

## **THE FORFEITURE OF PROPERTY UNDER ANTI-MONEY LAUNDERING ACT OF 2004**

**Dr. Mushtaq AL-Naimi**

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**ABSTRACT:** *Purpose: The purpose of this Article is to set out and to examine the forfeiture of property in Anti-Money Laundering Act of 2004. Design/methodology/approach: This Article's methodology relies on doctrinal legal research, using a 'black-letter law approach. Relying on doctrinal legal research has enabled us to analyse statutory provisions of the forfeiture of property under Anti-Money Laundering Act of 2004. Research Question: This Article posts the question: What Property is involved in Money Laundering Offences that is subject to forfeiture under Anti-Money Laundering Act of 2004. Originality/value: This Article contributes to the literature in identifying the property involved in money laundering offences, Financing of crime and terrorist financing, Structuring transactions offence, Reporting obligation offence, and cash transaction reports offence, that is subject to forfeiture.*

**KEYWORD:** Forfeiture, Property Involved, Money Laundering Offence, Anti-Money Laundering Act of 2004.

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### **INTRODUCTION**

A common approach of the most jurisdictions is that, proceeds of any offence, and any property used or intended to be used, in the commission of any offence is liable to be forfeited. It is an integral part of the Iraqi Penal Code No. 111(1969), where Article (101) provides, where a person is convicted of prescribed offence, the court may order forfeiture of property that were acquired as a result of the offence, and that were then seized or that were intended to be used in the commission of the offence. The court must, in all circumstances, order the forfeiture of particular items that are used to create funds for the commission of an offence, but nothing more.

However, a wide approach had been taken in Anti-Money Laundering Act of 2004 (hereinafter known as the 'AMLA'), where Article 6 (1) provides, on conviction of the defendant, any '*property involved*' in money laundering offences, Financing of crime and terrorist financing, Structuring transactions offence, Reporting obligation offence, and cash transaction reports offence, be subject to forfeiture. This Article examines each of these offences in order to *identify what property is involved in*.

### **What Property is involved in Money Laundering Offences?**

A broad interpretation should be given to the term '*property involved*' in money laundering offences. The proceeds of the unlawful activities, and property used for committing or facilitating the offence of money laundering, should be included. For better understanding of the forfeiture of property involved in money laundering offences, basic elements of the offence should be examined.

## Basic Elements of the Money Laundering Offence

Before examining elements of the money laundering offence, it is essential to have an understanding of what an offence actually means. Quite simply, money laundering is making tainted funds look untainted.<sup>1</sup> The purpose of 'true' laundering is to conceal the origin of funds from offence and yet retain control over them.<sup>2</sup> This offence can be committed in a number of separate ways. Explanation of those ways in detail is beyond the scope of this Article. However, there is generally a money laundering offence, where a person conceals or disguises any property, which is or represents proceeds of some form of unlawful activity.<sup>3</sup> These proceeds seem to be no limited to specified unlawful activity, but are extended to all serious crimes, and even beyond serious crimes.

It is observed that the concept of concealing or disguising carries a broad meaning. It can include references to concealing or disguising the nature, location, source, ownership, or control of the proceeds of unlawful activity.<sup>4</sup>

A person should also be liable for the money laundering offence where use proceeds of unlawful activity, so that he can be committed or benefited from another unlawful activity. Further, it could be an offence to use proceeds for protecting those who have engaged in unlawful activity from prosecution, or for carrying on the plan that initially generated the proceeds.<sup>5</sup> These are commonly called 'promotion money laundering.' An individual who takes the proceeds he obtains from defrauding single victim of his fraud scheme, and utilises it in a way that assists defraud the next victim, commits promotion money laundering.<sup>6</sup>

Furthermore, criminal liability for money laundering offence should be imposed on those who movement of criminally obtained proceeds. Although the AMLA does not expressly refer to movement of proceeds internationally, however, the act should be interpreted to include movement of any proceeds into or out of the Iraq. As such, it is an offence to transport, transmits, or transfers money into or out of the Iraq in order to commit an unlawful activity.<sup>7</sup>

## The Proceeds of the Unlawful Activities

Forfeiture order can be made with relation to the proceeds of the unlawful activity, which actually laundered by the defendant. Take the example of *Baghdad Municipality v. assistant accountant*.<sup>8</sup> In this case, the defendant was a public official in the Baghdad Municipality who misappropriated approximately 17 billion Iraqi diners (approximately \$15,500,000), through a forging expenditure bills from 2008 until 2009. Specifically, it had been proven that the defendant transferred (approximately \$5,400,000) of that amount to banks in Jordan and Lebanon, and purchasing properties with 4 billion Iraqi diners (approximately \$ 3,000,000), and cars with \$200,000. It is without a shadow of a doubt that the unlawful activity was misappropriation, and the financial transaction of the money laundering offence was the

<sup>1</sup> Qaid Hadie Dahash, *The Maladministration of the Coalition Provisional Authority in the Duty to Prevent Criminal Activities and its Effect on Illegal Funds (Causes & Solutions)* (PhD thesis, Bangor University, Bangor Law School, 2015) 185.

<sup>2</sup> Michael Levi, 'Money for Crime and Money from Crime: Financing crime and laundering crime proceeds' (2015) 21 (2) *European Journal on Criminal Policy and Research* 275-297.

<sup>3</sup> Article 3 (b) (i) of the AMLA.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

<sup>6</sup> Stefan D. Cassellat, 'The Forfeiture of Property Involved in Money Laundering Offences' (2004) Vol. 7, *Buffalo Criminal Law Review* 612.

<sup>7</sup> Article 3 of the AMLA.

<sup>8</sup> *Baghdad Municipality v. assistant accountant*, unreported (2010).

transfer of (approximately \$5,400,000). The court is entitled, according to Article 6(1) of the AMLA, to the forfeiture all property involved in the money laundering offence, which is, of course, \$5,400,000.

Although it may not be presented in the AMLA quite expressly, however, courts can make forfeiture order even, with relation to any the remaining funds of the \$15,500,000, above-mentioned which actually seized, even though it was not 'involved' in the money laundering offence. Courts are forfeited also the proceeds, which the defendant intended to be used to commit the money laundering offence, even if the proceeds was not laundered. An advantage of making forfeiture for both cases is that, it is contributed to recover the proceeds of the unlawful activity, and subsequently they could reversion to its rightful owner. It may be too succeed in stripping the wrongdoers of the funds, which may be utilised to commit offences in the future, such as financing of terrorism or buying drugs, *etc.*

In addition to the above, property that is part of the money laundering offence, should be subjected to forfeiture. This is so-called 'corpus,' or the 'subject matter' of the money laundering transaction.<sup>9</sup> Such forfeiture is quite certain logical. It is aimed at divesting the wrongdoers of the benefit, which is derived from the unlawful activity. To illustrate such forfeiture, take the example of *Baghdad Municipality v.Zina*.<sup>10</sup> In this case, the defendant was a public official in the Baghdad Municipality who misappropriated (13,994,190,200) billion Iraqi dinars (approximately \$9 million) of staff salaries. Real properties had shown with \$11,000 purchased by the defendant as well as a car from the United Arab Emirates with \$40,000 and valuables. In this case, there is, no doubt, that the subject matter of money laundering offence is objects being purchased, and therefore, under Article 6 (1) of the AMLA, is liable to forfeiture.

A matter that, quite naturally, arises is whether, in relation to clean funds, which are commingled with the proceeds of the unlawful activity, is subject to forfeiture or not. In the United States, the general approach is that, the courts have upheld forfeiture of commingled funds, namely clean and dirty funds.<sup>11</sup> Upholding is rested on the facilitation theory. In essence, the facilitation theory is submitted that the clean funds facilitated the laundering of the dirty funds.<sup>12</sup> It has argued that when dirty money is mingled with clean money, clean money is acting to hide or conceal the nature of dirty money, and then the clean money is dirtied. In consequence, the entire funds, regardless of how large, are subject to forfeiture.<sup>13</sup>

To illustrate the idea, take the example of *Tencer*,<sup>14</sup> who was a health care provider in Louisiana, deposited proceeds gained fraudulently, into various bank accounts across the country, where they were commingled with other money from multiple sources. Specifically, *Tencer* mingled roughly \$5,000,000 in dirty money with roughly \$5,000,000 in clean money in these accounts, and subsequently all of the money consolidated to form a single bank account in Las Vegas. Endeavouring to convert the entire amount to cash by *Tencer*, making the government seized the amount and sought to forfeit the entire amount as part of the money laundering case. Argument had been made by the defendant on the basis that the clean money

<sup>9</sup> Stefan D. Cassella, 'Forfeiture of Property Involved in Money Laundering Offences' (n 6) 620.

<sup>10</sup> *Baghdad Municipality v.Zina*, unreported (2010).

<sup>11</sup> However, there are some cases, which held that forfeiture is only extended to the portion traceable to the unlawful activity. See, *United States v. Pole No.3172* (Hopkinton) 852 F.2d 636 (1<sup>st</sup> Cir.1988); *United States v. One Parcel known as 352 Northup St.*, 40 F.Supp.2d 74 (D.r.I.1999); *United States v. One1980 Rolls-Royce*, 905 F.2d 89(5<sup>th</sup>Cir.1990).

<sup>12</sup> Robert W. Hubbard *et al.*, *Money Laundering and Proceeds of Crime* (Irwin Law 2004) 421.

<sup>13</sup> *ibid.*

<sup>14</sup> *United States v. Tencer* 107 F.3d 1120 (5<sup>th</sup> Cir. 1997).

was not part of the money laundering offence. However, the Fifth Circuit rested on the facilitation theory for forfeiture of the clean money, in that, it had assisted the defendant to conceal and disguise the nature, source, location, ownership, and control of the proceeds of his health care fraud offence.

### **Instrumentalities of the Money Laundering Offence**

In addition to the proceeds of the unlawful activities, property used or is intended to be used, for committing or facilitating the commission of money laundering offence, should be liable to forfeited. Such property has frequently been called 'instrumentalities of crime'. 'It is property that makes the offence easier to commit or harder to detect.'<sup>15</sup>

As has been mentioned, a key principle of forfeiture in the Iraqi Penal Code is that, where a person is convicted of a prescribe offence, the court authorises forfeiture of property if it is satisfied that it was used or intended for use in relation to, or for the purpose of committing offence.<sup>16</sup>

Even though the AMLA does not expressly refer to the principle above-mentioned, it does not go beyond it. The term any '*property involved*' should also be interpreted to include instrumentalities of the money laundering offence, otherwise, the society may not be become clean from means of offence, and it seems probable that they used for more offences in the future. Furthermore, forfeiture of instrumentalities of crime is given a great incentive for the property owner to take the necessary precautions, which could lead to prevent the wrongdoers from utilising his property for money laundering offence.<sup>17</sup>

Regardless of whether property lawfully acquired with lawfully obtained funds or unlawfully, property may be considered instrument if makes the money laundering offence mostly without hindrance. Thus, unlike the proceeds of unlawful activity that generate by the commission of offence, an instrument of crime is external property that acts to aide and facilitate the money laundering offence, and there is no necessarily for being part of the offence.<sup>18</sup>

Standard should be required in relation to forfeiture of the instrumentalities of money laundering offence. Whilst it is not present in the AMLA, the court is required to show a 'substantial connection' between the property to be forfeited and the offence. Even though what constitutes a 'substantial connection' may not be simple to identify accurately, the connection between the property and the offence must be more than merely incidental or fortuitous. In other words, the court must be demonstrated that property provides assistance in some substantial way in the commission of the money laundering transaction. Therefore, this requirement is allowed for forfeiture of the house in which the person stored regularly laundered funds.<sup>19</sup>

### **What Property is involved in Financing of Crime?**

An innovative offence has been often charged in prosecution since 2004, becoming primary part in the Iraqi Government efforts to combat terrorist activities. Article 4(1) of the AMLA

<sup>15</sup> *United States v. Schifferli*, 895 F.2d 987 (4<sup>th</sup> Cir. 1990).

<sup>16</sup> Article 101.

<sup>17</sup> David Pimentel, 'Forfeiture Procedure Revisited: Bringing Principle to Practice in Federal Court' (2012) Vol. 13, No. 1 Nevada Law Journal 44.

<sup>18</sup> Stefan D. Cassella, 'Forfeiture of Property Involved in Money Laundering Offences' (n 6) 641.

<sup>19</sup> Stefan D. Cassella, 643.

makes it a criminal offence to provide, attempt, or conspire to provide property, or to conceal or disguise the nature, location, source, or ownership of that property, knowing or intending, that it is to be used in preparation for, or in carrying out a violation of law. Providing prohibited property carries with it a possible fine, not more than 20 million Iraqi dinar (approximately \$15000), or imprisoned for not more than 2 years, or both.

It is observed that the AMLA knowingly prohibits providing property to facilitate unlawful activities. A wide meaning has been given to the unlawful activities. There is not list of the unlawful activities upon which Article 4(1) liability. Nevertheless, they are, without a doubt, extended to conduct that may be bore features of terrorism, but they are not *necessarily* terrorism activities. However, criminal liability for financing of crime arises, even if the unlawful activity is not, in fact, takes place. Providing the property with ‘knowing or intending’ that the defendant would be used it for an unlawful activity, liability arises at once. In this regard, it is observed that criminal liability has some similarity to criminal liability for complicity.

Although it is not introduced in the AMLA precisely as to what constitutes the ‘*property involved*’ in the financing of crime, it includes, according to Article 4(3), but is not limited to currency, monetary instruments, and financial securities. Therefore, the court is entitled to size and forfeit property provided, independent of whether the property is dirty or clean, if it is involved in money laundering transaction or attempted transaction, or if it is the proceeds of the unlawful activities for which the defendant was convicted.

### **What Property is involved in Terrorist Financing Offence?**

Terrorism financing is one of the most complex dilemmas the democratic world is facing at the present time.<sup>20</sup> The financing of a terrorist act, in and of itself, is ‘as serious an offence as the actual terrorist act.’<sup>21</sup> Discussion of the property involved in the offence of financing of terrorism is started with a definition of offence. A distinct offence of terrorist financing is set up under Article 4 (2) of the AMLA. It is provided that a person commits the offence of terrorism financing when provides or invites another person to provide property, support, or financial or other related services with the intention that property be used or in the knowledge that it will likely be used to carry out (a) a terrorist activity; (b) any other act intended to cause death or serious bodily harm to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict, for the purpose of intimidating a population, or to compel a government, or an international organisation to do or refrain from doing any act.

The approach to the definition of terrorism financing in the AMLA seem to be accorded with the definition of the International Convention for the Suppression of the Financing of Terrorism (hereinafter known as the ‘SFT1’999). Under Article 2(1), a person commits the offence of terrorism financing if that person by any means, directly or indirectly, unlawfully, and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of

<sup>20</sup> Muhamet ALIU (eds), ‘A Review of Sources on Terrorist Financing’ (2017) Vol. 13, No. 1 Acta Universitatis Danubius . Juridica 97.

<sup>21</sup> See, Hamed Tofangaz, ‘Criminalisation of Terrorist Financing; from Theory to Practice’ (2018), Vol. 21, Issue 1, New Criminal Law Review 78.

such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.<sup>22</sup> Furthermore, it seems that both definitions are undertaken to set up a common definition of terrorism, but are evaded from definition of terrorism itself, by paying attention to criminalising the financing of terrorism.

The distinct financing offence is supported by provisions for the forfeiture of property. This forfeiture includes any property involved in, or intended to be used or will likely to be used to commit a terrorist activity.<sup>23</sup>

### **What Property is involved in Suspicious Transaction Report Offence?**

One of the main obligations imposed on financial institutions is to file suspicious transaction reports (hereinafter known as the 'STRs'). It refers to 'a piece of information which alerts law enforcement that certain activity is in some way suspicious and might indicate money laundering or terrorism financing.'<sup>24</sup>

As result of the growing threat of global terrorism, the Financial Action Task Force (hereinafter known as the 'FATF') started the development of a worldwide standard of policy and legal measures to combat money-laundering offences, terrorist financing offences, in addition to the proliferation of weapons.<sup>25</sup>

Indeed, the FATF supports an obligatory system for reporting suspicious transactions and has recommended if financial institution suspects or has reasonable grounds to suspect that funds stem from a criminal activity, or are related to terrorist financing, it should be required, by law, to report promptly its suspicions to the competent authorities.<sup>26</sup> Additionally, it has recommend that financial institutions should be paid special attention to all unusual transactions and patterns of transactions that have no apparent economic or visible lawful purpose, and the background and purpose of such transactions examined and made available to supervisors, auditors and law enforcement.<sup>27</sup>

The system for reporting suspicious transactions had been taken by the AMLA. According to Article 19 (1), financial institution required to file a suspicious transaction reports when it knows, suspects, or has reason to suspect that unlawful activity has or is occurring and knows, suspects, or has reason that money laundering is or may be taking place. Report is also required when financial institution knows, suspects, or has reason to suspect that violation of transaction reporting requirement in any law, including the AMLA have or may be occurring. The obligation to file suspicious transaction reports is in relation to any transaction that is equal to or greater than 4 million Iraqi dinars (approximately\$5,000).<sup>28</sup> Failure to comply with this obligation could lead to criminal liability under Article 19(4) of the AMLA. It is provided that

<sup>22</sup> For more details, See, Hamed Tofangaz, 'Criminalisation of Terrorist Financing; from Theory to Practice' 57-140.

<sup>23</sup> See Article (6)(1) of the AMLA.

<sup>24</sup> M H Fleming, 'UK Law Enforcement Agency Use and Management of Suspicious Activity Reports: Towards Determining the Value of the Regime.' (2005) in Aspalella A. Rahman, 'Combating Money Laundering in the Banking Industry: Malaysian Experience' (2013) Vol.7, No.6 International Journal of Mechanical and Industrial Engineering 1467.

<sup>25</sup> See Julia Braun (eds), 'Drivers of Suspicious Transaction Reporting Levels: Evidence from a Legal and Economic Perspective' (2016) Vol. 2:1 Journal of Tax Administration 96.

<sup>26</sup> FATF Recommendation 20.

<sup>27</sup> FATF Interpretive Note to Recommendation 10 (Customer Due Diligence).

<sup>28</sup> Article (19)(1) of the AMLA.

a person who wilfully infringes the suspicious transaction reports shall be fined not more than 10 million Iraqi dinars, or imprisoned for not more than 1 year, or both.

In the STRs, banks reveal information as to the names of individuals or entities carrying out the suspicious transactions, an account of the transaction, the reality that the bank suspects or has reason to suspect that the transaction infringes the law or involves funds which came from illegitimate activities, and the basis for the bank's concerns.<sup>29</sup> Therefore, the STRs is 'a potential treasure trove for plaintiffs and their attorneys who may be fishing for new evidence or looking to exploit a bank's vulnerable spots for use in civil litigation.'<sup>30</sup>

It may be no difficult to identify the '*property involved*' in a suspicious reporting violation, in particular, following set out the '*property involved*' in money laundering offences. Therefore, when the Money Laundering Reporting Office shows an offence involved in suspicious transaction report, the forfeiture would depend on what that offence turns out to be. If it is money laundering, the court is entitled to forfeit any property involved in money laundering offence above-mentioned. While if offence is in relation to structuring transactions, forfeiture may be included the whole amount that was split up into smaller parts in order to avoid the reporting requirement or property traceable thereto.

### **What Property is involved in Cash Transaction Report Offences?**

A system of compulsory reporting of large cash transactions, based partly on the American model,<sup>31</sup> had been adopted in the AMLA. According to Article 20 (1) of the AMLA, financial institutions have a duty to file a report to the designated authority for all cash transactions involving the prescribed sum. This is in excess of 15 million Iraqi dinars (approximately\$10,000). 'This record keeping preserves a financial trail for investigators to follow and allows the government to scrutinise systematically large cash transactions.'<sup>32</sup>

Financial institution that fails to file requisite report is liable to criminal liability under Article 20(5) of the AMLA. It is provided that a person who wilfully infringes any reporting requirement shall be fined not more than 10 million Iraqi dinars, or imprisoned for not more than 1 year, or both. Furthermore, it is an offence for anyone either within or outside of the financial institution to cause or attempt to cause a financial institution to fail to file a report required, or to structure or assist in structuring, a transaction with one or more financial institutions to avoid the filling requirements.<sup>33</sup>

It is not difficult to identify what constitutes the '*property involved*' in a cash transaction report violation. Failure to report a currency transaction could lead to forfeit unreported funds. In the same way, in a structuring case, the court may forfeit the full sum, which was break up into smaller amount in order to avoid the reporting requirement.<sup>34</sup>

<sup>29</sup> See Qaid Hadie Dahash, *The Maladministration of the Coalition Provisional Authority in the Duty to Prevent Criminal Activities and its Effect on Illegal Funds (Causes & Solutions)* (n1)251.

<sup>30</sup> Alex C. Lakatos and Mark G. Hanchet, 'Confidentiality of Suspicious Activity Reports' (2007) 124 (9) *Banking Law Journal* 794-795.

<sup>31</sup> According to the Bank Secrecy Act of 1970, financial institutions are required to file currency transaction reports for all cash transactions over \$10,000. See 31 U.S.C. § 5322 (2003). For more details, See Courtney J. Linn, 'Redefining the Bank Secrecy Act: Currency Reporting and the Crime of Structuring' (2010) Vol. 50, No 2, *Santa Clara Law Review* 412.

<sup>32</sup> Ted E. Senator (eds), 'Financial Crimes Enforcement Network AI System (FAIS) Identifying Potential Money Laundering from Reports of Large Cash Transactions' (1995) Vol. 16, No 4, *AI Magazine* 22.

<sup>33</sup> Article 5 of the AMLA.

<sup>34</sup> Stefan D. Cassella, 'Forfeiture of Property Involved in Money Laundering Offences' (n 6) 591.

## CONCLUSION

Legislation providing for the forfeiture of property derived from criminal activities is useful. By targeting the proceeds of offence, adhere to the fundamental principle that perpetrators ought not to benefit from their crimes; it is wished that the criminal's ambitions would be destroyed. As a rule, offenders ought not to be permitted to maintain their proceeds to enjoy as soon as they released from jail. Furthermore, by stripping criminals of the proceeds of their criminal activities, the statutes authorising forfeiture should eventually affect the underlying motivations and functions of wrongdoers. This approach had been taken by the AMLA in seeking to effective deterrence and policing of terrorism, financial crime, as well as fraud.

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