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STRENGTHENING EXISTING INTERNATIONAL COOPERATION IN CRIME PREVENTION AND CRIMINAL JUSTICE, INCLUDING TECHNICAL COOPERATION IN DEVELOPING COUNTRIES, WITH SPECIAL EMPHASIS ON COMBATING ORGANIZED CRIME

Note by the Secretary-General

Addendum

Money laundering and associated issues: the need for international cooperation

Summary

This report contains an overview of the national and international initiatives against money laundering, and provides a comparative analysis of the various approaches developed until now. It seeks to identify the areas where international cooperation is essential and to indicate how it would be most productive in effectively dealing with the problem. This report should be considered in connection with the annex to document E/CN.15/1992/4/Add.1, which outlines a model decree for the confiscation of criminal proceeds.

*E/CN.15/1992/1 and Corr.1.

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INTRODUCTION

1. The connection between organized crime and illict drug trafficking has changed both the panorama of organized crime and the way criminal justice systems react to this phenomenon. It is also changing the way policy makers and practitioners think about it. At the same time, while awareness of the international dimensions of the problem has grown, progress towards a more rational global approach remains slow.

2. The strategy traditionally applied and currently used to combat organized crime is to combine specific criminal legislation directed at organized crime activities and entities with aggressive law enforcement policies. When this strategy has been applied successfully, it has resulted in an increased number of convictions of organized crime offenders, but illegal activities have not been substantially curbed.

3. Different hypotheses can explain this phenomenon. One is that younger members of the same organized crime group have filled the leadership voids left by the convictions. Another is that other organized groups have entered activities traditionally controlled by the group decimated by law enforcement policies.

4. If a lesson can be drawn from these results, it is that the effects of criminal sanctions alone on criminal organizations are limited. Their deterrence is rather weak, considering the low probability of arrest for "drug lords" and the large income this illegal activity produces. Furthermore, prioritizing among prosecutions and convictions of organized crime bosses is of doubtful efficiency.

5. Following the money trail could constitute a more effective and efficient alternative. Money-laundering investigations and the confiscation of proceeds from criminal activities undermine the ability of a criminal organization to perform its main task, the production of wealth.

6. The mounting concern of the international community over the infiltration of legal financial markets, and the attempts of organized crime to control sectors of national economies through the laundering of its illicit proceeds, was reflected in the Political Declaration and Global Programme of Action on international cooperation against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances contained in the annex to resolution S-17/2 adopted by the General Assembly, at its seventeenth special session, as well as in Assembly resolution 45/107, and in resolution 24 of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. 1/ In particular, the Assembly, in paragraph 18 of the annex to its resolution 45/107, recommended the elaboration of standards for international assistance in respect of bank secrecy, facilitating the seizure and confiscation of proceeds in bank accounts derived from criminal acts, as well as the development of more effective standards to inhibit the laundering of money and investment connected with criminal activities.

7. The following two approaches appear to prevail in the provisions of both national laws and international instruments designed to address the problem of money laundering: regulating the reporting of financial and currency transactions; and making money laundering a crime.

8. The rationale behind these provisions is that increasing the difficulty and risk of laundering the proceeds of organized crime will reduce its profitability and, ultimately, its scope.

9. The effectiveness and efficiency of such a strategy will depend upon many conditions. It has some limitations. International cooperation will therefore be a key to its success. The enormous size of the criminal proceeds involved attracts banks, financial institutions and corrupt administrations. The control of money laundering will be vulnerable to weak links in the complex international financial network of interacting institutions. The controls can be defeated as soon as some criminal organizations are able to find one bank, one financial institution, or one administration willing to serve as an accomplice to their money-laundering schemes.

10. Closing these circuits of opportunity cannot be left to the individual integrity of the enormous number of financial, political, and legal actors involved in various parts of the world. It will have to be fortified with incentives for international cooperation and disincentives for violations. Countries will have to be encouraged to render their banking and financial systems able to stand greater scrutiny, share information, provide mutual assistance to other countries, and implement sanctions.

11. Successful control of money laundering requires exchange of data, investigations carried out by administrative authorities and law enforcement agencies, and prosecutions and sanctions. Without appropriate international cooperation, all these efforts could yield few results while incurring large costs.

12. This report is designed to canvass significant developments, at both national and international levels, relating to the recently recognized dangers of money laundering and to attempts to dispossess organized crime of its profits by the provision of adequate modalities to enable the tracing, seizing and freezing of illicit proceeds. It seeks to identify certain problems which appear to have been inadequately addressed to date, as well as certain disparities in the modalities developed. It concludes with a possible blueprint for international action, in which the United Nations can play a leading role, for the development of a genuinely effective multilateral regime designed to enable the international community to fight effectively against organized crime; to dispossess criminals of their ill-gotten gains and possibly return those gains to the societies adversely affected by their conduct; and to eliminate havens capable of being utilized by criminals in their attempts to outwit effective law enforcement.

I. BACKGROUND

13. "Money laundering" is a term first used in the United States of America to refer to Mafia ownership of launderettes, cash businesses in which licit and illicit income could be so commingled as to make the entire income appear to have a lawful source. In modern parlance it is a more complex process, often using the latest technology, of sanitizing money in such a manner that its true nature, source or use is concealed, thereby creating an apparent justification for controlling or possessing the laundered money. The expression "money laundering" was apparently first used in a judicial or legal

context in a case in the United States in 1982* involving the forfeiture of alleged laundered Colombian cocaine money.

14. There are a number of reasons why the phenomenon of money laundering raises such interest today. First, until recently money laundering was not an independent statutory offence. For the criminals, the rationale behind the process lay mainly in the necessity to avoid detection for the criminal conduct which generated the money. If the person was apprehended and convicted of the original criminal conduct, he or she might spend some years in jail, but thereafter could still enjoy the ill-gotten gains. When the dimensions of the problem made action imperative, a number of countries introduced legislation enabling the tracing, freezing and confiscation of proceeds of certain, or all, serious crimes. This has been a fairly recent development, the first example of it occurring in the United States of America in 1970 with the passage of the Racketeer Influenced and Corrupt Organisation Act, 2/ the Drug Abuse Prevention and Control Act, 3/ and the Continuing Criminal Enterprise Acts. 4/ In the United Kingdom of Great Britain and Northern Ireland, proceeds of drug offences could be confiscated after passage of the Drug Trafficking Offences Act 1986, while in Australia, confiscation could result from conviction for any indictable federal offence pursuant to the Proceeds of Crime Act 1987. Some European countries have had some confiscation provisions in their criminal laws for much longer, for example, Italy since 1931 and Switzerland since 1 January 1942,** although under such provisions the assets subject to confiscation usually had to be directly related to the criminal activity. This limitation was removed by amendments to the Swiss Penal Code (which came into effect on 1 August 1990) and to the Italian Penal Code (which came into effect on 18 May 1978).***

15. Faced with the possibility of both incarceration and loss of proceeds, money laundering became even more important for criminals, and hence more sophisticated. When to this is added the fact that the Group-of-Seven Financial Action Task Force on Money Laundering, in a report issued in February 1990,**** estimated that sales of certain drugs in the United States and Europe amounted to approximately 122,000 million United States dollars ($)+

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*See United States v. $4,255,625.39, Federal Supplement, vol. 551, South District of Florida (1982), p. 314.

**See article 240 of the Italian Penal Code and article 58 of the Swiss Penal Code.

***New articles 305 bis and 305 ter of the Swiss Penal Code, and article 748 bis of the Italian Penal Code.

****The Group-of-Seven major developed market economies are Canada, France, Germany, Italy, Japan, United Kingdom and United States. In order to enlarge its expertise and to reflect the views of other countries particularly concerned by, or having valuable experience in the fight against money laundering, eight other countries were invited to join the Task Force. They were Australia, Austria, Belgium, Luxembourg, Netherlands, Spain, Sweden and Switzerland.

+References to dollars ($) are to United States dollars, unless otherwise stated.

per year, of which as much as $85,000 million per year could be available for laundering and investment, it is not surprising that in a number of countries money laundering has been made an independent statutory offence.*

16. What is unusual is that such a new offence created by a number of Member States has, in five short years, triggered such international interest. In 1988, for example, the Basel Committee on Banking Regulations and Supervisory Practices, composed of representatives of central banks or supervisory authorities, adopted a Statement of Principles which imposed a voluntary code of conduct on banks with respect to money laundering. 5/ In 1990, the Group-of-Seven Task Force issued its report, including 40 recommendations for an effective money-laundering prevention and enforcement programme. In 1991 the Council of the European Communities issued a directive (91/308/EEC) on prevention of the use of the financial system for the purpose of money laundering. In addition, within the Organization of American States, a group of experts is in the process of developing model regulations concerning laundering offences connected to illicit drug trafficking and related offences.**

17. Of even greater international importance, however, are two multilateral Conventions which require all contracting parties to criminalize money laundering. The first is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 6/ (hereinafter referred to as the 1988 Convention), adopted by 106 countries on 20 December 1988, which requires money laundering related to offences defined by article 3(1) of the said Convention to be criminalized. The second is the prima facie non-offence-specific Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, drawn up by the Council of Europe and opened for signature on 8 November 1990 7/ (hereinafter referred to as the money-laundering Convention). As both Conventions also contain detailed provisions on the tracing, freezing and confiscation of the proceeds of relevant offences and on the rendering of international assistance with respect thereto, they provide an opportunity not to be missed for the international community, regardless of differences in legal systems, for at least consistent or compatible approaches to emergent problems. Equally, the requirement to criminalize money laundering will facilitate international cooperation, which, due to the application of the dual criminality principle, is at present hampered by the fact that in many countries such conduct does not constitute a criminal offence.

18. Since a principal motivating factor for criminal activity is economic gain or profit, effective seizure of criminal proceeds can be a serious disincentive. In relation to drug trafficking, it represents a "third solution" following the supply-and-demand-based approaches whose effectiveness

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*Some estimates are even higher. For example, in "Drug money laundering, banks and foreign policy", a report of the Subcommittee on Narcotics, Terrorism and International Operations submitted in February 1990 to the United States Senate Foreign Relation Committee at the second session of the One Hundred and First Congress (1990), it was estimated that the laundering of illegal drug profits was a $300,000 million annual business, of which $110,000 million was generated in the United States alone.

**See Organization of American States, "Final report of the group of experts to prepare model regulations concerning laundering offences connected to illicit drug trafficking and related offences" (OEA/SER.L/XIV.2.11).

and acceptability have been the subject of debate, particularly at the international level. The development of effective means of attacking drug profits may prove to be a more effective solution than attempting to regulate either the supply of, or demand for, drugs.

19. Some additional observations should be made. Money laundering is a process which cannot be looked at in isolation. It must be viewed in the context of its emergence as an offence involving universality of jurisdiction, through the confiscation of the proceeds of crime and international cooperation in upholding the rule of law, as well as in the context of the systems and rules which permit it to occur. This includes a review of national and international financial systems, bank secrecy and the capacity to establish anonymous trusts or corporations (thereby creating a second hurdle to effective investigations).

II. THE LAUNDERING PROCESS

20. As noted above, the need to launder proceeds stems from the desire of criminals both to conceal the crime which generated those proceeds, and to be able to enjoy them. The strategy of criminal organizations is to manipulate their illicit proceeds, usually, but not always, through the legitimate financial sector, in such a manner as to make those proceeds appear to have come from a legitimate source. Thus money laundering is a vital component of all financially motivated crime. More importantly for the international community, since obfuscating any evidentiary paper or money trail is a precondition to successful money laundering, such activity will invariably involve transborder operations, often including many border crossings in the course of a laundering "transaction".

21. Cash is the medium of exchange in all manner of criminal activity. Tax evasion in the "black economy" also favours cash, and similar laundering techniques are employed. Criminal activities such as gambling, prostitution and fraud schemes have always generated substantial illicit cash proceeds needing to be concealed, and ad hoc laundering methods were devised to mask the source of those proceeds. However, the vast cash profits generated by organized crime, including drug trafficking, in the last decade could not be safely and effectively laundered using the old methods. A professional money-laundering industry has thus emerged to provide the answers, resulting in the development of new and more sophisticated techniques capable of processing the enormous volume of bank notes that can flow from, for example, a single large consignment of imported drugs.

22. The laundering of proceeds usually involves the international movement of funds at some point in the process. For example, drug syndicates must, in many cases, make payments to a foreign supplier, to processors, to those responsible for the importation, as well as to those who collect and launder the proceeds. Finally, accumulated proceeds representing the profits must somehow be "legitimized", thus making it possible for the traffickers to use their acquired wealth.

23. It is generally agreed that the laundering process, regardless of the degree of complexity, is accomplished in three basic steps, known as placement, layering and integration. 8/, 9/ Placement is the actual placing of cash in a financial institution for transfer elsewhere, or the purchase of a monetary instrument, such as a bank cheque, which in turn can be transferred elsewhere. It could also involve the physical carriage of cash across borders so as not

to leave a paper or evidentiary trail in relation to the transaction in the home country. According to law enforcement officials from several countries, it is during the "placement" stage, often involving deposits of large amounts in small denominations of banknotes, that the launderer is at greatest risk. Where the money is to be physically carried across an international border, it must be converted into notes of a more manageable size, that in itself possibly supplying a basis for suspicion. Layering is the process of transferring the funds amongst numerous accounts, preferably in many countries, by means of a complex of financial transactions designed to break any evidentiary links from the original source of those funds. The final step of the laundering process, integration, is the shifting of laundered funds either to legitimate organizations that have no apparent connection with organized crime or to the criminal organization, in such a way that an innocent explanation, for example, a foreign loan, can explain possession of the funds. In many countries, interest paid on foreign loans is tax deductible, thus enabling criminals to claim tax deductions in respect of "interest" they are paying to themselves.

24. While the methods of laundering are limitless, the basic pattern of international laundering remains unchanged. The criminal organization selects one or more foreign banks, preferably in a "secrecy" haven. Such havens normally impose little or no income tax, and will offer a degree of bank secrecy and, not infrequently, commercial secrecy. 10/ Other common attributes are a comparative lack of exchange control laws, political stability, policies encouraging or welcoming foreign investment, highly developed international communication facilities, together with professional personnel with the necessary skills in areas of accounting, banking and law. Not infrequently, such havens also have laws which enable the formation of companies, trusts or other legal personalities without disclosing the identity of the real or beneficial owner.

III. BANK SECRECY

25. No one would argue that some degree of confidentiality in the customer-bank relationship is not appropriate. The connection, however, between bank secrecy and illegal activity is well established. In one view, banks merely perform a function or provide a facility which coincidentally can be used for money laundering. On the other hand, with what is known about money laundering today, the question arises as to when a facilitator can be regarded as either an aider and abetter of money laundering, or an accessory after the fact to the predicate criminal conduct which generated the proceeds. Under ordinary principles of criminal law in many countries, evidence establishing "wilful blindness" can amount to evidence of objective matters from which knowledge may be inferred. Even a belief by a bank official that money deposited represents the proceeds of unlawful gambling, when in fact it turns out to be proceeds of drug trafficking, could, under the laws of a number of countries, still render both the official and the bank criminally liable for money laundering.

26. A number of ways have been identified by which banking secrecy laws can be exploited. Some stem from the nature of the account coupled with the customer-bank relationship, while others stem from associated laws that permit the structuring of legal entities in such a way as to maintain the anonymity of the real owners.

27. Examples of secrecy capable of being exploited deriving from the nature of the account and the customer-bank relationship include: the "named account", by which a bank maintains a current account and only a signature card enabling

over-the-counter transactions by the customer - although this has the drawback that many members of the bank staff may become aware of the identity of the customer; the "numbered account", where the depositor cannot make over-the-counter withdrawals but this is done on his or her behalf by a bank account manager, preventing the customer's identity from becoming known to other bank employees; the "false-name account", an account which appears to belong to a person other than the real or beneficial owner. In most cases involving the above-mentioned accounts, laws conferring secrecy preclude disclosure of the identity of account holders and, in some cases, of other depositors to the accounts.

28. Many banking secrecy havens also have laws permitting the establishment of shell corporations, without disclosing the true owner of the corporation, or the establishment of, for example, "dummy" trusts, in situations where the trustees are also the beneficiaries of the trust, albeit anonymously so. In a classical trust there are at least three parties, namely the person conferring property (the settlor), through another party (the trustee), for the benefit of a third party (the beneficiary). Under the above-mentioned arrangements, however, those three parties can be the same person. Where named accounts, numbered accounts or false name accounts are operated by such shell corporations or dummy trusts, there is in effect a second layer of protection impeding effective law enforcement. Even if the bank secrecy law of the relevant jurisdiction can be penetrated, the true identity of the account holder can still not be established. So seen, banking secrecy coupled with other secrecy laws are available as a tool of the trade of professional money launderers.

IV. INITIATIVES TO OVERCOME ABUSE OF BANK SECRECY

A. National initiatives

29. At the national level, a number of countries have criminalized money laundering either generally or in respect of moneys or property obtained from particular types of criminal activities. This process is expected to continue, as all countries acceding to the 1988 Convention are required to criminalize drug-related money laundering. Similarly, countries wishing to accede to the money-laundering Convention must criminalize money laundering in respect of offences generally,* although there is provision in the Convention whereby, at the time of the signature or ratification, a signatory may specify that the money-laundering offences are to apply only in respect of such predicate offences or categories of offences as it declares.**

30. In so far as dual criminality is a prerequisite for international cooperation, including extradition and mutual assistance in criminal matters, the more countries that criminalize money laundering, preferably in similar terms, the better and more effective will that cooperation be.

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*See article 6.

**See article 6, paragraph 4.

31. Under the laws of some countries, including the United Kingdom,* Australia,** and the United States, banks themselves can be prosecuted for money laundering. This provides a powerful incentive for banks to volunteer information to law enforcement agencies. Usually the banks volunteering such information are also given a statutory defence against any action for breach of confidentiality which might be brought by their customers.

32. Two countries have taken a more radical step in the fight against money laundering. The United States and Australia have introduced statutory regimes pursuant to which banks and other financial institutions must report any suspicious transaction involving cash and any other monetary instruments, as well as all cash transactions over a given amount, $10,000 in the case of the United States, and 10,000 Australian dollars ($A) in the case of Australia.*** An underlying rationale for these schemes is the thwarting of successful money laundering by creating an evidentiary link at the placement stage, that is, when proceeds first enter the financial system. Given hopes for improvements in international cooperation, such an evidentiary link could ultimately be the beginning of a trail permitting law enforcement to follow the money during the layering and integration stages.

33. The United States scheme was introduced in 1970 by what is known as the Bank Secrecy Act 1970,**** which has subsequently been amended on a number of occasions. The amendments were designed to render the scheme more effective, inter alia, by clarifying search powers particularly in relation to search of persons suspected of exporting currency, and to criminalize the practice of "smurfing", or so structuring transactions as to avoid the threshold reporting requirements. Although first introduced in 1970, it was not until some major prosecutions of banks for failure to comply that the scheme became effectively operative+ in the mid-1980s.

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*See Drug Trafficking Offences Act 1986, sect. 24.

**See Proceeds of Crime Act 1987, sects. 81 and 82.

***Reporting obligations are also imposed on persons importing or exporting currency amounting to $A 5,000 in the case of Australia, while in the United States the threshold is the same as for domestic reporting.

****The Bank Secrecy Act is in fact title 1 of the Bank Records and Foreign Transactions Act 1970, now codified as amended at 12 United States Code, sections 1730d, 1829b, 1951-1959 (1988) and in scattered sections of 31 United States Code (1982). Title 11 of the same Act is the Currency and Foreign Reporting Act, now codified as amended at 31 United States Code, sections 5311-5324, and Supplement 111 of 1985.

+In the first such major prosecution, the First National Bank of Boston was fined $500,000 for breaches of the Act involving failure to report cash transactions amounting to $1,200 million. The deposits involved had been made in bills of up to $50 and the withdrawals in bills of $100. The evidence indicated that most of the $100 bills had been shipped to foreign banks. The prosecution was followed by a $2.25 million civil fine against the Crocker National Bank and a $4.75 million fine against the Bank of America (see Whitney Adams, "The practical impact of money-laundering laws on financial

34. The Australian scheme, on the other hand, is of much more recent origin, having been created by the Cash Transaction Reports Act 1988, and progressively brought into operation since 1 January 1990. There are a number of similarities to the United States scheme, including the range of cash dealers who are obliged to report under the Act. Cash dealers include banks, building societies, credit unions (financial institutions), financial corporations, insurance companies and brokers, securities and futures brokers, managers of certain trusts, dealers in travellers cheques and money orders, currency and bullion dealers, cash carriers as well as totalizators, bookmakers, casinos and gambling houses.

35. In both the United States and Australia it can be said that cash transaction reporting has acted as a trigger for investigations that might otherwise never have taken place, although, contrary to the normal reactive law enforcement roles, police agencies need to be proactive in the sense that at the commencement of the inquiry they may have no idea of the conduct at which their inquiries are directed. A major weakness of both schemes, however, is that they do not cover wire or telegraphic transfers between financial institutions or other cash dealers, except in cases involving suspicious transactions. This is a major weakness for a number of reasons. First, international banking frequently uses such means of transfer. Secondly, if a cash transaction or suspicious transaction report was avoided at the placement stage, then there may be no other evidentiary link to the source of the money. Thirdly, telegraphic transfers can be prearranged so that a number of such transfers can be made almost simultaneously, for example, the same money can be telegraphed to and from numerous accounts in different jurisdictions, thus further obfuscating any evidentiary trail. The Government of Australia has recently announced that it will legislate to widen the reporting requirements of the Cash Transaction Reports Act 1988 to cover such wire or telegraphic transfers.

36. Numerous other countries have addressed the problem of the legal definition of money laundering and of appropriate penal sanctions. Italy, for example, has enacted certain important laws, in the context of a comprehensive strategy against organized crime, through legislative initiatives. Money laundering is considered a separate offence when the proceeds derived from certain offences, including aggravated robbery, aggravated extortion, kidnapping for ransom, or offences involving the production of and trafficking in drugs. In very recent Italian legislation certain important new elements have been introduced. In addition to laundering of the proceeds of crime, other activities are proscribed, including obstructing the identification of assets derived from illicit activity and even the use of such assets or proceeds in economic and financial activities. This evidently represents a wide scope of criminalization, covering all possible forms of money laundering and the introduction of illicitly acquired assets into licit financial markets. In addition, anyone cooperating in the above-mentioned activities, including the staff of banks or other financial institutions, is considered an accessory to the offence.

(continued) institutions", American Bar Association, 1990 White Collar Crime National Institute). The largest civil penalty recorded was a civil fine of $14.8 million against the Bank of Credit and Commerce International for money laundering allegedly linked to Manuel Noriega (see "Noriega-linked bank admits laundering", Wall Street Journal, 17 January 1990, p. 4).

37. Protection against money laundering was strengthened by virtue of law 197 of 5 July 1991, which introduced a complex of provisions to restrict transactions in cash, or "to the bearer" financial instruments, and to prevent the use of the financial system for illicit purposes. All transactions amounting to over 20,000,000 lire can only be conducted through certified financial entities, which are under the obligation to verify the identity of the persons involved and keep a record of such information. Persons involved in these transactions are under the obligation to declare in writing the identity of persons on behalf of whom the transaction is carried out. The new Italian provisions against money laundering also foresee the creation of a data bank and include the obligation to maintain records of transactions which, while being under the above-mentioned amount, create reasonable suspicion of being part of one major transaction. There is also the obligation to report to the competent authorities all suspicious transactions, including multiple transactions carried out by persons whose normal professional activity does not provide justification for them. Violations of these obligations are punished with prison terms, administrative sanctions and fines of up to 40 per cent of the amounts involved.

38. Other countries that have enacted legislation against money laundering include Argentina, Bahamas, Canada, Costa Rica, Dominica, France, India, Luxembourg, Malaysia, Mexico, Paraguay, Saint Lucia, Spain and Zambia. 11/ Japan has recently enacted relevant legislations as well, but at the time of writing, the translation of the text of the pertinent law was not available.

B. International initiatives

39. There have been significant developments internationally, at bilateral, regional and multilateral levels. Notwithstanding these efforts, more remains to be done, and the United Nations, given its global constituency, could and should be in the forefront of the necessary activity.

40. The first significant international move to criminalize money laundering, albeit limited to drug-related money laundering, was the adoption of the 1988 Convention, which came into force on 11 November 1990.

41. The Convention, in article 3, paragraph 1, subparagraphs (b)(i) and (ii) and (c)(i), defines money laundering as follows:

> "(b)(i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
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> "(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;

"(c) Subject to its constitutional principles and the basic concepts of its legal system:

"(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences; ...".

Paragraph 3 of the same article provides that: "Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances."

42. For reasons which will become apparent, these definitions are of pivotal importance. Only eight days before the adoption of the 1988 Convention, the Statement of Principles of the Basel Committee 5/ had been agreed to. The Statement acknowledged that public confidence in the banking system may be eroded by its perceived association with criminals, and outlined some basic rules with a view to combating money laundering through the medium of the banking industry. Emphasis was placed on proper customer identification, compliance with legal and other requirements relating to financial transactions, and a refusal to assist transactions which appear to be associated with money laundering. Of equal importance was the fact that the Statement approved, subject to the extent allowed by rules relating to customer confidentiality, the cooperation of banks with law enforcement agencies. While the Statement of Principles is not a document having legal force, several steps have been taken to make the obligations binding. According to the Financial Action Task Force on Money Laundering,* these include a formal agreement among banks of three European countries containing an explicit commitment to the said obligations, a formal indication by bank regulators that failure to comply could lead to administrative sanctions, or the adoption of legally binding texts incoporating the Principles.

43. The most comprehensive multilateral examination of the question of money laundering, which also acknowledges the recent awareness of the problem, is the report issued in February 1990 by the Financial Action Task Force on Money Laundering, which contains 40 principal recommendations for dealing with the problem. The aims of the Task Force were, inter alia, "to assess the results of cooperation already undertaken to prevent the utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field, including the adoption of the statutory and regulatory systems to enhance multilateral legal assistance".

44. In an effort to describe the process of money laundering, it adopted, as a working definition, the following:

"(i) The conversion or transfer of property, knowing that such property is derived from a criminal offence, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his action;

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*See report of the Financial Action Task Force, chap. II, sect. A.

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from a criminal offence;

(iii) The acquisition, possession or use of property, knowing at the time of receipt that such property was derived from a criminal offence or from an act of participation in such offence."*

45. That definition is similar, but not identical, to the formula employed in the 1988 Convention. On its face it is wider in that it is not restricted to drug-related conduct as predicate offences. In one sense, however, it is arguably narrower. In (i) above the conversion or transfer of property must occur "... knowing that such property is derived from a criminal offence ...", whereas the equivalent definition in the 1988 Drug Convention is "knowing that such property is derived from any offence ... or from an act of participation in such an offence ..." (emphasis added).

46. Additionally, the question was raised whether (iii) above, which corresponds to article 3, paragraph 1, subparagraph (c)(i), of the 1988 Convention, describes money laundering per se, or rather an economic aspect of crime which must be addressed in any comprehensive scheme against money laundering. If knowledge of the illicit origin is an element, then, arguably, the acquisition, possession or use of such property - unless acquired from a person not so aware - must amount to participation in the offence of money laundering, or possibly to the offence of being an accessory after the fact to the offence which generated the property.

47. The recommendations outline a comprehensive strategy for dealing with money laundering and with proceeds (as to which see later), and appear to have the capacity to be a blueprint for a programme of action for the international community as a whole, a programme in which the United Nations could take a leading role. Indeed, the report itself makes the point that "an effective money laundering programme should include increased multilateral cooperation and mutual legal assistance in money laundering investigations and prosecutions and extradition in money laundering cases, where possible".**

48. The principal relevant recommendations call upon each country to take such measures to enable it to criminalize drug money laundering as set forth in the 1988 Convention (recommendation 4), thus overcoming the apparent discrepancy between the definitions of money laundering adverted to earlier. More importantly, it is recommended that each country should consider extending the offence of drug money laundering to cover any other predicate crimes for which there is a link to drug trafficking; alternatively, measures could be introduced to criminalize money laundering based on all serious offences and/or all offences that generate significant proceeds, or on certain serious offences (recommendation 5).

49. Additionally, it is recommended that, where possible, corporations themselves - not only their employees - should be subject to criminal

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*See report of the Financial Action Task Force, chap. II, sect. B.

**See report of the Financial Action Task Force, part 2, recommendation 3.

liability (recommendation 7). This question can be of significance in the field of international cooperation where dual criminality is of relevance. If one country is investigating corporate money laundering and seeks assistance from another where corporate criminal liability is not recognized, a refusal of assistance might ensue and investigative efforts might be frustrated, particularly in view of the fact that a number of countries do not recognize the concept of corporate criminal responsibility.

50. The question of corporate criminal responsibility is a vexed one. In most legal systems a corporation is a legal person, but in some cases without the responsibility of such a person. Corporations possess a form of immortality, are organized primarily for profit, can be sufficiently vast and powerful to challenge Governments - particularly in developing or smaller countries - and at times are seen to act without social conscience. Corporations from time to time do things which individual staff members or shareholders would not do, principally because responsibility is so dispersed that no individual can be held legally responsible. Even in jurisdictions where corporate criminal responsibility is recognized, a frequent condition precedent is that an individual with managerial responsibility for the corporation, or that part of its activities in which the conduct occurred, can be held legally liable.

51. The report further makes recommendations in relation to both banks and non-bank financial institutions concerning customer identification and maintenance of records both as to customer identification and transactions. As a rule these should be retained for at least five years after the account is closed, and the relevant documents should be available to domestic competent authorities in the context of relevant criminal prosecutions and investigations (recommendations 12-14). In relation to institutions, corporations, foundations and trusts that do not conduct business in the country where their registered office is located (these would include the "shell" companies referred to earlier), it is recommended that reasonable measures should be taken to obtain information about the true identity of the persons on whose behalf accounts are opened or transactions conducted. It begs the question of what amounts to "reasonable measures" in the context of such "shell" companies or trusts located in countries which legally permit their incorporation or existence without disclosure of the identity of the beneficial owners.

52. Recommendations 15 and 16 require vigilance in relation to complex, unusually large transactions and unusual patterns of transactions with no apparent economic or visible lawful purpose and, where it is suspected that funds stem from any criminal activity, it is recommended that institutions should be permitted or required to report those suspicions to competent authorities, subject to protection against suits for breach of confidentiality. This, in essence, amounts to the suspicious transaction reporting which has already been enacted into law in countries such as Australia, Italy, the United Kingdom and the United States.

53. The report realistically recognizes the existence of countries that have no, or insufficient, anti-money-laundering laws, calls for special vigilance in business relations and transactions with persons, including companies and financial institutions, from such countries, and requires financial institutions with branches in such countries to ensure adherence by those branches to the Task Force's recommendations. Where local applicable laws preclude adherence, competent authorities in the parent country of the principal institutions should be informed of the inability to comply (recommendations 21 and 22).

This clearly identifies an area of need with fertile opportunities for further multilateral action.

54. The report makes many other recommendations, including consideration of the feasibility and utility of establishing a system of reporting of currency transactions, both domestic and international, over a fixed amount (recommendation 24); the role of regulatory and other administrative authorities (recommendations 26-29); and monitoring and exchanging information on cash flows and developments in money-laundering techniques (recommendations 30 and 31). Finally, the report stresses the need for international cooperation both in relation to money laundering and the associated tracing, seizing, freezing and confiscation of proceeds of crime (recommendations 32-40).

55. It should also be noted that the report has identified a number of areas that merit further international and multilateral attention, including:

(a) The scope of money laundering, in particular by reference to the nature of the requisite predicate offences;

(b) The question of the existence of corporate criminal responsibility in some countries and not in others, and the possible effects on international cooperation resulting therefrom;

(c) The existence of trusts, corporations and other bodies under legal systems permitting non-disclosure of the identity of the beneficial owners;

(d) The existence of countries with no or insufficient money-laundering measures;

(e) The possibility that differences in the necessary mental element in money-laundering offences created by national legislatures - such as knowledge, recklessness or negligence - may affect international cooperation where dual criminality is a factor.

56. The latest significant multilateral development has been the elaboration of the money-laundering Convention by the Council of Europe, in consultation with Australia, Canada and the United States. All countries that participated in its development have been invited to sign, and provision is made for the accession of other States. The Convention is in general terms, not offence-specific, and makes it obligatory for signatories to criminalize money laundering (article 6), although there is provision whereby at the time of signature or ratification, a signatory may specify that the money-laundering offences are to be only in respect of such predicate offences or categories of offences as it declares (article 6, paragraph 4).

57. Under the heading "laundering offences", article 6, paragraph 1, which defines the obligation to criminalize money laundering, is worded as follows:

> "1. Each Party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:
>
> "(a) 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;

"(b) 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; and, subject to its constitutional principles and the basic concepts of its legal system;

"(c) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;

"(d) 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."

In subparagraphs (a), (b) and (c), a condition precedent to the commission of a money-laundering offence is that the property is proceeds. "Proceeds" is defined in article 1 as follows:

"(a) Proceeds means any economic advantage from criminal offences. It may consist of any property as defined in subparagraph b of this article;

"(b) Property includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property."

58. There is a significant difference between this formulation and that contained in the 1988 Convention. The latter requires the property to be "derived from any offence ... or from an act of participation in such offence ...", an expression arguably wider than "... means any economic advantage from criminal offences". First, "derived from" may apply to property indirectly, as well as directly obtained from the commission of an offence, whereas the language of article 6 of the money-laundering Convention may be argued to limit money laundering to economic advantage only directly obtained from the offence. Secondly, it clouds the issue of what the alleged launderer must be proved to know before he or she could be convicted. For example, if a criminal, with money obtained from a predicate offence, purchases a house for $100,000 and later sells it for $150,000 due to capital appreciation, and gives $50,000 to a third person who knew of the source of the original purchase money, what state of knowledge must be proved against the third person?

59. It is unfortunate that the differences referred to above may leave arguments for lawyers seeking to have different conclusions drawn on the basis of a different wording. In this regard, it is also relevant to note that the report of the Task Force recommended both that countries accede to the 1988 Convention, and that countries should encourage international conventions such as the "draft Council of Europe convention on confiscation of the proceeds from offences" (recommendation 35).

60. As noted earlier, while the money-laundering Convention is structured in general, not offence-specific, terms, it makes provision for signatories to

limit the money-laundering offences they are obliged to create to such predicate offences or categories of offences as they declare. This matter is worthy of further international consideration. Double standards, particularly in criminal law, are not conducive to the maintenance of respect for the rule of law, and there would appear to be little policy justification for proscribing certain forms of money laundering and permitting others. A problem of even greater significance is that many criminal organizations are involved in diversified criminal activity, which may involve both predicate and non-predicate offences. How is the prosecution to prove that particular property was the proceeds from a particular offence or category of offences? Finally, if international cooperation in respect of money laundering on the basis of predicate offence becomes efficient, organized crime has the capacity to change its activity into non-predicate criminal conduct. While drug trafficking and its proven profitability may have been the motivating factors in the development of the two Conventions, other lucrative criminal activity has already been identified, including organized white-collar and corporate fraud and arms trading. Past experience has shown that new forms of criminality or new methods of carrying out such activity, relying on the latest technology, will emerge.

V. PROCEEDS OF CRIME

61. As stated at the beginning of this report, while money laundering and the tracing, freezing, seizure and confiscation of the proceeds of crime are closely linked, concepts of the proceeds of crime date back earlier than the awareness of the problem of money laundering. Italy and Switzerland had a limited capacity to confiscate proceeds as early as 1931 and 1942, respectively; in 1970, the United States enacted legislation on both criminal and civil forfeiture of criminal proceeds, and many countries have followed suit, particularly since the 1980s. In fact, it was those legislative measures which led both to the development of a professional money-laundering industry and to the consequent awareness of the problem of money laundering.

62. Under both the 1988 Convention and the money-laundering Convention, signatories are required to adopt such legislative and other measures as permit the tracing, seizure, freezing and confiscation of the proceeds of crime, and to permit international cooperation in relation to those matters.

63. While the obligation to give mutual assistance arises from treaties - bilateral, regional or multilateral - the capacity and mode of execution of requests for assistance are governed by national law, and this fact is normally recognized in the treaty creating the obligation. As a number of countries may be enacting new laws on these matters to enable them to accede to the above-mentioned Conventions, this is an appropriate time for a body such as the United Nations to assist Member States in achieving, if not uniform laws, at least laws which are sufficiently compatible and harmonious to render international cooperation as effective as possible.

64. Precisely because concepts of "proceeds of crime" have been developed for some time, a number of countries have legislated with respect to it. Even with the more recent multilateral advances, significant differences in national laws continue to exist, mainly owing to the variations in legal systems, although in certain areas "bridges" have been constructed to permit different legal systems to afford each other an acceptable degree of reciprocity. There could well be benefits for the international community in arriving at an acceptable degree of

compatibility of laws and assistance modalities, in so far as that is consistent with a recognition of the political, economic, social and cultural differences of Member States.

A. National initiatives

65. The laws of many countries permit tracing, freezing, seizure and confiscation of the proceeds of crime and, usually (but not always) subject to a treaty relationship, the granting and requesting of cooperation and mutual assistance either to or from foreign States, as the case may be. Some of the differences in such laws were mentioned in a recent paper by the Division of Crime Problems of the Council of Europe, 12/ and include distinctions in the matter of confiscation and the predicate offences in respect of which confiscation is possible, relating, for example, to:

(a) Whether the proceeds are derived directly or indirectly from predicate criminal activity;

(b) Whether property can be confiscated or whether confiscation is achieved by the "value confiscation" method whereby the court assesses profits and makes an order enforceable against any property owned by the person;

(c) The possibility that some States may permit both forms of confiscation, or even a combination of the two;

(d) The nature of the necessary predicate criminal activity.

66. Other differences have been referred to in this paper. They include differing mental states in relation to money-laundering offences created in various countries; whether or not corporate criminal responsibility is recognized; and even to the manner in which foreign seizure, freezing and confiscation orders may be enforced. The latter aspect will be dealt with later; it is a significant area where both Conventions under discussion have achieved a compromise capable of accommodating different systems. None the less, the various matters mentioned above, all of which have a capacity to inhibit effective interjurisdictional cooperation, are worthy of United Nations consideration.

67. Another significant development at the national level has been the elaboration of laws enabling investigative and curial powers under domestic laws relating to proceeds of crime to be exercised on behalf of other jurisdictions.

B. International initiatives

68. Concepts of mutual assistance, including both investigative and judicial assistance, are of long standing, but assistance in relation to the tracing, seizure, freezing and ultimately confiscation of the proceeds of crime is of fairly recent origin. One reason for this is the time-honoured principle of international law that one country should not enforce the criminal laws of another. Given the recognition of the interdependence of the community of nations in the fight against organized crime, particularly in situations where organized crime actively uses borders to exploit the consequent fragmentation of effort by law enforcement, this could not be permitted to continue. Proceeds of crime is one area where some countries are now prepared to give full faith and credit to orders of courts of other countries, notwithstanding their criminal nature.

69. Original developments occurred in a bilateral context, through the negotiation of treaties on mutual assistance or mutual judicial assistance in criminal matters. A number of countries are engaged in significant bilateral treaty negotiation programmes, with the bulk of the resultant treaties addressing issues relating to proceeds of crime.

70. A significant multilateral international initiative occurred in 1986, with the adoption by representatives of the Commonwealth of Nations, at the Commonwealth Law Ministers' Meeting held at Harare, of a scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth. It is not treaty-based and depends for effective operation on all member countries of the Commonwealth having, or passing, adequate domestic legislation in relation to the subject matters with which the scheme deals, and passing legislation to enable the exercise of powers and functions by their law enforcement and curial bodies on behalf of other Commonwealth countries.

71. The scheme also addressed the question of proceeds of crime, enabling one country, at the request of another, to assist in locating and identifying proceeds of crime and, where so located or identified, to take action to prevent dealings in them and ultimately to confiscate them. Confiscation could result either from the requested country's giving full faith and credit to an order of a court of the requesting State and enforcing it, or from the requested country's bringing its own confiscation proceedings based on the evidence made available by the requesting State. Moreover, the provisions are not offence-specific but apply to any serious criminal conduct. Regrettably, not all Commonwealth countries have yet passed the necessary enabling legislation, and for this reason the scheme is not yet fully operational.

72. Three other significant advances were the adoption and coming into force of the 1988 Convention, the opening for signature of the money-laundering Convention, and the adoption by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders of a Model Treaty on Mutual Assistance in Criminal Matters, including an Optional Protocol dealing with proceeds. 13/ As seen earlier, both the 1988 Convention and the money-laundering Convention require the criminalization of money laundering, the former with respect to drug-related conduct, and the latter prima facie with respect to all criminal conduct, although countries may limit the money-laundering offence by declaring it to apply only to nominated predicate offences or categories of offences. The Optional Protocol to the model Mutual Assistance in Criminal Matters Treaty deals with assistance in the enforcement of orders authorizing the tracing, seizure, freezing and confiscation of proceeds, but does not directly deal with money laundering. If all countries criminalize money laundering, however, then in so far as the granting of assistance is governed by the principle of dual criminality, the Protocol would be available in respect of such conduct.

73. While these international initiatives are to be welcomed, it is unfortunate that in such a newly emerging multilateral area of interest, significant differences already exist.

74. The definition of proceeds contained in the money-laundering Convention, covers the use of the word throughout the Convention, including the provisions on money laundering, tracing, seizure and confiscation.

75. In article 1 of the 1988 Convention, however, proceeds, which does not relate to the money laundering provision, is defined as follows:

"Proceeds" means any property derived from or obtained, directly or indirectly, through the commission of an offence ... ."

Property is defined in identical terms to those of the money-laundering Convention.

76. Moreover, article 5 of the 1988 Convention, which deals with confiscation, amplifies the above definition in so far as it relates to property that can be ultimately confiscated. Paragraph 6 of article 5 provides as follows:

"6. (a) If proceeds have been transformed or converted into other property, such property shall be liable to the measures referred to in this article instead of the proceeds;

"(b) If proceeds have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to seizure or freezing, be liable to confiscation up to the assessed value of the intermingled proceeds;

"(c) Income or other benefits derived from:

"(i) Proceeds;

"(ii) Property into which proceeds have been transformed or converted;

"(iii) Property with which proceeds have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds."

77. There is, therefore, a significant difference in the definitions of the basic terms which act as the trigger to activate the provisions of the two Conventions relating to the obligations to provide for tracing, seizure, freezing and confiscation of proceeds and to give international assistance with respect to those measures. In the earlier example of a home purchased with proceeds of crime and which appreciates in value, there is no doubt that, under the 1988 Convention, the entire value of the house can be confiscated, as the capital appreciation will amount to "income or other benefits derived from" proceeds. The position under the money-laundering Convention is not that clear. Would the capital appreciation amount to "any economic advantage from criminal offences", or would the causal link with the crime be severed so that the capital gain is attributed to the purchase of the house rather than to the crime? This question could also be of significance in those jurisdictions where a person cannot be charged with both a predicate offence and the laundering of the proceeds of that offence, for example where the predicate offence fails to satisfy the dual criminality test in the requested State and the person cannot be charged with laundering in the requesting State, thus leaving no basis for international cooperation in confiscating either the direct or any indirect proceeds.

78. In certain other respects the Conventions are in tandem. Both preclude the use of bank secrecy* as a ground for refusal of assistance with respect to

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*See article 5, paragraph 3, and article 7, paragraph 5, of the 1988 Convention, and article 18, paragraph 7, of the money-laundering Convention.

proceeds of crime, although as noted earlier this can be an illusory benefit in cases where a second layer of secrecy, such as anonymous trusts and shell companies, is available.

79. Another welcome development is that both Conventions have, in a major respect, built an important bridge between differing legal systems in relation to the execution of confiscation or forfeiture orders. Both Conventions allow either direct execution of an order made by a foreign court, or, alternatively, the institution, by and in the State where proceeds are located, of confiscation proceedings at the request of another State,* as well as permitting confiscation of specific property or a sum of money equivalent to the value of such property as represents proceeds.** Similarly, both provide that the measures permitted shall be carried out in accordance with the laws of the State where the proceeds are located.***

80. Unlike some earlier treaties and conventions, these Conventions address the objects to be achieved rather than the methodology of achieving them. Methodology is left to the respective domestic laws of the States concerned. It is also relevant to note that the money-laundering Convention is far more comprehensive on the question of proceeds than the 1988 Convention.

81. The money-laundering Convention seeks to provide a complete set of rules, including procedural, where appropriate, and addresses issues left either unaddressed by the 1988 Convention or which the latter Convention has left to be resolved in bilateral arrangements between the Parties.

82. Another feature of the money-laundering Convention, although not couched in obligatory terms, is the conferral of a discretion on States to forward to other States, without request, information on proceeds of crime of which they become aware, in circumstances where the former States consider that disclosure of that information may assist the latter States in initiating or carrying out investigations or proceedings, or which might lead to a request for assistance under the Convention. Finally, the money-laundering Convention does not require dual criminality as to predicate offences, enabling confiscation of proceeds of an offence not known to the criminal law of the country where the proceeds are located (article 6, paragraph 2).

VI. POSSIBLE FUTURE ACTION

83. The international community, through the adoption of the 1988 Convention, has expressed its universal abhorrence of drug-related money laundering. However, as noted earlier in this report, there would seem to be little policy justification for the proscription of money laundering arising from some profit-generating criminal activities and not others. Double standards,

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*See article 5, paragraph 4, of the 1988 Convention, and article 13 of the money-laundering Convention.

**See article 5, paragraph 1, of the 1988 Convention, and article 7 of the money-laundering Convention.

***See article 5, paragraph 9, of the 1988 Convention, and article 12 of the money-laundering Convention.

particularly in criminal law, are not conducive to the maintenance of the rule of law or to international cooperation, and there may be difficulties in proving that particular proceeds are attributable to particular predicate offences. In any event, drug trafficking may not remain - or for that matter still be - the most profitable form of transborder criminal activity. These concerns were apparently taken into account in the formulation of the Commonwealth Scheme of Mutual Assistance in its provisions relating to proceeds, and of the money-laundering Convention in relation to its provisions on both proceeds and the substantive money-laundering offence.

84. Much valuable work has been done in the area by bodies including the Commonwealth Law Ministers, the Council of Europe, the Group-of-Seven Financial Action Task Force and the United Nations. In many areas problems have been identified and solutions suggested, in others problems have been identified but not yet resolved. Unfortunately, in some instances different solutions have been put forward, such differences potentially leaving scope for exploitation.

85. That said, and provided unaddressed problems can be solved, the work done by the various aforementioned bodies could - given the increased realization of the dangers posed by money laundering and the international priority accorded it - provide a sound basis for future action. There is no apparent reason why money laundering, regardless of the predicate crime, should not be regarded with the same attention by the international community as other conduct which constitutes the subject of multilateral conventions.

86. The recommendations of the Financial Action Task Force, coupled with the provisions of the 1988 Convention, the money-laundering Convention and the Model Treaty on Mutual Assistance in Criminal Matters could form the basis of a comprehensive international strategy to deal with money laundering and associated matters relating to proceeds, including the establishment of an effective system of international cooperation capable of putting law enforcement and judicial authorities on an even footing with their nemesis.

87. Some matters earlier identified would additionally need to be addressed. These include the following:

(a) The appropriate scope and definition of any money-laundering offence;

(b) The definition of proceeds, for example, direct or indirect, including profits;

(c) Whether both civil and criminal forfeiture orders should be capable of enforcement, and, if so, whether conviction for a predicate offence, or for the offence of money laundering, is to be a condition precedent;

(d) The building of bridges permitting compatibility in cooperation even between different legal systems;

(e) The questions of "anonymous" trusts and corporations that thwart effective law enforcement even where bank secrecy can be penetrated;

(f) the question of cash transaction reporting. It is not envisaged, for example, that all countries should - or need - establish costly cash transaction reporting systems as exist in certain countries. On the other hand, a requirement to report suspicious transactions that have no apparent economic

or legal basis would not seem inappropriate, subject to giving financial institutions protection for civil actions for breach of confidentiality;

(g) Questions of dual criminality which may inhibit effective international cooperation in cases where different mental elements are applicable to a money-laundering offence, or in cases where the criminal capacity of the offender, such as a corporation, is recognized in one State but not in another.

88. In addition, the needs of Member States should be addressed through a concerted effort of practical assistance. In particular, expertise in the elaboration of appropriate legislation, training in investigative and prosecution methods and techniques, as well as in the establishment of special investigative units, where appropriate, would be required. Further, assistance to Member States wishing to make bilateral, subregional or regional arrangements on the issue of money laundering would greatly enhance international cooperation and improve the response to the problem.

Notes

1/ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August-7 September 1990): report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C.

2/ 18 United States Code, sect. 1961.

3/ 21 United States Code, chap. 13, sects. 801-971.

4/ 21 United States Code, sects. 848 and 853.

5/ "Prevention of criminal use of the banking system for the purpose of money laundering", Federal Banking Law Reporter, vol. 1271, No. 11,785 (Commercial Clearing House, 10 February 1989).

6/ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (United Nations publication, Sales No. E.91.XI.6).

7/ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, European Treaty Series No. 141 (Strasbourg, Council of Europe, 1990).

8/ Peter E. Meltzer, "Keeping drug money from reaching the wash cycle: a guide to the Bank Secrecy Act", Banking Law Journal, vol. 108, No. 3, pp. 230-255.

9/ Bruce Woolford, "The cash transaction reporting system in Australia", paper presented to the Senior Officers Refresher Program, Australian Police Staff College, at Manly, New South Wales, on 11 July 1991.

10/ "Crime and secrecy: the use of offshore banks and companies", record of hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, Ninety-Eighth Congress, first session (1983), p. 230.

11/ Commission on Narcotic Drugs, Cumulative Index 1987-1990 (United Nations publication, Sales No. E.91.XI.5), p. 84.

12/ "The Council of Europe laundering Convention: a recent example of a developing international criminal law", paper presented at the International Workshop on Principles and Procedures for a New Transnational Criminal Law, held at the Max Planck Institute, Freiburg, from 21 to 25 May 1991 inclusive.

13/ Eighth United Nations Congress ..., sect. A.