulations. The direct consequence of this lack of uniformity was a confusion for states in adopting cooperative systems in law enforcement against ML. The consequence was to create confusion among countries in the adoption of proper cooperative systems concerning the law enforcement against ML. The preventive/regulatory approaches adopted by the EU might have had a better application across Europe, but do not offer significant alternatives to stop the processes of laundering abroad. As regularly reported in the medias, ancillary offences related to HR violations are found to be constellations all leading to ML. The international standards stated by the FATF have not been able yet to provide with the necessary arms to fight this crime, which to date is evaluated approximately for generating \$870 billion per year (an amount equal to 1.5 per cent of global GDP). It could be that the mutual evaluation system and the black list (in which are inserted the NOCT's) were of a great help in increasing: both the perception of the gravity of the phenomenon, and to ostracise the countries not complying with AML

standards. Indeed, it can happen that countries turn a blind eye on the repression of this offence, benefiting from the fluxes that circulate inside their territories. Scholars observed that nowadays, criminal organizations pursuing the maximizations of their profits, have chosen markets that are high profitable and low risky. This study highlighted the problem concerning THB and SOM (the third most profitable market for international criminal groups) under a human rights lens. The threshold dimension of this thesis examined the economic, legislative, and social dimensions embodied by the ML. Each of these dimensions led to draw similar conclusions that can be summed up as the following: the international community shall rethink the concept of criminalisation of ML under a lens related to the protection of HR. If regional systems seem to become more open to it, finding an appropriate answer for fighting ML still represents a challenge. This thesis strove to offer an answer to this political, legal and human issue that could concentrate all the matters found in the three arenas explored. The findings lead to suggest the drafting of a new AML Convention. The Convention should include as its backbone a HR based approach that would stress the intentions of contracting states to protect their populations from the detrimental human and economic effects of ML. Another approach of criminalization of this crime seems necessary in particular within such an international panorama. Considerations should be focused upon ML per se, and not only on its predicate offences. Eventually, a third element constituent of the AML Convention could be the establishment of an international tribunal against money laundering, that would apply universal jurisdiction in cases where ML is characterized by seriousness and a transnational form. This tribunal would finally bring sanctions and reparations, which is to date two functions out of reach of governments and international cooperation.

The aim of this study was to encourage the present panorama of legal and political responses to ML to evolve and consider money laundering not only as an economical crime, but a serious violation of human rights. I express my wishes for the International Anti Money Laundering Convention to see the light and contribute to the defence and protection of the universality of human rights.

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