Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?

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Introduction

The discourse of risk and globalization has become a very popular one, both among social analysts and within the business and intelligence 'communities'. Implicit and/or explicit risk judgments have long been central to the financial world and its policing: the key question is which risks are being considered and whether we have the knowledge and operational models to incorporate them. Bankers, lawyers and law enforcement personnel are forced by pressure of circumstances to live so much in the present that it is difficult to see how far we have travelled in the era beginning approximately in the mid–1980s since money laundering first became a term with which bankers and lawyers were expected to be acquainted. The authors crave the readers' indulgence therefore for some historical development of the paradigm of banking and law enforcement to set alongside the other contributions to this volume. In making such a contribution, the authors want to clarify how far the risk paradigm has entered the general world of 'law and order', at least in the UK.[1]

The allocation of scarce policing and surveillance (including private sector) resources inevitably entails the conscious or taken-for-granted allocation of priorities. Goal displacement is commonplace, as interest groups seek (consciously or not) to further their own objectives at the expense of the proclaimed objective. Nevertheless, resource allocators have to decide which are the most serious – in

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[1] It is easy to overestimate the extent to which policing paradigms travel at the same speed in the same direction. Those enforcement worlds in which transnational mutual assistance is commonplace may harmonize more quickly – though there are substantial variations even within the EU – but this may not touch significantly the general styles of policing.

European Journal of Law Reform, Vol. 4, No. 2
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terms of both 'objective' harm[2] and media-constructed harm that turn into political and organizational priorities – current *and future* events with which they wish to deal in relation to the resources that they have available. This relationship is a naturally dynamic one, in the sense that left to themselves, organizations tend to focus on the short-term politically (with small or large 'p') pressed priorities and to neglect the longer term structural issues: in this human process, stated goals are often eroded except when organizations insist on the pursuit of their operational plans. The latter style is often condemned by pragmatists as 'inflexible' (and is one of the features of totalitarian centrally planned economies), despite the consistency that such adherence to policy brings compared with the legal dictum of 'taking each case on its merits', which latter can amount to little more than a justification for unselfconsciously erratic policy-making. In contemporary policing, for example, in making decisions about how much surveillance particular released sex offenders 'need', explicit risk assessments are made, though there may not be the resources to accommodate all those who need high supervision and therefore actual time devoted to each high-risk person may be scaled down.[3] Public order policing similarly is risk-based, though not normally on the basis of clinical judgments about the risks from individual people.

By contrast with modern banking,[4] the discourses of international bodies such as the Financial Action Task Force are primarily oriented not so much towards risk-management as towards national and institutional obligations to reduce crime facilitation. In this sense, though intended to be applied within the context of globalization, they sit securely within the absolutist 'law and order' control mode rather than with some other risk optimization mode. Despite the rhetoric of 'financial crime risk management', this is based on modest scientific foundations in many areas: despite typologies exercises, there is insufficient hard, systematically collected evidence of the extent and forms of fraud and, especially, of money laundering[5] to enable sensible universally agreed judgments to be made. One should have sympathy for the inherent difficulty about the publication of advice on *modi operandi* of terrorism finance and on the laundering of other forms of crime, since the availability of information of this kind to financial institutions around the globe

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2 Some readers may not believe in the concept of objective harm but, by analogy with Bishop Berkeley's refutation of the solipsistic fallacy, there are self-evident effects of terrorist attacks that are physically objective. This is so even though some might not define martyrdom as a 'harm' and the slaughter of enemies as not harming the innocent or even (as in genocide) not harming persons of the same human status as the perpetrators.

3 M. Maguire, 'Policing by risks and targets: Some dimensions and implications of intelligence-led crime control' in (2000) 9 *Policing and Society* 1

4 *See* Charles Freeland, 'How Can Sound Customer Due Diligence Rules Help Prevent the Misuse of Financial Institutions in the Financing of Terrorism' in (2002) 4 *European Journal of Law Reform* 2, and the standard setting of most bank regulators

5 *See*, for example, the current advice given to financial institutions by FATF on profiles of terrorism for anti-laundering detection purposes.

inevitably gives rise to leakage to some offenders and thus serves as counter-intelligence.[6] Conversely, regulators and policing agencies should understand that if they cannot specify and/or are unwilling to specify the plausible forms of laundering – often on the expressed grounds that they do not want to constrain the identification and reporting behaviour of regulated persons – it may be unfair to expect financial institutions to do so. As money-laundering legislation shifts from criminal penalties for 'failing' to report crimes one *did actually* suspect to those for 'failing' to report crimes one 'objectively'(?) *ought to have suspected*,[7] this tension about reasonable expectations will become progressively greater.

But these are not the only difficulties. For example, there are resource constraints that arise in relation to the 'War on Terrorism'. Governments for whom terrorism risks against domestic targets are modest may be reluctant to divert resources away from local crime concerns (or non-policing needs such as health and education) to help to reduce terrorism risks in other countries; while Western countries such as the UK (since 'the Troubles' in Northern Ireland in the late 1960s) and, more recently, the US, more willingly divert resources from domestic crime issues which do concern the public[8] to dealing with terrorist threats. A key motivator for this transnational transformation of defences against terrorism is the global reach of threats not just to embassies and other governance institutions overseas but also to *corporate* interests worldwide. Again, there is nothing new about this risk from globalization to the national economic interests of superpowers: as their role in defending the British East India Company and West Indian plantations illustrates, 18th and 19th century policing in colonies was usually directed towards the preservation of overseas assets, and such threats often contained a cultural or ideological component as well as any desire to take property for resale and economic gain.[9]

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6 This is so *a fortiori* if the information is placed on websites. The UK National Criminal Intelligence Service and some other European FIUs such as the Netherlands are developing limited access extranets, but counter-intelligence risks still remain.

7 For such shifts towards 'objective' obligations, *see* the Second Directive on Money Laundering agreed by the EC and the European Parliament at the end of 2001, and the Proceeds of Crime Act 2002 in the UK.

8 Rates of street and household crime have been falling since 1998 to the time of writing, but fear of those crimes has not been falling. Whether Enron employees and ex-employees in Texas (as opposed to New York and Washington) would be (now and in the past, with the benefit of hindsight) rational to fear terrorism more than to fear the collapse of their own pension funds and employment is a more complex issue that lies outside the scope of this article.

9 Indeed, the tradition of the police serving (and/or being perceived as serving) the interests of the state rather than those of the local population and crime victims is one of the more unfortunate legacies of colonialism that community policing strategies have had great difficulty in overcoming. The fact that no-one then called these 'anti-globalization' protests (for the term had not been invented) does not make that any less accurate as an ascription.

The regulation of economic élite and piratical behaviour trans-nationally involves 'persuading' formally independent nation states to adopt similar measures even though there sometimes may be no obvious benefit to them in so doing. To some extent, this constellation of self-interest is altered by terrorism in the abstract. However, those groups or networks threatening the US and other Western powers may be quite different from those threatening some Third World governments, while many small island economies may be affected by terrorism only indirectly via 'trickle down' from damage to global business levels. Furthermore, the behavioural boundaries of such global regulation are somewhat vague, given the flexible definitions both of terrorism and transnational organized crime.

There is an inherent tension between, on the one hand, governmental and prosecutorial threats to the private sector for not succeeding in detecting or reporting possible money laundering[10] and, on the other, the fact that the support of corporate actors is needed for 'government at a distance' to succeed: the state or rather, in the case of trans-national crime control, the total set of states[11] cannot hope to monitor and control financial transfers directly. This monitoring must be 'entrusted' (under threat of penal and/or administrative sanctions) to the financial services firms and professionals in the front line of the 'war on terrorism' (and 'war on organized crime'). Even if we knew how many jurisdictions were currently facilitating the movements of terrorist funds (which potentially is all jurisdictions involved in financial services business), the enforcement task would not be restricted to those, since the use of particular offshore finance centres is based upon a dynamic view of the costs and benefits of particular jurisdictions at any given moment.[12]

It is difficult, even with hindsight, to work out when and how the view developed that attacking the money trail was a key element in the fight against organized crime. Wechsler places it in the mid–1980s[13] – which would be around the period that the FBI and other law enforcement agencies started to use the Racketeer Influenced Corrupt Organizations (RICO) legislation passed in 1970 – but at least outside the US, the investigative resources devoted to financial policing have never reflected the rhetorical and political attention it has received. Even before the frantic and all-consuming financial search for terrorist funds in the wake of the air strikes against

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[10] It is not suggested that this is simple game theory. Through ideological hegemony, the marshalling of political support and party and/or personal financing, corporate actors can wield enormous influence.

[11] The authors have avoided the tempting term 'collectivity' because it can be argued that this implies harmonious purposes among states: the extent to which the collaboration of *all* states is required differs by type of crime: fewer states need to co-operate to deal with maritime piracy than with money laundering or intellectual property violations, since technology makes the latter sites very portable with low capital costs.

[12] The authors are not positing an optimal or 'rational' model here. Every launderer has his or her own information set and contacts, and in an imperfect market of knowledge asymmetries, there is no one model that fits all.

[13] W. Wechsler, 'Follow the Money' in (July/August 2001) 80(4) *Foreign Affairs* 40.

New York and Washington in September 2001 (and, for that matter, before the collapse of Enron in December 2001), there was widespread official fear of 'the dark side of globalization'. The latter brings together a variety of themes and a variety of political positions from financial regulators concerned about unmonitored 'off-the-books' (though often legal) transactions conducted by vast commodity hedging funds held in offshore finance centres; through law enforcement agencies bothered about 'the' Mafia and international terrorist networks; to aid agencies troubled by the 'export' (that is, theft) of funds by Third World potentates into covert individual and corporate accounts held in offshore finance centres. Terrorist finance generates a threat to the security of international capital and the lives of financial services employees as well; so (to a greater extent than with drug trafficking or tax evasion, for example) self-interest may reasonably temper profit maximization if institutions believe that the identification of terrorist finance can protect them or activities in which they have a stake.[14]

The ideological and value threat of terrorism thus constitutes a distinction from organized crime and other 'threats to society'. One of the special features of terrorist fund laundering is that it explicitly aims to examine the proceeds of legitimate-source activity actually used or intended to be used for (rather than deriving from) a criminal purpose; in that sense, its closest analogues are (1) the corporate and political 'slush funds' used for transnational corruption and political finance, and (2) tax evasion on non-criminal activities. This broad approach is crucial if anything approximating a plausible effort is to be made in restricting terrorists' access to funds; though on a harm reduction model, it may make some sense to restrict flows to particular terrorist groups from particular sources without necessarily having a major impact on the totality of terrorist finance.[15]

This article shall review how the international 'community' strives to counter the anomic, crime-facilitative effects of globalization by rowing against the tide of economic liberalization in the name of global crime control and financial stability.[16] Thus, there is a sometimes faltering attempt to create a new world anti-crime order (of which measures against terrorism are a part) as a component of, or supplement to, the New World Economic Order. There will be a review of the growth of 'soft law' instruments and cascading peer group pressures and their gradual transforma-

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[14] This stake might include businesses or governments to which they have loaned money, whose security as well as whose business plans may be disrupted both by actual and fear of terrorism. Contrariwise, the reporting of suspected terrorist finance also can bring physical risks to staff should they be identified – directly or by logical deduction – as the source of the information.

[15] To avoid accusations of naivety, it is necessary to recognize that terrorist funding can come from the West as well as from the 'rogue states' defined by the US.

[16] A cynic might suggest that these controls are taken in the interests of Western capitalist security, but given the number of Third World countries devastated by the looting of both overseas aid and domestic assets by their corrupt potentates, the authors regard this as a very partial analysis.

tion into a mix of raising consciousness of mutual interdependence with economic and political sanctions to act against transnational corruption and transnational laundering facilities.

Money-laundering and anti-crime strategies

The regulation of the money trail relates to any crimes that require and/or generate significant crime proceeds requiring more than short-term storage. Drug trafficking was the precursor for international policing expansion by US agencies such as the DEA[17] and by the military and intelligence agencies in the post-Communist era, but though proactive 'special investigative methods' have expanded everywhere, none of them can plausibly prevent all drugs, people, or contraband smuggling. Therefore the attempt to monitor financial transactions and confiscate crime proceeds beyond the borders of individual governments was the obvious next key strategy in the transnational 'organized crime' containment programme.[18] Though it was never clear whether such monitoring and confiscation constituted a sufficient as well as necessary condition for success (nor how it would be identified if and when 'success' had been attained), success was believed to require a major global infrastructure of compatible legislation and mutual legal assistance both for financial investigation and for proceeds of crime restraint and confiscation. The US, supported from the start by Australia, France and the UK, was the principal enthusiast for anti-laundering measures to attack kingpins of the drugs trade but, as Gilmore has observed,[19] the extraordinary rapidity (less than two years) with which the 1988 UN Vienna Convention came into force is testimony to the power of drug issues in the political culture of nations around the world. Despite such political consensus, however, the G–7 took an early decision in 1989 to create a new (temporary) body, the Financial Action Task Force, rather than leaving it to the UN to serve as the efficient instrument of these anti-laundering measures. Since that date, measures to control the money trail have proceeded along two axes:

1. The increased drawing of financial institutions into playing public functions, via the imposition of requirements (a) to report suspicions and – just as

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[17] E. Nadelmann *Cops Across Borders* (University Park Pennsylvania State University Press 1993).

[18] *See* for recent developed notions of this, e.g., Office of National Drug Control, *National Drug Control Strategy* (Washington DC Office of national Drug Control Policy 2002); State, *Money-Laundering and Financial Crimes* (Washington DC US State Department 2001); Treasury, *The 2001 Money Laundering Strategy* (Washington DC US Treasury Department in consultation with the US Justice Department).

[19] W. Gilmore, *Dirty Money: The Evolution of Money Laundering Counter-Measures* (Strasbourg Council of Europe Publishing 1999, 2nd ed.).

significantly – to develop the capacity to form suspicions (via know-your-customer and other rules) on pain of imprisonment and corporate penalties, and (b) to report and not to deal financially with persons who appear on lists of 'banned persons', of which the most notable source is the US Office of Foreign Assets Control (OFAC);[20] and

2. The increased development of international norms for money laundering control at the level of the nation state via FATF and its regional complementary bodies in Asia-Pacific, the Caribbean, Europe and, most recently, Africa and South America, as well as via financial regulators.

There has been a shift from the initial exclusively drug focus in anti-laundering policy towards a focus on all-crime (though currently excluding tax crime) and transnational organized crime,[21] to which terrorism has been added explicitly in the aftermath of 11 September 2001.[22] As Levi[23] and Gold and Levi[24] observed in their

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[20] Of the many other lists, perhaps the most significant are those issued under the authority of the UN Security Council requiring the immediate (and indefinite) freezing of the assets of stipulated natural and legal persons. See in particular the 'Taliban' lists made under the authority of Resolution 1267 of 15 October 1999 and the 'Al-Qaeda' list mandated by Resolution 1333 of 19 December 2000. As explained elsewhere in this article, these lists are legally binding on all member States because they are measures taken under Chapter VII of the UN Charter.

[21] Prior to 11 September 2001, the money-laundering nexus had only intermittently sought to bridge crimes for economic gain with terrorism. The UK Prevention of Terrorism (Temporary Provisions) Act 1989 included several measures intended to clamp down on terrorist finance (and Northern Ireland legislation gave greater powers in the province), but the most explicit link came in June 1995 when President Clinton wrapped up terrorist threats with international organized crime when he told the UN that 'the threat to our security is not in an enemy silo, but in the briefcase or the car bomb of a terrorist. Our enemies are also international criminals and drug traffickers who threaten the stability of new democracies and the future of our children'. (President Clinton, Address at the United Nations Fiftieth Anniversary Charter Ceremony, San Francisco, 26 June 1995. Text available at <www.defenselink.mil/1995/s19950626-clinton.html>)

In Presidential Decision Directive [PDD] 42, dated 21 October 1995, President Clinton asserted that 'international organised criminal enterprises [...] are not only a law enforcement problem, they are a threat to national security'. In Executive Order 12,978 [21 October 1995, 1995 USCCAN B106], effective the same day *and never rescinded*, he declared a 'national emergency to deal with that threat'. Federal agencies were directed to take 'all appropriate actions within their authority to carry out this order'. The primary and over-riding common purpose of the Directive and the Executive Order was 'to protect the welfare, safety and security of the United States and its citizens', though there was some recognition of obligations to others.

[22] Prior to the 11 September terrorist attacks in the United States, the issue of terrorist financing had not assumed a position of prominence in the activities of the FATF, though it had in some individual jurisdictions such as Northern Ireland (*see* Levi and Osofsky, 1995). On 24 September the Ecofin Ministers of the 15 EU members called for the mandate of the FATF to be broadened so as to cover the terrorist issue. On 6 October 2001, G-7 finance ministers called upon the FATF to include specific treatment of terrorist funds in

studies of how suspicious financial transaction reports come to be constructed and followed through, few bankers know what types of crime – if any – their customers may be engaged in: with the exception of some ideologically or culturally sympathetic bankers and non-bank financial services such as money transmitters, this would apply *a fortiori* to terrorist finance. If clients fool bankers or lawyers into believing that at most, the funds constitute 'merely' tax 'dodging', then it is plausible that no suspicious transaction report will be made.[25] Therefore, it is only if all crimes are included within the obligation to report suspicions that the layer of rationalizations falls away (save, perhaps, for labelling the behaviour tax avoidance). Conversely, representatives from some offshore finance centres have expressed the view (in discussions with the principal author) that it is only if the drugs issue is split off from tax evasion (and, especially, from OECD measures against 'harmful tax avoidance') that effective financial services co-operation with anti-drug law enforcement will take place. At the time of writing, in the summer of 2002, FATF Member States are far from agreement over whether countries should be compelled explicitly to include tax offences as a predicate for money laundering.

One of the prime instruments of the New World Economic Order is the radical concept of mutual evaluation, which involves peer evaluation of both the enactment and implementation of legislation and other policy instruments. This represents a major departure from the traditional view that implementation of treaties and conventions was a purely domestic matter. Even though methodological coherence

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the current revision of the 40 Recommendations; to issue special guidance on the subject to financial institutions; and to develop a process to identify countries that facilitate terrorist financing and to propose a course of action to achieve co-operation from such jurisdictions. An emergency plenary meeting of the FATF was held in Washington DC on 29–30 October 2001. It agreed on eight special recommendations on terrorist financing and a plan of action 'to secure the swift and effective implementation of these new standards'. A declaration by the EU heads of state and the commission of 19 October 2001 called for 'effective measures to combat the funding of terrorism by formal adoption of the Directive on money laundering and the speedy ratification by all Member States of the United Nations Convention for the Suppression of the Financing of Terrorism. Moreover, the commitments made in the FATF, the mandate of which must be broadened, must be turned into legislative instruments by the end of the year', i.e., 2002.

[23] M. Levi, '*Pecunia non olet*: cleansing the money launderers from the Temple', in (1991) 16 *Crime, Law, and Social Change* 217.

[24] M. Gold and M. Levi, *Money-Laundering in the UK: an Appraisal of Suspicion-Based Reporting* (London Police Foundation 1994).

[25] The 1999 FATF interpretative note tries to find an intermediate position and to get financial and other regulated bodies to report suspicions even when a 'tax' explanation is given, at least where it is not obvious that tax evasion actually is involved. This states:

> 'In implementing Recommendation 15, suspicious transactions should be reported by financial institutions regardless of whether they are also thought to involve tax matters. Countries should take into account that, in order to deter financial institutions from reporting a suspicious transaction, money launderers may seek to state *inter alia* that their transactions relate to tax matters.'

and standardization remain underdeveloped, mutual evaluation has gained increasing popularity as a *method*; it holds out the promise of greater legitimation and 'buy in' potential than measures that are simply imposed, and thus it is not surprising that (with variations) such a process is built into all late modern regimes for dealing with corruption (Council of Europe 'GRECO' and OECD) as well as money laundering and proceeds of crime confiscation (Council of Europe, EU, FATF and the IMF).

Mutual evaluation and the Financial Action Task Force

(1) The Context

The increasing popularity of mutual evaluation processes at the international level owes much to the demonstration effect of the work of the Financial Action Task Force on Money Laundering (FATF). Since this body was created by the 1989 Paris Summit Meeting of the G–7, its membership has expanded to include 29 jurisdictions representing OECD countries, financial centre jurisdictions and (more recently) selected strategically important states drawn from previously underrepresented regions such as South America. It meets in plenary session several times each year, including one meeting held in the country of the presidency (which rotates on an annual basis). Though located physically within the OECD (and being a significant component of its website), the FATF is not formally part of that or any other international institution, nor is it a creature of treaty. Rather it is the steering body of an *ad hoc* grouping of governments and others with a single issue agenda – money-laundering controls – which can contain great complexity given the range of activities with which that agenda intertwines. Regulated laundering potentially includes the proceeds of all crimes for gain and even, in the case of terrorism and some cyber crimes, of the proceeds of both criminal and non-criminal activities committed for ideological rather than material gain. FATF attendees consist mainly of financial regulators and law enforcement representatives, alongside senior civil servants normally drawn from Treasury and Justice Departments.

The FATF aims to give effect to three central objectives:

a) the strengthening of the criminal law and securing other improvements in national legal systems;
b) the strengthening of international co-operation; and
c) the enhancement of the role of the private sector in efforts to prevent and detect money laundering. It has done so primarily by making and reviewing (in 1995–6 and again 2001–2) its 40 recommendations or action steps which were first elaborated in its 1990 Report.[26]

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[26] *See* Gilmore *supra* note 19, and M. Pieth, *Die Bekämpfung der Geldwäscherei – Modellfall Schweiz?*, (Basel and Frankfurt am Main 1992).

i) Monitoring implementation by FATF members

In the conclusion to the 1990 report it was recognized that 'a regular assessment of progress realised in enforcing money laundering measures would stimulate countries to give to these issues a high priority...'.[27] Two principal procedures have since been developed to this end:[28]

1. a process of annual *self assessment*, originally based on two detailed questionnaires circulated to each member country or territory and then analyzed for compliance with the 40 Recommendations. The self-assessment system has been refined on several occasions, adding to the number of more objective items and then, after the general revisions of 1996, extending questions on the laundering of non-drug crime proceeds. 'Enhanced self-assessment' procedures were agreed to at the September 1999 FATF plenary, and two alterations are particularly significant, namely the removal from the self-assessment process of non-mandatory or vague recommendations and a more focused review on areas of partial or non-compliance. FATF also tried to simplify and streamline the process, shortening and combining the previous questionnaires.[29] The self-assessment procedure continues to contain divergent interpretations of some recommendations, but FATF members themselves consider there to have been a significant improvement;[30]
2. Unprecedented in international practice in the criminal law sphere at the time, FATF II decided to supplement self assessment with a system of *mutual evaluation*, examined by selected other members of the FATF, according to an agreed protocol for examination and agreed selection criteria. The initial round of mutual evaluation, the major purpose of which was to assess the degree of formal compliance with the recommendations, was completed in 1995. A second round, with a focus on the effectiveness in practice of the measures taken by members, was initiated in the following year and was completed in mid–1999. The remit here also included an assessment of 'any follow-up action taken in response to the suggestions for improvement made in the first round'.[31] The third round will focus 'exclusively on compliance

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27 W. Gilmore (ed.) *International Efforts to Combat Money Laudering*, (Cambridge Grotius 1992) at p. 24.

28 A third but little used device is known as a cross-country review. This is intended to provide an analysis of the implementation of specific recommendations by the membership as a whole.

29 'FATF Annual Report 1999–2000' (Paris FATF 2000) at p. 20.

30 *See*, e.g., 'FATF Annual Report 2000–2001' (Paris FATF 2001) at pp. 13–14. The FATF has decided to complete an early self-assessment exercise to ascertain the degree of compliance by its members with the new recommendations on the financing of terrorist activities.

31 *See* 'FATF Annual Report: 1996–1997' (Paris FATF1997) at p. 10. Although there were only 26 members in the relevant period, a total of 28 evaluations were undertaken; this

with the revised parts of the recommendations, the areas of significant deficiencies identified in the second round and generally the effectiveness of the counter-measures'[32] but because of the phasing of the evaluation cycle in relation to the revisions, evaluation criteria are always the product of the previous set of recommendations rather than the most recent agreed improvements.

Mutual evaluation is, in essence, an international system of periodic peer review under which each member is subject to a form of on-site examination.[33] As Patrick Moulette, the current FATF executive secretary, has pointed out: 'Each evaluation team usually comprises three examiners (four for the larger countries) of different nationalities whose expertise must cover all aspects of the fight against money laundering. Each team therefore comprises a legal expert (a judge or justice ministry representative), a financial expert (from a finance ministry, central bank or regulatory authority for the financial sector), and an operational services (law enforcement) expert (from the police, the customs or an agency receiving and analysing suspicious transaction reports, such as FINCEN in the United States).'[34] Formally, the team of examiners is selected by the FATF president (in reality, by the secretariat), and thereafter, the country to be examined is advised as to both the composition of the team and the dates of the on-site visit.[35] While it is 'an underlying principle of the mutual evaluation process[...]that all members should participate in the process', this goal was not fully satisfied in the first round. In the second, all members provided at least one evaluator although efforts to secure a better balance in terms of overall involvement were not completely realized.[36]

The examination team visits the country in question, normally for three days,

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included assessments of Aruba and the Netherlands Antilles, which are separate constituent parts of the Netherlands which is a member of the FATF.

[32] 'FATF Annual Report: 1997–1998 (Paris FATF1998) at p. 8

[33] For this reason (among others), the Multilateral Evaluation Mechanism (MEM) being operated by the Inter-American Drug Abuse Control Commission of the OAS to monitor compliance with the anti-drug strategy of the hemisphere cannot be regarded as a system of mutual evaluation as that term is used in this paper. In the CICAD process, each evaluated country provides data in response to a standard questionnaire as well as a paper on its drug problem on the basis of which a governmental expert's group, representing all 34 Member States, drafts jurisdiction specific reports including recommendations for improvement. There is no on-site visit element to the process (which also excludes sanctions of any kind). However, the process does include detailed coverage of the issue of money laundering and extends to the monitoring of the implementation of country specific recommendations.

[34] P. Moulette, 'The Mutual Evaluation Process of the Financial Action Task Force on Money Laundering' (PC-R-EV(98)1, 29 January 98) (Strasbourg Council of Europe 1998) at p. 25.

[35] 'Review of FATF Anti-Money Laundering Systems and Mutual Evaluation Procedures 1992–1999' (Paris FATF 2001) at p. 37.

[36] Ibid. at pp. 37–38.

during which time it meets those ministries and institutions (public and private) with a mandate or substantial practical involvement in the anti-money laundering sphere. The team then prepares a detailed report, including the identification of deficiencies and suggestions for improvement, which is discussed in and adopted by a plenary meeting of the Task Force. Although each such report is and remains confidential, agreement was reached to make executive summaries public. These are contained in the annual reports of the work of the FATF, which can now be accessed by the general public on the Internet.

Detailed procedures, rules and expectations have been developed to govern all of the stages of this innovative and intrusive process,[37] the comprehensive exposition of which lies beyond the scope of this article. However, while the system has evolved over time, a significant effort has been made from the outset to ensure equality and consistency of treatment of evaluated jurisdictions and a recent *internal* review has concluded that, by and large, these goals have been met.[38]

Although the self assessment and mutual evaluation procedures were developed with existing Member States and territories in mind, they have been used in two situations which were not fully envisaged at the outset; in relation to institutional members and in the context of the recent limited programme of geographic expansion of membership. The European Commission and the GCC are full participants within the FATF, but – perhaps significantly for anti-terrorism purposes – while all fifteen European Union States are members, none of the six members of the GCC (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates) are Task Force participants in their own right.

Over time the absence of regular monitoring procedures for these countries emerged as a source of concern, connected at least in part to terrorism and the fear thereof. In May 1997 agreement was reached on how to carry out an evaluation of the measures taken by them. The first step was to distribute self-assessment questionnaires. Unfortunately the partial and incomplete nature of the subsequent returns made it impossible to form a view as to the state of compliance. Consequently, it was agreed that a high level FATF mission would be despatched to the Council Secretariat to seek further information and 'to discuss how to improve the implementation of effective anti-money laundering systems in the Gulf region'.[39] This mission eventually took place in January 1999 and resulted in a commitment to provide all outstanding information required for the self-assessment exercise. In addition, the discussions set in train a process which was to result in all GCC members save Saudi Arabia agreeing to undergo mutual evaluation.[40] However, 'given the unique position of the GCC[...]it was decided

[37] Ibid. at 35–42; R. Sansonetti, 'The Mutual Evaluation Process: A Methodology of Increasing Importance at International Level' in (2000) 7(3) *Journal of Financial Crime* 218 at 219–220.

[38] *See* FATF *supra* note at p. 13.

[39] *See* FATF *supra* note at p. 11.

[40] 'FATF Annual Report: 1998–1999' (Paris FATF 1999) at p. 30.

that mutual evaluations of its member States should be a joint FATF/GCC process'.[41] The series of on-site visits commenced in June 2000 and all five had taken place prior to June 2001. Similarly, the same five states have completed the self-assessment exercise and responsibility for future such surveys has been assumed by the GCC Secretariat.[42]

The second innovative context in which the process of mutual evaluation has been employed is in the vetting of new applicants for membership. In June 1998, the FATF decided to permit the first limited expansion of its membership since the early 1990s. Here the focus was to be on broadening the geographic base to include 'strategically important countries which already have certain key anti-money laundering measures in place (criminalization of money laundering; mandatory customer identification and suspicious transactions reporting by financial institutions), and which are politically determined to make a full commitment towards the implementation of the forty recommendations, and which could play a major role in their regions in the process of combating money laundering'.[43] The subsequently elaborated criteria for admission included a political commitment 'to undergo annual self-assessment exercises and two rounds of mutual evaluations'.[44]

Pursuant to this policy of strategic influence, Argentina, Brazil and Mexico, which had been admitted to observer status in September 1999, had their anti-money laundering systems positively evaluated (on the limited range of 'fundamental' principles) the following year and were admitted to full membership in June.[45]

Surprising those sceptics who regard mutual evaluation as a 'stroking' cartel, the prospect of a mutual evaluation visit frequently acts as a catalyst for governmental action. As Dilwyn Griffiths, the then FATF executive secretary, noted in his address to the 1993 Oxford Conference on International and White Collar Crime: 'I do not think that progress in implementing the recommendations would have been as swift and substantial without it. Countries are concerned to have a good story to tell examiners and there is thus an impetus to get things done which would otherwise be lacking'.[46] The detailed reports indicate often quite extensive areas in which improvements in laws, regulations and practices could and should be made. One of the functions of the second round (which will also be a feature of the third) is to

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[41] *See* FATF *supra* note at p. 24.

[42] *See* FATF *supra* note at pp. 14–15; Saudi Arabia has since submitted a self-assessment to the Secretariat of the GCC.

[43] *See* FATF *supra* note at p. 8.

[44] *See* FATF *supra* note at p. 7.

[45] Potential new members include Russia, India, China and South Africa. A curious feature of this list is that Russia, as will be seen below, is presently on the FATF blacklist of NCCTs.

[46] D. Griffiths, 'International Efforts to Combat Money Laundering: Developments and Prospects', in *Action Against Transnational Criminality: Papers from the 1993 Oxford Conference on International and White Collar Crime* (London Commonwealth Secretariat 1994) p. 11 at p. 13.

check on the measures adopted in response to the deficiencies identified in the earlier report.[47]

While these periodic reviews have been sufficient to secure substantial improvements in many FATF members, compliance with the forty recommendations is incomplete. For this reason, the Task Force has formulated a policy (unchanged since 1994) which reflects a graduated approach. At its most basic and frequently invoked level, this takes the form of a requirement for the country concerned to make periodic reports. As one insider has noted: 'when a country fails to comply with a large number of FATF recommendations, we initiate a follow-up procedure, a major feature of which is the obligation to submit regular progress reports on the implementation of the recommendations. There would be no point in completing an evaluation and then ignoring the result.'[48]

When this tactic for increasing peer pressure fails, additional steps may be taken, as happened with Turkey in 1995—96. Its failure, *inter alia*, even to enact basic anti-money laundering legislation had placed it in a position of serious non-compliance with the recommendations. Accordingly, the FATF president first wrote to relevant ministers in that member country expressing concern. Subsequently, a high level mission was sent to Ankara to encourage the government to take urgent action or face the possibility of having more serious steps taken against it. Finally, on 19 September 1996, the FATF issued a public statement in which it invoked its so-called Recommendation 21 procedure against a member for the first time.[49]

This prospect of financial near-paralysis seems to have had the effect of stimulating the attention of policy makers and others in Ankara, and in November 1996 Turkey enacted and brought into force the Law on the Prevention of Money Laundering. The Recommendation 21 measures were then lifted.

Concerns over partial non-compliance by other FATF members have been frequently expressed. Of these, the most serious to date related to Austria, which had declined to abolish anonymous passbooks for Austrian residents in spite of the fact that this was regarded as a clear breach of the requirements of Recommendation 10. As a result, the FATF policy was triggered. The president first wrote to the Austrian Government about this matter, but when this did not lead to change, a high level

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47 A recent FATF internal review reveals significant differences in the level of positive responses to such recommendations from the first round: 'When averaged out across all the members[...], approximately the same number of suggestions were implemented as those that were not' (*see* FATF *supra* note at p. 34).

48 *See* Moulette *supra* note at p. 27)

49 Recommendation 21 of the FATF states: 'Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.'

mission was dispatched to Vienna without success. The Task Force invoked Recommendation 21 and called on financial institutions to give special attention 'to transactions with bank cheques issued by Austrian banks and denominated in Austrian schillings, as these funds might be the result of the closing of anonymous passbook savings accounts'. In the news release of 11 February 1999 which announced this measure, the FATF indicated that it would continue to monitor the situation.

When even this robust (in international relations terms) stance failed to bring about the desired change in policy the Task Force, at its February 2000 meeting, took the unprecedented step of agreeing – and agreeing publicly – to suspend Austria from membership unless, by 20 May:

'1. The Austrian government issues a clear political statement that it will take all necessary steps to eliminate the system of anonymous passbooks in accordance with the 40 FATF Recommendations by the end of June 2002.
2. The Austrian government introduces and supports a Bill into Parliament to prohibit the opening of new anonymous passbooks and to eliminate existing anonymous passbooks in accordance with the above paragraph.'[50]

Whether to mitigate public shaming or from fear of economic consequences, the Austrian government soon took the required steps, leading to the lifting of the threat of suspension.[51]

However, questions have been raised about the willingness of FATF to apply consistent principles to more powerful nations than Turkey or Austria: the prime candidate here is the US, whose 1997 and subsequent evaluations might appear to merit more severe treatment than it has received.[52] The operation of the non-compliance policy 'relies on a combination of the compliance findings under mutual evaluation reports and the self-assessment exercise',[53] though both the non-compliance strategy and mutual evaluation have had the original 1990 recommendations as the frame of reference whilst self assessment relates to the recommendations as amended in 1996. These should however be brought into alignment in the course of the third round (although as noted earlier, the next round will also be out of 'sync' with the new recommendations).[54]

ii) FATF-style regional bodies

In governmental circles in the major economies, the FATF experience with mutual evaluation has been widely perceived as a success. A recent internal review concluded

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[50] OECD News Release, Paris, 3 February 2000.

[51] *See* FATF *supra* note at pp. 20–22; K. Alexander, 'The International Anti-Money Laundering Regime: The Role of the financial Action Task force' in (2000) 1(1) *Financial Crime Review* 9 at 19.

[52] *The Economist*, 23 June 2001, at p. 801.

[53] *See* FATF *supra* note at p. 43.

[54] *See* FATF *supra* note at pp. 17–18

that the process had 'proven to be, by and large, an effective and efficient one, which utilises relatively few resources to obtain significant results'.[55] A broadly similar view has been taken in the literature.[56] Sansonetti noted that the process 'is one of the cornerstones of the FATF and has proven to be the most successful element of its activities'.[57] The Task Force has created an ever-growing number of regional anti-money laundering bodies, most recently in Africa and South America. These regional structures differ in practice, procedure and emphasis in response to regional needs, practical local realities and political sensitivities. Similarly, the nature and intensity of the relationship with the FATF itself differs from case to case, but there is always some involvement with the FATF secretariat, and such bodies as the Offshore Group of Banking Supervisors conduct joint OGBS/FATF evaluations. The rather awkwardly entitled Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (PC-R-EV) is supported by the Secretariat of the Council of Europe in Strasbourg, and its processes of self assessment and mutual evaluation are undertaken against a more extensive set of anti-laundering standards than those applied to FATF members. Thus, in addition to the Forty Recommendations, participating countries are assessed in relation to their compliance with the 1988 UN and 1990 Council of Europe conventions, and the 1991 EC Directive.[58] All members report back to a plenary meeting one year after being subject to mutual evaluation on their own progress made towards implementation of the recommendations contained therein.[59] Members cannot be suspended, though the Recommendation 21 procedure for 'special attention to transactions' may be applied.[60] At its January 2001 plenary, it was agreed that in principle the second round of evaluations, which has now commenced, should include at least one FATF evaluator in each team.[61] Clearly, the political principle is to get Member States to 'buy in' to the legitimacy of the process and to the outcomes generated by that process under the watchful eye of FATF.

The June 1996 annual report noted that 'where a non-member has successfully gone through a mutual evaluation by an international organisation, using a methodology in line with FATF standards, and is in compliance with the FATF forty recommendations according to this evaluation, that non-member should not fall under the policy outlined in Recommendation 21'.[62] Conversely, a mutual

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[55] *See* FATF *supra* note at p. 49.
[56] S. Morris, 'Mutual Evaluation: An Approach to Achieving Fairness and Progress in Implementing International Agreements' in (1999) 15(7) *International Enforcement Reporter* 285; S. Morris, 'Mutual Evaluation Systems' in (2000) 15(4) *American University International Law Review* 792.
[57] *See* R. Sansonetti (2000) at p. 218.
[58] 'PC-R-EV: Annual Report 2000' (Strasbourg Council of Europe 2000) at p. 41.
[59] Ibid. at pp. 5, 8.
[60] 'PC-R-EV: Examiners Guide' (Strasbourg Council of Europe 2000) at pp. 12–13.
[61] *See* Council of Europe *supra* note at p. 6.
[62] 'FATF Annual Report: 1995–1996', (Paris FATF 1996) at p. 17.

evaluation by such a body which revealed substantial non-compliance could be expected to make the imposition of this measure by the FATF even more likely. However, the Non-Cooperative Countries or Territories (NCCT) initiative has called this into question. The Task Force established a working group which afforded priority to the elaboration of criteria to be utilized in defining non-cooperation and in establishing the process through which to identify specific jurisdictions considered to meet the criteria in practice. Central to it are some 25 criteria – a distillation from and adaptation to the 40 Recommendations – which define non-cooperation for these purposes.[63] It also established a review process which was intended to result in the production of a 'black list' of NCCTs. Finally, for present purposes, it identified a number of steps – including the imposition of sanctions – to encourage progress from those so listed.

The Task Force undertook country specific reviews (which differed substantially from the mutual evaluation process in both nature and scope) over the following months the outcome of which was contained in its report of 22 June 2000.[64] This created, *inter alia*, a 'black list' of 15 jurisdictions. While the majority were 'offshore' centres in the Caribbean and the Pacific, it also embraced states as diverse as Israel and Russia. Those listed were strongly urged to address identified deficiencies in their systems. As an initial encouragement to do so, the Task Force (unexpectedly) invoked its Recommendation 21 procedure for all on the list. It also warned that if they failed to respond in a positive manner, consideration would be given to the adoption of counter-measures. In July these developments were warmly welcomed by the G–7. Heads of State and Government reiterated their willingness to act together, in appropriate cases, to impose such measures 'including the possibility to condition or restrict financial transactions with those jurisdictions and to condition or restrict support from IFIs to them'.[65]

In the course of the following year, the FATF articulated its policy on the removal of jurisdictions which make sufficient progress from the list, reviewed (and listed) additional non-member states and territories, and paved the way for the imposition of co-ordinated measures against certain delinquents,[66] a step finally taken for the first time in early December 2001, but restricted to the Pacific Island micro-State of Nauru.[67]

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[63] *See* FATF *supra* note at pp. 18–19.

[64] 'Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures' (Paris FATF 2000).

[65] Statement of the G-7.

[66] *See* FATF *supra* note 35; and FATF, 'Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures' (Paris FATF 2001).

[67] At the joint Ecofin and Justice and Home Affairs (JHA) Council held in Luxembourg on 16 October 2001, all EU members agreed to apply countermeasures 'in concert and concomitantly'. All undertook to ensure that they had the necessary legal powers in place by 1 January 2002.

This plainly represented a cultural shift, in trying to achieve results from multilateral efforts without first or afterwards requiring global consensus. Needless to say, virtually every aspect of this initiative has been the subject of criticism and it has proved to be extremely controversial within the FATF-style regional groups.[68] Expressions of significant discontent in this and other similar contexts have been acknowledged by the Task Force. In the words of the June 2001 annual report:[69]

> [. . .] the FATF recognises that this effort has[. . .]had the unintentional effect of straining the relationship between the FATF and the FATF-style regional bodies. The FATF has therefore discussed possible solutions to improve its relationships with the FATF-style regional bodies in the NCCT area. Possibilities include giving greater weight to the mutual evaluations conducted by FATF-style regional bodies when assessing potential NCCTs, provided the regional body takes into account the 25 NCCT criteria as part of its mutual evaluation process.[70]

Both the PC-R-EV and the FATF have agreed to do this: notwithstanding the fact that there is no doubt that certain of those criteria, while consistent with the 40 Recommendations, go beyond those standards as currently drafted and therefore impose higher standards than those applied to 'full' FATF members.[71]

iii) The influence of the FATF model beyond money laundering

Given the fact that all fifteen Member States of the EU are FATF participants, it is not surprising that the positive experience of the mutual evaluation of anti-money laundering measures should have resulted in discussions of how it could and should be used in the work of the union in other justice and home affairs spheres. In the mid–1990s, the increased focus on the threat posed by organized crime provided that opportunity.

The high level group set up in 1998 recognized that, while formal participation in such treaty regimes was a necessary condition for the provision of specific forms of international co-operation, it was not, in itself, sufficient to ensure effective and co-ordinated action. For this reason, Political Guideline 3 requested the Council to establish a mechanism, based on the experience with the model developed in the FATF, for mutually evaluating the manner in which instruments concerning international co-operation in criminal matters are applied and implemented in each of the Member States. Elsewhere the principles on which this peer evaluation process were to be based were set out in summary form. It was recommended that mutual

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[68] Cf. Council of Europe *supra* note 58 at pp. 5–7.

[69] The FATF decided in September 2001 to conduct a self-assessment exercise to gauge the extent to which its own membership complies with the NCCT criteria. No decision has yet been taken to integrate this equivalence into the next round of mutual evaluations.

[70] *See* FATF XII *supra* note at p. 11.

[71] *See* Council of Europe *supra* note 58 at pp. 6–7; *see* FATF *supra* note at p. 5.

evaluation 'should as a priority be carried out in respect of judicial co-operation and could, if the experience proves positive, be extended to other areas of implementation'.[72]

While the FATF precedent was clearly influential in the formulation of the text of the Action Plan (and is specifically invoked in the preamble), only two (Ireland and the Netherlands) FATF reports have been made public by those countries,[73] whereas every member of the EU has elected to permit publication in full of the country reports produced during the first round. In this respect, there is a parallel with Council of Europe GRECO teams[74] discussed below. Within the OECD corruption context, unlike FATF, the full reports are required to be made publicly available.

At a more substantive level, the follow-up and compliance procedures of the FATF are more extensive and firmly established than those of the EU. This is partly explained by the fact that, while it has a single-issue agenda, the Joint Action is intended to deal in sequence with diverse criminal justice issues. Nevertheless, proposals have recently been made by the presidency that a reporting system be established through which each jurisdiction would describe, in writing, 'either the action taken since the evaluation to remedy the problems pinpointed by the experts, or the reasons for their inaction'.[75] The presidency suggested that, subject to cost, consideration be given to extending such evaluations to the candidate countries for admission to the EU.[76]

The strategy for the prevention and control of organized crime for the beginning of the new millennium published in the Official Journal in May 2000 calls for highest possible priority to be given to the strengthening of the mutual evaluation process and its utilization for the most important issues concerned with the prevention and control of organized crime. Here a balance should be sought between relevant law enforcement, judicial and prosecutorial concerns. Furthermore the Council was urged to consider the possibility of supplementing it 'with a simplified and expedited mechanism, to be applied to the implementation by Member States of specific undertakings. This simplified and expedited mechanism could be used for the evaluation of specific areas of implementation or for questions which necessitate rapid evaluation'.[77] However, without overstating and idealizing the 'one culture'

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[72] Council action plan to combat organized crime of 15 August 1997, OJ 1997 C251/1 at p. 11.

[73] *See* FATF *supra* note at p. 42.

[74] Technically, a country can object to having its report published but to date (Spring 2002) this has not happened, as a culture has developed of making them open.

[75] 'Note from the Presidency: Final report on the first mutual evaluation exercise – mutual legal assistance in criminal matters' (CRIMORG 12/EJN5) (Brussels Council of the European Union 2001) at p. 30.

[76] Ibid.

[77] The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium, of 3 May 2000, OJ 2000 C 124/1 at pp. 12–13.

view of Europe, these measures arise within the context of fairly equal countries: post-enlargement, far greater heterogeneity of culture, income and state capacity will exist.

Mutual Evaluation and the OECD's instruments against transnational corruption

The Context

The procedures of mutual evaluation have been further developed in an area closely related to money laundering and containing some overlaps with it: the harmonization of international standards against corruption, promoted primarily by the OECD[78] and the Council of Europe.[79] One component of this is the application of money laundering legislation as a lever for freezing and repatriating embezzled and defrauded public funds as well as bribe payments to senior public officials in the victim countries, especially in the South and the East.

Again, the technologies applied to make international instruments work are closely related to the context of the initiative. In the case of the OECD's anti-bribery initiative, the US has initially been the driving force, even if for reasons that differ from those that drive its interests in combating money laundering. The Foreign Corrupt Practices Act (FCPA), enacted under the Carter administration as part of the post-Watergate clean-up,[80] left US-business at a competitive trade disadvantage since their major competitors in Europe and Asia were not ready to follow suit in the 1970s.[81] However, towards the end of the 1980s the Republican administrations under Reagan and Bush began to tone down the FCPA.[82] In an effort to shift responsibility for what seemed to be a departure from a moral approach to international business, the first Bush administration sought a clear decision within the OECD. However, quite unexpectedly, instead of refusing the US initiative, the OECD Working Group on Bribery (WGB) decided to outlaw transnational corruption. The example of the FATF greatly helped to develop a flexible soft-law

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[78] OECD: Revised Recommendation of the Council on Combating Bribery in International Business Transactions, adopted on 23 May 1997, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997, signed on 17 December 1997.

[79] Council of Europe: Criminal Law Convention on Corruption, ETS No 173, 27 January 1999, Civil Law Convention on Corruption, ETS No 174, 4 November 1999.

[80] ABA (ed.), *The Foreign Corrupt Practices Act: How to Comply Under the New Amendments and the OECD Convention*, (California 19 February 1999).

[81] An early attempt of the UN to co-ordinate the efforts of the Convention was abandoned in 1979 after there was a failure to agree.

[82] Cf. the amendments to the FCPA of 1988.

approach in the years between 1989 and 1994, with the drafting of an openly worded recommendation. The process of toughening up the language in the years up to 1997 demonstrates the ambiguous nature of such collegial participant groups: the intergovernmental process leaves national governments totally outside until they are suddenly confronted with a fairly concrete text and asked to take legal action. The text is only politically, not legally, binding, but its implementation will be forced along by a very strong lobby of peers. In May 1997, some European countries (especially France and Germany) sought to slow down or derail the initiative by substituting for the collegial 'soft law' procedures the more formal negotiated rules required for a legally binding convention. The OECD, an institution hitherto unaccustomed to drafting conventions let alone criminal law treaties, countered by rewriting part of the recommendation into a binding text and negotiated the final treaty in a matter of six months. Whereas, as was noted above, the FATF integrated its members' standards into regional and national texts to be applied both inside and outside the organization, the OECD's peer group amalgamated soft law and convention texts and appended an evaluation process to enforce the implementation of this mix, but only on its members.[83] Shortly afterwards, the Council of Europe followed suit by pursuing an equally mixed agenda of guiding principles and criminal and civil law conventions among its GRECO members.[84]

Different from the FATF and also from most international organizations dealing with corruption, the OECD is totally focused on a very specific goal: to create a level playing field for exporters and investors worldwide[85] by collectively-unilaterally[86] banning the bribery of foreign public officials and related accounting offences as well as money laundering by natural and corporate persons domiciled in industrialized states. Caught in a kind of 'prisoner's dilemma', states had to choose whether to go ahead and expose industries domiciled in their territories to the risk of severe criminal or administrative action, or to risk public stigma and marginalization as states tolerant of corruption. Such pressure has taken on formidable forms and – to a greater extent than the FATF NCCT initiative, for example – has been directed towards changing the legislation and behaviour of the core members of the Club.

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[83] Article 12 of the bribery convention specifically provides for monitoring and follow-up to be undertaken in the framework of the OECD Working Group on Bribery (WGB). The terms of reference of the WGB in turn make provision for systems of both self- and mutual evaluation.

[84] The 1998 agreement establishing GRECO contains detailed provisions on the mutual evaluation procedures that were to be utilized, so these are less flexible than the OECD arrangements.

[85] The OECD Member States represent 70 per cent of world exports and 90 per cent of foreign direct investment. The US trade representative estimated the value of the OECD convention to the US at 30 billion USD per annum in potential trade gained from the prevention of transnational bribery by its competitors.

[86] Cf. for this approach M. Pieth, 'The Harmonization of Law against Economic Crime' in (1998/99) *European Journal of Law Reform* 527 at 535 et seq.

Targets for such high-visibility pressure have included France, Germany, Japan and the UK.[87]

Under this high-profile media and political reputational spotlight, it is not surprising that the OECD convention was implemented even more quickly than the UN drugs convention: it entered into force barely a year after its signature and two years later, all signatories have ratified, and thirty out of thirty-five members have implemented the standard in national law. This rapid development may suggest a sense of the pressure applied amongst Member States, a pressure intensified after the key G–7 countries had decided to change their own legislation.

The international significance of the FATF precedent

The significance of the rise and rise of mutual evaluation processes of the FATF type at the international level should not be underestimated. The notion that, to join a quasi-club within the international community and to be considered acceptable to responsible international society, one had to submit to periodic on-site inspection by one's peers, constituted a radical departure from the orthodoxy of international affairs, where considerations of autonomy and sensitivities about territorial sovereignty have traditionally dominated governmental thinking. Intrusive verification procedures are, of course, not unknown. Of these, perhaps the most comprehensive are to be found in the sphere of arms control and disarmament; the ultimate form of which to date was provided for in the text of the 1993 UN Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction.

However, even in the sphere of the monitoring of the implementation of legal obligations enshrined in international treaties, on-site procedures are very much the exceptions which prove the rule. More commonly, multilateral treaties will contain either no or relatively formal monitoring procedures allied with weak dispute settlement procedures: an approach well illustrated by the 1988 UN drug trafficking convention.[88] In the case of the FATF's efforts to monitor compliance and

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[87] The then German minister of economy was exposed in the international media as condoning international corruption for delaying the agreement to the new text. The UK has been officially and publicly criticized for its unwillingness to legislate in time and representatives have gone as far as to discuss economic sanctions against British companies. Japan has been asked to redraft its new law due to serious 'misunderstandings', and in late 2001, the diet was in the process of adopting new additional legislation to complement the first version of three years ago. In the case of France, the WGB intervened during the primary legislative process itself and asked for changes to be made between the first and second reading. After some serious political haggling, essential changes were made.

[88] W. Gilmore (1993) at pp. 38–41.

implementation of its 40 Recommendations, they take the form of 'soft law' and are not formally binding as a matter of international law. As noted earlier, its package of counter measures is not contained in a treaty text to which its members have subscribed (though some of the required or suggested measures are embodied, at least in part, in other treaty texts). While some recommendations may have crystallized into rules of customary international law, many must continue to be regarded as lacking any obligatory legal effect, whatever may be the political and economic effects of non-compliance.

The importance of the international precedent set by the FATF (and, at least on paper, by certain of the regional anti-money laundering groupings) is further underlined by the fact that the membership agreed to a practical graduated procedure (of which the imposition of Recommendation 21 measures[89] and the threat of expulsion are particularly noteworthy) through which their own compliance with the agreed strategy can be encouraged if not enforced. It is rare for countries to accept the concept of the imposition of quasi-sanctions for failure to implement non-legally binding standards, and this indicates the power of 'soft law' when combined with heavyweight political push.

The Security Council has the power to impose sanctions under Chapter VII of the UN charter in order to maintain or restore international peace and security. In the aftermath of the terrorist attacks on the US on 11 September 2001, such powers were used to prevent and suppress the financing of terrorist acts and to require the freezing, without delay, of terrorist funds (Security Council Resolution 1373 (2001)). Notwithstanding the view of the Council that there is a close connection between international terrorism and, *inter alia*, drugs, money laundering and organized crime,[90] the opportunity to utilize its powers against other criminal suspects in the absence of such a demonstrable terrorism nexus is severely restricted by both technical legal and political considerations.

In large measure because of the positive demonstration effect of the FATF precedent, the making of provision for mutual evaluation of the implementation of international commitments in the area of financial crime has become commonplace. Indeed, in certain institutional contexts it has become the new orthodoxy. This is, in turn, well illustrated in the practice of the Council of Europe, where the firm expectation has emerged that international legal instruments adopted in pursuance of its programme against corruption will make specific provision for the monitoring of implementation through GRECO.[91]

Though some few communist ideological insurgents remain (e.g. FARC in Colombia) and the G–7 may reasonably fear Islamic anti-capitalist as well as anti-globalization campaigners, anti-communism may no longer be as necessary because

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89 *See supra* note 13.

90 This is too large an issue to be dealt with here, but some groups fund terrorist activities from crime, while others may do so wholly or partially from legitimate business activities.

91 *See*, e.g., Article 24 of the Council of Europe Criminal Law Convention on Corruption.

there are no plausible alternatives to capitalism, at least in non-theocratic States. Bodies such as FATF where voting powers are widely distributed cannot be a simple mechanism for the pursuit of US-only, UK-only or France-only 'threat reduction'. An authentic reason to take action outside the borders of the state is provided by the (correct) analytic construction that the continuing existence of places to hide and cleanse money is a prerequisite for a continuing transnational crime enterprise trade. Putting pressure on all governments to comply has both symbolic as well as direct instrumental purposes. The term 'mutual evaluation' will survive because it serves the purpose of making international relations look voluntary; the extent to which this is and will be seen as being mystificatory, and by whom, depends both on how the major G–7 countries behave (in whatever international body they are operating) and on how legitimate both the acts and the process are seen by those who are members of regional/international bodies and those who are not.

At least three aspects of the expansion of globalized modes of regulation (including mutual evaluation) may give cause for concern. First, such expansion may erode or side-step some essential principles of the rule of law, not because it is involuntary but because it shows a lack of interest in classical principles of criminal law. Secondly, it is not clear what, if any, limits there are to this pragmatic expansionism (and the implementation 'assistance' that often accompanies it). And thirdly, the soft focus of mutual evaluation may conceal a tougher underbelly of hegemony and lack of democratic control.[92] It is difficult to see what sort of democratic argument would support the right of Third World élites to receive bribes from the West against the economic interests of their nations. However, if the economic activities of independent states are defined as illegitimate facilitators of 'the enemy'[93] that 'require' disablement in the 'Wars' on organised crime and terrorism, this poses obvious dangers for the traditional rights of minority nations who are cajoled or threatened into submission.[94] A sense of grievance is especially likely when FATF member countries are *not* sanctioned for the same practices that would lead less powerful nations to be blacklisted. This may be politically tempting but it looks like the sort of (often unconscious) preference for symbolic victories over real impact that has bedevilled the 'War on Drugs' since its inception; if the UK, US or other powers are allowed not to identify beneficial owners, but the OGBS and smaller economies are required to identify them on pain of economic sanctions, how can the claim to effectiveness – whether as a motivation or as an effect – be justified? A similar situation arises with requirements on European but not American

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[92] *See* Pieth *supra* note at pp. 540–5.

[93] J. Blum et al., *Financial Havens, Banking Secrecy and Money-Laundering* (New York United Nations 1998); M. Levi and M. Maguire, 'The Identification, Development and Exchange of Good Practice for Reducing Organised Crime' (Report for Falcone Programme, European Commission, 2001 unpublished).

[94] It can become a slippery slope on which any obstructions to smooth co-operation are deemed to justify intervention and sanctions.

accountants and lawyers to report suspected transactions. The imposition of reporting obligations on lawyers flows from the new directive and (at least until the revision of the 40 Recommendations) does not form a part of the FATF package. Consequently, the sanctions against non compliance does not apply to this issue for EU members at present. Thus, mutual evaluation is a very useful process to international bodies who are concerned with effectiveness (or rather, efficiency and coherence) of implementation, which also offers a political mode of integration well beyond the mere passage of legislation; it does not by itself orient states in judging the impact of regulation on the extent and organizational form of primary criminal behaviour itself. Indeed, whereas there is a clear connectedness of anti-transnational bribery policies to fairer trade and of *some* 'good governance' controls to better flows of famine and (relative) poverty relief, the measurement of the relationship between anti-laundering controls and actual outcomes, such as crime reduction, remains very much in its infancy.

Although this paper has described the rise and rise of mutual evaluation and stressed the significance of this, there must also be consideration of the limitations of this exercise. Whether or not it is correct that a tighter focus on terrorist finance will eliminate (or, more plausibly, reduce) terrorism, the measures demanded by the most likely attack targets are unlikely to be achieved simply by mutual evaluation and voluntary responses. There is too great a temptation to stigmatize 'rogue states' and take financial action in the face of 'clear and present danger'. There will also be pressures to rationalize the world systems of evaluation to reduce the regulatory burdens that inspections impose, though if and how this will be achieved politically remains open to serious question. One should note here the FATF-inspired self-assessment exercise of compliance by both member and non member States, with the eight special recommendations on terrorism. In the latter context at least, by the June 2002 plenary, the FATF put in place a process to identify non-cooperative jurisdictions in this sphere and compel improvements, based on the responses to self assessment questionnaires by members and non-members.[95]

Though it is doubtful that those areas in which mutual evaluation has been firmly established will be reigned back, newer international conventions and other instruments outside the EU and applicant countries' framework may find it more difficult to get countries to agree to be monitored. It remains to be seen, therefore, whether mutual evaluation constitutes a false dawn of a new mode of regulation of international criminal 'law-in-action', or merely an application to a relatively restricted though important set of globalized commercial phenomena based on what the unprepared political market would bear at a particular historical conjuncture.

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[95] See the FATF website, especially the press releases following the Washington DC meeting October 2001, the Hong Kong meeting at the end of January 2002, and the Paris meeting June 2002.

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