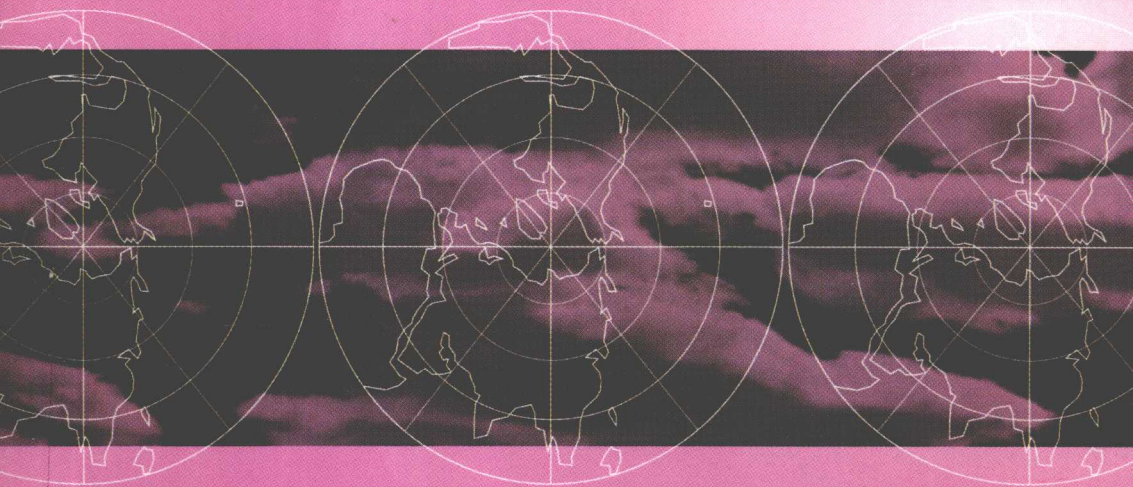




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Money Laundering

A New International
Law Enforcement Model



GUY STESENS

Money Laundering

A New International Law Enforcement Model

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To my parents

Preface

At the beginning of the millennium, the fight against money laundering features very high on the international, and in many countries, also on the domestic, political agenda. The speed with which norm-makers have put in place a set of legal rules designed to fight the laundering of the proceeds, first from drug trafficking, and, later on, of the proceeds from many other criminal activities as well, is impressive. There is of course more than one explanation for the high level of attention the subject of money laundering is receiving. The vigorousness with which authorities beat the drum of the fight against money laundering should of course be set against the backdrop of the widespread concern about the phenomenon of organized crime, and in particular organized drug trafficking, and may in part also be attributable to international pressure. At the same time, however, the eagerness of legislators to adopt rules to combat money laundering also betrays an implicit, though (apparently very) strong, belief in the effectiveness of these rules. The anti-money laundering regulations are apparently looked upon as a very powerful instrument against various forms of acquisitive crime.

It is the burden of this book to investigate whether the set of legal rules that have been put in place on an international and domestic level to curb money laundering can indeed make an effective contribution to the fight against money laundering and, if these rules prove to be unsatisfactory, how deficiencies can be remedied. The book aims to provide an extensive discussion of the legal framework for money laundering and the main legal problems that may arise in the implementation of these rules. The chief aim of this book is therefore to probe into, on the one hand, the legal impediments that may hinder the fight against money laundering and, on the other hand, the legal adaptations that are required to make the fight against money laundering effective. Although the emphasis is thus clearly

put on the goal of fighting crime, the due process perspective also receives attention. The exceptional procedures that have been elaborated to make the profit-oriented approach to criminal justice effective in this context inevitably evoke questions about the protection of individual rights. This study has been undertaken from an international and comparative viewpoint. Given the international nature of the phenomenon of money laundering, any effective solution has necessarily to be devised and implemented on an international level. The international approach is apparent in two ways: first, the various legal rules designed to fight money laundering are studied from an international and comparative angle and, second, an important part of the book is devoted to the legal measures that may further curb international money laundering operations. Both strands of this international approach also necessitate a comparative law perspective. For it is impracticable to study the international set of rules that have been created to fight money laundering without studying domestic implementation legislations as well. Also, the study of legal mechanisms to fight international money laundering operations – be they unilateral extra-territorial measures, or be they international co-operative mechanisms – by essence implies a comparative perspective: these mechanisms do not operate in an ‘international legal vacuum’, but take effect through domestic legal systems. For practical reasons, the number of legal systems that could be studied in this comparative approach was of course limited. Apart from that of the author’s own country, Belgium, the following countries’ legal systems were taken into account: The Netherlands, Luxembourg, Switzerland, the United Kingdom and the United States of America. The United States and Switzerland’s approach to money laundering were studied in detail because many of the rules on money laundering originated in either of both of these countries. Switzerland and Luxembourg were also selected because of their stringent rules on banking secrecy. England and Wales and The Netherlands were selected in view of their detailed legislation, both substantive and procedural, on confiscation and on the repression and prevention of money laundering.

The book starts by describing the wider context which spawned the fight against money laundering. Notwithstanding the high ‘popularity’ of anti-money laundering regulation, there is often little clarity about the social, economic and legal background of the fight against money laundering and even less about the goals of this fight. An essential knowledge of these contextual elements is, however, an absolute prerequisite to a thorough understanding of the problem of money laundering and its legal aspects. Thus, a grasp of the profit-oriented criminal justice model,

which is aimed at depriving offenders of their ill-gotten gains rather than at depriving them of their liberty, is essential to a full understanding of the goal of anti-money laundering rules. Part I further contains an analysis of the two main instruments of the criminal law in the curbing of acquisitive crime: the confiscation of illegally derived proceeds and the criminalisation of money laundering.

Part II charts the preventive legislation on money laundering. The discussion of these rules is centred on the three principal activators in the implementation of money laundering. First, the obligations of financial and other institutions that are prone to be misused for the purposes of money laundering are set out in detail. Second, the role of the financial intelligence authorities, that is the authorities that receive information from financial institutions on suspicious transactions and that are in general responsible for combating money laundering, is explained. Third, attention is paid to the role of the authorities that supervise financial institutions.

Parts III and IV are both devoted to a study of the problems that are posed by the need to combat money laundering on an international level. The third part deals with jurisdictional problems that are likely to arise in the context of the international fight against money laundering. It contains a theoretical analysis, based on comparative research, of the jurisdictional questions that are bound to arise in the context of many prosecutions of international money laundering operations.

Part IV aims to give a comprehensive coverage of the international measures that can be taken to tackle money laundering schemes that take place in the territory of more than one state and therefore by their very nature defy the territorial limitations of the range of actions available to governmental authorities. This problem of the territorially limited range of national law enforcement authorities can in essence be solved in two ways: either by resorting to unilateral measures which are intended to have an extra-territorial effect or by having recourse to co-operative mechanisms whereby the territorially competent state is asked to take certain measures on behalf of another state. In the context of the international fight against money laundering, this problem presents itself mainly in three different forms. The first problem with which law enforcement authorities are confronted is that of getting access to information located in foreign countries where they have, as a matter of principle, no authority to act. In the context of the fight against money laundering, this international law problem is compounded by the fact that the information sought after is often covered by domestic banking secrecy rules. The

various legal mechanisms that are deployed to obtain access to this information are therefore scrutinised. Another major problem is that of taking provisional measures relating to property located abroad. The third stumbling block for an effective international approach to the phenomenon of money laundering is the confiscation of property located abroad and, related to that, the problem of asset sharing, that is the sharing of assets between states or authorities that have collaborated in depriving the offender of his illegally derived proceeds.

This book is the English-language version of my Ph.D. thesis, which I defended at the University of Antwerp in 1997. I undertook myself the daunting task of translating my Dutch-language dissertation into English. This gave me an opportunity at the same time to adapt a doctoral dissertation into a book aimed at a wide international audience from diverse legal cultures and from equally diverse professional backgrounds. It is my sincere hope that the reader who comes to this book will in it find what he is looking for. It was, however, not my purpose – and, given the wide variety of national legal rules on the topic, it would at any rate have been impossible – to provide the reader with detailed information on domestic law. On the contrary, the book is intended to provide the reader with a breadth of perspective that he would not have if he were to confine his attention to his own legal system or to the professional sector in which he is active. Of course, this does not alter the fact that the study which I undertook is inherently limited to a number of countries and that interesting legal mechanisms that exist in other legal systems have not been analysed. I am equally well aware of the fact that all the legal systems that have been studied, save that of the United States, are European. This does not spring from some form of Eurocentric attitude, but from the simple fact that it is very difficult for linguistic, logistical and many other reasons, to study non-Western legal systems. In addition, it is a simple matter of fact that most international legal instruments relating to money laundering have largely been inspired by legal rules incepted in the Western legal culture, especially in the United States and Switzerland.

In adapting and translating my dissertation, I have also been able to incorporate into the text recent developments relating to the international combat of money laundering. The effective date of completion of my study is therefore 30 June 1999.

In writing this book, I have enjoyed the support of many people. I will not venture to thank them all individually here, lest I forget some. I would nevertheless like to express my gratitude to those to whom I owe special thanks. In the first place, I would like to express my deepest gratitude to

Professor Christine Van den Wyngaert who was the supervisor of my thesis and with whom I have been working at the University of Antwerp, for over six years now. I have been truly privileged, not only to have had the benefit of her enormous expertise in the field of international criminal law, but also to have had her constant encouragement and support. Furthermore, I also wish to thank the other members of my doctoral jury: Professor Herman Braeckmans of the University of Antwerp, Professor Alain De Nauw of the Free University of Brussels, Professor Luc Huybrechts, Judge in the Belgian Supreme Court, Professor Julian Schutte, Director at the European Council and Professor Bert Swart of the University of Amsterdam (formerly of the University of Utrecht).

Last, but not least, I wish to express my profound gratitude to my parents, without whose constant encouragement this book would never have been finished.

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Abbreviations

AA	<i>Ars Aequi</i>
Ala.L.Rev.	<i>Alabama Law Review</i>
ALI	<i>American Law Institute</i>
All ER	<i>All England Law Reports</i>
Am.Cr.LR	<i>American Criminal Law Review</i>
Am.JComp.L	<i>The American Journal of Comparative Law</i>
Am.J.Cr.L.	<i>American Journal of Criminal Law</i>
Am.Soc'y Int'l L.Proc.	<i>American Society of International Law Proceedings</i>
Ann.Dr.Liège	<i>Annales de Droit de Liège</i>
Ann.Dr.Louv.	<i>Annales de Droit de Louvain</i>
Ann.Inst.dr.int	<i>Annales de l'Institut de droit international</i>
Ann.Rev.Bank.L.	<i>Annual Review of Banking Law</i>
Ariz.JInt'l & Comp.L	<i>Arizona Journal of International and Comparative Law</i>
Arr.Cass.	<i>Arresten van het Hof van Cassatie</i>
ATF	<i>Arrêts du Tribunal fédéral suisse</i>
Bank.Fin.	<i>Tijdschrift voor Bank- en Financiewezen- Revue bancaire et financière</i>
Banking LJ	<i>Banking Law Journal</i>
BCCI	<i>Bank of Credit & Commerce International Holdings, S. A.</i>
BCLR	<i>Butterworths Constitutional Law Reports</i>
BHRC	<i>Butterworths Human Rights Cases</i>
Br.JCr.	<i>British Journal of Criminology</i>
Bus.LR	<i>Business Law Review</i>
Cambr.LJ	<i>Cambridge Law Journal</i>
Cambr.LR	<i>Cambridge Law Review</i>
Can.YBInt'l L	<i>Canadian Yearbook of International Law</i>

CCE	Continued Criminal Enterprise
CDB	Convention relative à l'obligation de diligence des banques (1992 version, unless specified otherwise)
CJA	Criminal Justice Act
CJ(IC)A	Criminal Justice (International Co-operation) Act (C(IC)A)
CMLR	<i>Common Market Law Review</i>
Co.L	<i>The Company Lawyer</i>
Col.LRev.	<i>Columbia Law Review</i>
Colum.JTransnat'l L	<i>Columbia Journal of Transnational Law</i>
Crim.App.R	<i>Criminal Appeal Reports</i>
Crim.LRev.	<i>Criminal Law Review</i>
DD	<i>Delikt en Delinkwent</i>
DEA	Drug Enforcement Agency
Denv.JInt'l L & Pol'y	<i>Denver Journal of International Law and Policy</i>
Dick.J.Int'l.L	<i>Dickinson Journal of International Law</i>
DPCI	<i>Droit et Pratique du Commerce International</i>
DTA	Drug Trafficking Act
DTOA	Drug Trafficking Offences Act
Duke LJ	<i>Duke Law Journal</i>
ECCP	European Committee on Crime Problems (Council of Europe)
ECHR	European Convention on Human Rights
ECLR	<i>European Competition Law Review</i>
ELR	<i>European Law Review</i>
Emory Int'l LRev.	<i>Emory International Law Review</i>
ETS	<i>European Treaty Series</i>
EuGRZ	<i>Europäische Grundrechte Zeitschrift</i>
Eur.JCr., Cr.L & Cr.J	<i>European Journal of Crime, Criminal Law and Criminal Justice</i>
FATF	Financial Action Task Force on Money Laundering
FATF-I	First report of the Financial Action Task Force on Money Laundering, containing 40 recommendations (1990)
FATF-II	Second report of the Financial Action Task Force on Money Laundering (1991)
FATF-III	Third report of the Financial Action Task Force on Money Laundering (1992)

FATF-IV	Fourth report of the Financial Action Task Force on Money Laundering (1993)
FATF-V	Fifth report of the Financial Action Task Force on Money Laundering (1994)
FATF-VI	Sixth report of the Financial Action Task Force on Money Laundering (1995)
FATF-VII	Seventh report of the Financial Action Task Force on Money Laundering (1996)
FATF-VIII	Eighth report of the Financial Action Task Force on Money Laundering (1997)
FATF-IX	Ninth report of the Financial Action Task Force on Money Laundering (1998)
FATF-X	Tenth report of the Financial Action Task Force on Money Laundering (1999)
<i>Fordham L.Rev.</i>	<i>Fordham Law Review</i>
FRD	<i>Federal Rules Decisions</i>
<i>Geo.Wash.JInt'l L & Econ.</i>	<i>The George Washington Journal of International Law and Economics</i>
<i>Harv.Int'l LJ</i>	<i>Harvard International Law Journal</i>
<i>Harv.LRev.</i>	<i>Harvard Law Review</i>
HKLR	<i>Hong Kong Law Review</i>
<i>Houston JIL</i>	<i>Houston Journal of International Law</i>
HRLJ	<i>Human Rights Law Journal</i>
ICCPR	International Covenant on Civil and Political Rights
ICLQ	<i>International and Comparative Law Quarterly</i>
ILM	<i>International Legal Materials</i>
IML	Institut Monétaire Luxembourgeois
<i>Int'l L Enf. R</i>	<i>International Law Enforcement Reporter</i>
<i>Int'l Law.</i>	<i>The International Lawyer</i>
IRS	Internal Revenue Service
<i>J.Bus.L</i>	<i>Journal of Comparative Business and Capital Market Law</i>
<i>JCr.L</i>	<i>Journal of Criminal Law</i>
<i>JCr.L&Crim.</i>	<i>The Journal of Criminal Law and Criminology</i>
<i>J.Comp.Bus. & Cap. Market L</i>	<i>Journal of Business Law</i>
JDF	<i>Journal de droit fiscal</i>
JDI	<i>Journal de droit international</i>
JIBL	<i>Journal of International Banking Law</i>

<i>Journ.Proc.</i>	<i>Journal de Procès</i>
JT	<i>Journal des Tribunaux (Belgium)</i>
JT(suisse)	<i>Journal des Tribunaux IV (Switzerland)</i>
<i>Law QRev.</i>	<i>Law Quarterly Review</i>
<i>Lloyd's Mar. & Com.LQ</i>	<i>Lloyd's Maritime and Commercial Law Quarterly</i>
MLAT	Mutual Legal Assistance Treaty
MLR	<i>Modern Law Review</i>
NJ	<i>Nederlandse Jurisprudentie</i>
NJB	<i>Nederlands Juristenblad</i>
NJW	<i>Neue Juristen Wochenschrift</i>
NLJ	<i>New Law Journal</i>
<i>Nova LRev.</i>	<i>Nova Law Review</i>
<i>Nw.JInt'l.L & Bus.</i>	<i>Northwestern Journal of International Law & Business</i>
<i>Nw.ULRev.</i>	<i>Northwestern University Law Review</i>
<i>NYLSch.JInt'l & Comp.L</i>	<i>New York Law School Journal of International and Comparative Law</i>
<i>NYUJ Int'l L. & Comp.L.</i>	<i>New York University Journal of International and Comparative Law</i>
<i>NYUJInt'l L & Pol.</i>	<i>New York University Journal of International Law and Politics</i>
<i>Ohio NUL Rev.</i>	<i>Ohio Northern University Law Review</i>
OJ	<i>Official Journal of the European Communities</i>
PACE	Police and Criminal Evidence Act 1984
Pan.	<i>Panopticon</i>
<i>Parl. St.</i>	<i>Parlementaire Stukken</i>
Pas.	<i>Pasicrisie</i>
PCA	Proceeds of Crime Act
<i>Publ. ECHR</i>	<i>Publications of the European Court on Human Rights</i>
RDP	<i>Revue de Droit Pénal et de Criminologie</i>
<i>Rec.Cours</i>	<i>Recueil des Cours de l'Académie de droit international</i>
Report US Delegation	Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, reprinted in W. C. Gilmore, <i>International Efforts To Combat Money Laundering</i> (Cambridge: Grotius Publications Limited, 1992), p. 98.
Restatement (Second)	Restatement of The Law (Second). The Foreign Relations Law of the United States. As Adopted and Promulgated by The American Law Institute