MONEY LAUNDERING AND TERRORISM FINANCING: AN OVERVIEW

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The purpose of this overview is to examine why and how criminal and terrorists organizations use legitimate financial institutions to move and store assets, and how lawmakers have built on that fact to propose innovative and more efficient responses to crime problems.

Profits generated by some organized criminal activities, such as drug trafficking or traffic in human beings, cause a threat not only to public safety, because of the huge economic power accumulated by a number of criminal organizations, but also financial systems themselves and to economic development. Recent events showed that terrorist groups also build financial empires, the purpose of which are specifically to undermine public safety and international financial stability.

The international efforts to combat money laundering since the beginning of the 1990s are built on strategies aiming at attacking criminal organizations through their financial operations, firstly to deprive them of the means to act, and secondly, by unraveling the web of their financial networks and financing methods; to gain knowledge of how better to combat them.

This strategy was first developed in the late 1980s, when law enforcement was faced with the growing threat caused by the Colombian drug cartels, particularly the Cali and Medellin cartels. Both criminal organizations accumulated such wealth and power that the issue turned from a public safety problem to a threat against the State itself.

The anti-money-laundering strategy developed at that time was in response to the reality that the traditional means for combating organized crime had reached the limits. The only existing weakness of criminal organizations was their need to utilize the legal channels of the banking and financial system to transfer funds and disguise the origin of assets. The necessity to put these funds "on the market" made them extremely vulnerable, and tracing the laundering process was a more cost-effective and a less dangerous means to achieve law enforcement objectives. Such a strategy had also the advantage of targeting efforts on the richest and thus most dangerous criminal organizations.

The tragic events of September 11 showed that the rationale of this strategy could be applied *mutatis mutandis* to terrorist groups. It also demonstrated that all the efforts to improve financial transparency in order to better track criminal money had achieved a

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[1] Mr. Thony originally delivered this paper on May 10, 2000 during which time he served as a Judge with the Court of Appeals, Versailles, France. Mr. Thony has since joined the IMF Legal Department as Assistant General Counsel, and has included a number of updates to this version of the paper.

limited result. In many cases, criminal investigators were still unable to trace movements of suspect funds and to identify, behind shell companies or offshore bank facades, the real ownership of suspicious assets.

I. Money laundering and financing of terrorism: Fundamentals

Criminal organizations are involved primarily in profit-making crime,. They are constituted for this purpose as well as to exploit crime opportunities in a systematic and large scale manner. The consequence is that the operation of a criminal organization may generate a vast amount of wealth, but at the same time, a vast number of problems. The generated cash is neither easy to hide nor to utilize. Sudden use of unexplained wealth may raise suspicion. Investigators may easily establish a link between cash, illicit activities, and their perpetrator.

It is thus necessary, for criminal organizations to, (1) erase the link between the crime and the money, (2) erase the link between the money and its new owner, and finally (3) shelter the profits from possible confiscation.

The above activities constitute the very nature of money-laundering, which generally develops in three phases:

- The first phase consists of introducing the funds gained from criminal activities into the banking and financial system; this phase has become more and more fraught with risk due to the heightened attention now given these movements of cash by law enforcement, and the now widespread requirement that banks report suspicious transactions.

- The second phase consists of putting the funds that have entered the financial system through a series of financial operations, the purpose of which is to mislead potential investigators and to give these funds the appearance of having a legal origin. This is the money-laundering phase that most often uses offshore mechanisms. Numerous comings and goings between financial havens and the launderers' banks, punctuated by false invoices, false loans, or other devices, ultimately mislead investigators regarding the origin of the money.

- Finally, the third phase in money-laundering, once these funds appear to have a legitimate origin, consists of reintroducing the funds into the legal economy,

    - through consumption of luxury items, since the goal of profitable criminal activity is first to be able to "burn" the ill-gotten funds;

    - through investments in common place assets, including shares in companies, real estate, etc.;

    - through investments in economic entities that are themselves susceptible of becoming money laundering machines including casinos, hotels, restaurants, cinemas, etc., as well as in companies in which payments are made in cash and where the dirty money can easily be mingled.

The above description of money-laundering mechanisms takes a simplified view of the process. The reality may be more complex or more basic depending on certain factors that

impact the money laundering strategies of criminal organizations, such as the quantity of assets, the structure and level of organization of the criminal organization, and in particular, the hiring of financial experts to develop and implement money laundering schemes.

If experts agree on the fact that the magnitude of what could be called the "Gross Criminal Product" could be as high as 1,000-1,500 billion dollars every year, the amount of criminal funds laundered is much lower. Some authors even argue that criminal organizations tend not to engage in money laundering practices because of the related costs (Kopp, 2000). It is clear that only those criminals that accumulate more wealth than they can actually spend will engage in money laundering practices, and these assets are a small portion of the total of proceeds of crime, probably not more than 10 to 30%.

The Strange Links Between Organized Crime and Terrorism

Money laundering and the financing of terrorism may be seen as distinct activities. The laundering of criminal funds aims at giving a legal appearance to dirty money, whereas the laundering of terrorist funds aims at obscuring assets of a legal origin (such as public funding or so-called charities). This distinction is useless, however, since the objective of public policies is not to address the issue of the processing of illegal funds, but the funds themselves and the organizations behind them. In this regard, criminal assets and terrorist assets represent the same threats to financial systems and public institutions, and it is clear that the strategies designed to fight criminals when they channel their funds through financial systems may apply with the same success in combating terrorist financing cases.

In addition, mysterious ties often unite organized crime and terrorism. A sort of objective alliance forms in many instances between criminal and terrorists groups, fed by their convergent interests: criminal organizations benefit from the ability of terrorist and guerrilla organizations to do damage, while the latter in turn benefit from the financing that criminal activities can obtain for them. The strange similarity between the geography of terrorism movements and other guerrillas and the geography of large-scale drug trafficking is self-explanatory: the Revolutionary Armed Forces of Colombia (FARC) are to be found in coca producing areas, whilst the African civil wars are taking place in areas where precious stones and other natural riches are extracted; the soldiers of Al-Qaeda in Afghanistan and the Khun Sa rebels in Myanmar foment their armed actions in the world's largest opium-producing areas. Cambodia, Chechnya, the Balkans, and Sri Lanka are equally interesting areas for studying the manner in which ideology can become the front for organized crime, or the manner in which organized crime can come to the aid of terrorist causes.

The Sources of Terrorism Financing

Criminal activities are today an increasingly more important part of the terrorist economy, and these activities vary according to the terrorist organizations concerned. The criminal activity that provides by far the largest funding for terrorism is drug trafficking. However, other activities also provide significant sources of funding, and include: racketeering, sometimes discreetly called a "revolutionary tax" (ETA, FLNC, IRA), abductions with ransom demands (Colombian paramilitary groups, groups active in the republics of the former Soviet Union), trafficking in precious stones (Khmer Rouge, rebel groups in Sierra Leone and in Angola), as well as procuring and trafficking in human beings. Arms trafficking is a separate case in that it is both the source of financing and involves the use of these resources and also combines with other types of trafficking in which it is a medium of exchange.

Government-provided financing used to be the principal source of income for terrorist organizations during the cold war period, when regional conflicts often were battlefields for the two blocs, and each terrorist cause an opportunity to destabilize or disorganize the other bloc. The end of the cold war has dried up this source of financing. Although some isolated states continue to provide certain terrorist groups with weapons, training camps and financing, the principal terrorist organizations have had to look elsewhere for support.

Collecting funds from the diaspora, although a long-standing practice, has become a significant source of financing. The IRA has drawn a large part of its revenues from the Irish community in the United States, and this has also been done by the GIA in Algeria, by the Al-Qaeda, Sri Lankan rebels, Armenian terrorists, to cite just a few, seeking funds from compatriots who are on exile or are expatriates for economic reasons. Charitable organizations play a big part in this mode of financing, which explains why they are particularly targeted in current strategies. But it is also because charitable organizations could mingle legitimate proceeds from individuals and private enterprises (whether voluntary or not), and governments with the proceeds from criminal activities, all behind a charitable façade, that makes potential investigations unseemly and makes it difficult to distinguish dirty money from clean money.

II. The International Community's Response: Identify and Destroy Criminal Financial Networks

(1) The Objective: Prevent the Accumulation of Wealth by Organized Criminal Groups

For the international community, the objective in combating money-laundering is three-fold. It involves simultaneously protecting the international financial system, preventing criminals from enjoying the proceeds of their crimes, and preventing them from utilizing the formidable economic power they have amassed to challenge the stability of governments.

The approach in which organized crime is attacked by combating dirty money has many advantages. Given the financial power of criminal organizations and the fact that they are not defeated by any one measure, cracking down on money-laundering is a way to weaken the organizations without confronting them physically at a time when traditional methods of fighting them have shown their limitations the "war on drugs" decreed by Ronald Reagan in the 1980s had limited effects. Combating the money from crime also means suppressing the ultimate purpose of criminal activities making profits. It is a way to suppress the means for doing harm and, finally, a way for law enforcement to penetrate organized crime.

The task is theoretically made easier because criminal organizations cannot operate using their traditional methods of threats, blackmail, violence or racketeering in order to launder the proceeds from their crimes. To give their profits the appearance of being legal, they must necessarily go through legal channels (the financial system) and use legal methods (corporate law, banking law), a terrain where it is easier to combat them.

Therefore, combating money-laundering is an important means in the fight against organized crime, as was stated in the global action plan adopted at the World Ministerial Conference on

Organized Transnational Crime,[2] which called upon the States to "ensure that the fight against organized transnational crime is based on strategies aimed at defeating the economic power of criminal organizations."[3]

(2) The Means

The strategy is implemented through a series of legislative measures taken by governments and revolving around three axes:

- prevention, the goal of which is to prevent the financial system from being used for purposes of money-laundering, particularly through a general requirement to precisely identify originators, as well as placing and limitations on certain transactions that serve as vehicles for money-laundering;

- detection of money-laundering operations through legislative provisions allowing for the centralization of information by authorities charged with combating such operations (reporting suspicions) and implementation of specialized investigative measures (access to computer systems and commercial and banking information, etc.);

- suppression of money-laundering activities and associated crimes, as well as confiscation measures that are complements to enforcement, and preventive measures such as freezing and seizing assets.

This arsenal of measures is as strong as its weakest link-criminal proceeds tend to move toward countries that have not put such measures into place. It is thus necessary to ensure that the implementation of these measures is as uniform and as widespread as possible. The efforts of the international community have sought to encourage countries to institute the necessary legislative framework through international legal instruments designed to harmonize standards or through initiatives that seek to compel recalcitrant countries to adopt them. For example, this is the goal of the efforts made by the Financial Action Task Force (FATF).

It must be noted that this objective remains far from being reached. Many countries have not yet developed the necessary legislation, and even where they have done so, the implementation of the measures may depend on the extent to which they receive support.

(3) The Necessary Involvement of the Financial and Banking Sector in Accomplishing the Objectives

Transactions associated with money-laundering go through channels that are outside law enforcement's customary range of control, with illegal transactions thus becoming particularly problematic. Starting with the economic concept of information asymmetry,

[2] Held in Naples, November 21-23, 1994. See report to the United Nations General Assembly on the World Ministerial Council on Organized Transnational Crime, A/49/748.

[3] Political Declaration and Global Action Plan against Organized Transnational Crime, report to the United Nations General Assembly, *op.cit.*, Para. 35.

Pierre Kopp (1995) explains that one of the problems in combating money-laundering "comes from the information asymmetry in principal-agent relationships between the State (the principal) charged with implementing the fight against money-laundering, and the financial sector (the agent)," the only entity that has the data on illegal transactions.

The difficulty thus lies in the fact that the authorities charged with implementing policies to combat money-laundering have the power to act but do not have access to information that would allow them to act. It is the financial institutions that have this information but they do not have power to act.

Therefore, the detection of money-laundering operations necessarily involves collaboration and information exchange between the financial sector and the authorities responsible for legal procedures. Without this collaboration, there is little chance that money-laundering operations could ever become known, as they are by nature hidden. Given the confidentiality of the information held by banks, it has been necessary to establish bridges between prosecution and enforcement authorities and financial institutions in order to allow this information to circulate while honoring confidentiality requirements. These bridges take the form of Financial Intelligence Units (FIUs).

Notwithstanding, law enforcement's access to this information, officials would not be in a position to identify, among the mass of information generated by the daily financial transactions of a financial sector institution, operations that are suspicious or that conceal money-laundering activities. This is all the more true because the suspicious nature of a transaction most often results not from the intrinsic characteristics of the transaction itself but rather from factors extraneous to the transaction.[4]

A reporting system has thus been introduced in most jurisdictions requiring professionals subject to this requirement to inform the legally designated authority of any transactions he believes could be linked to money-laundering operations. This is the system for reporting suspicions that has been progressively adopted by most States.[5] It transforms the financial sector professional into a filter responsible for separating economically justified operations from operations linked to the activities of a criminal organization. Bankers, particularly due to their knowledge of their clients and of the economic and financial arena, have detection measures that go beyond the formal criteria that might characterize a suspicious transaction. This is all the more important because in most cases there is no difference in the manner in which money-laundering operations and legal operations are carried out.

It is in this spirit that the international community in the late 1980s instituted an international legal framework which is still in its development, specifically to confront new threats, but also to remain informed of new money-laundering techniques.

(4) The international legal Bases of the fight against money-Laundering and the financing of terrorism

[4] For example, the absence of a connection between the transaction and the economic activity of the operator; his nationality; numerous complex transactions within a short period of time.

[5] On this issue see , Thony, (1997).

1988 marked the starting point for an international strategy with the signature of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[6], which provided the first legal definition of money-laundering., In addition, the Basel Statement of Principle[7] adopted at the same period, involved the financial system in the fight against funds of criminal origin and terrorism financing. Since then, a succession of international legal instruments and international initiatives have established the framework in which the States operate and the standards on the subject.

A. International Conventions

<u>The 1988 Convention</u>

The 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the fruit of the experience of nearly a century in drug control, is the first convention to have laid the foundations of the new strategy to combat drug trafficking organizations., It moved away from emphasizing direct repression of drug traffic toward attacking the goal of all organized crime, and also its weakest point namely money itself.

The Convention recognized that "illicit drug traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels," and became the first international instrument to make the fight against the proceeds of crime an angle of attack in the fight against organized crime and drug trafficking.

The Convention provides a definition of money-laundering that has been taken up in many laws as well as in most international conventions on the subject.[8]

The Convention instituted a **complete mechanism for mutual international assistance in the area of confiscation** that seeks to resolve the problems that result from the fact that the assets in which drug traffickers invest their profits are not always found in the country where the party involved carries out these activities, where he has his domicile or even where he is arrested. These provisions apply to proceeds drawn directly from drug traffics, as well as substances, materials and equipment used for drug trafficking. They also apply to drug trafficking proceeds that have been converted to other assets, proceeds mixed with legitimately acquired assets, income drawn from the proceeds of trafficking income drawn from assets into which proceeds have been converted as well as income drawn from assets in which these proceeds have been mixed.

It seeks to provide concrete solutions for recurring problems in international cooperation. By instituting procedures for direct transmission of requests for mutual judicial assistance, it attacks the slowness of these procedures. By making cooperation compulsory, except in cases stipulated in the convention, it limits bad faith refusals to cooperate. It expands the field of

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[6] United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna (Austria), December 20, 1988, no. 27627, E/CONF.82/15

[7] adopted by the Basel Committee on Banking Supervision in December 1988

[8] Infra. Note 9 and surrounding text

cooperation between governments and allows not only international confiscation of assets of criminal origin, but also the freezing or provisional seizure of assets.

Signed on October 20, 1988, the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances took effect on November 11, 1990. As of November 1st 2002, it had been ratified by 166 countries.

The Strasbourg Convention

The Council of Europe's *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime*[9] was opened for signature on November 8, 1990. The Convention adopts the definition of money-laundering established by the Vienna Convention, as well as the provisions on international cooperation in the area of seizure, confiscation and mutual judicial assistance in investigations. However, it extends the field of its intervention to all the proceeds of crime, defining them more broadly as "any economic advantage from criminal offenses." It also adopts the recommendations of the FATF[10] with respect to the rules for preventing money-laundering in the banking and financial system.

All members of the Council of Europe except Armenia, Bosnia and Herzegovina, Georgia and Turkey have ratified it. It has also been ratified by two non-members, Australia and Monaco.

The OECD Convention on Corruption

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[11] was signed in Paris on December 17, 1997[12] and took effect on February 15, 1999. The goal of the 35 signatories is to protect international trade (and by extension the emerging client states) from the scourge of corruption, while preserving equal opportunities among exporting countries.

The Convention does not thereby target only acts of active corruption in international business transactions (exchanges and investments). It requires the signatory states to make the corruption of foreign public officials a criminal violation and, pursuant to Article 3, to provide "effective, proportionate and dissuasive" sanctions for individuals and legal entities comparable to those applied in the case of the corruption of a national official.

It provides an autonomous definition of the notion of a foreign public official, whether or not they belong to a signatory state, as well as a broad interpretation of territorial jurisdiction.[13] It

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[9] Council of Europe, ETS 141

[10] See below

[11] Organization for Economic Cooperation and development (OECD) DAFFE/IME/BR(97)20

[12] All the Member States of the OECD plus Argentina, Brazil, Chile and Slovenia.

[13] Article 4 of the Convention provides final "Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

also establishes objectives in the area of standards for verifying accounts and mutual judicial assistance, and requires the States, if they are unable to harmonize their legislation, to look for a "functional equivalent," the importance of the follow-up mechanism.

An OECD working group is responsible for organizing a mechanism for joint evaluations consisting of two phases. The first phase of the examination consists of an evaluation of the transposition laws of the country being examined, under the supervision of the secretariat and the two examining countries. This phase began in April 1999 and has to date allowed for the examination of the transposition laws of 23 States. A second phase of examination, the launch date of which remains to be determined, will endeavor to study the concrete implementation of the legal provisions studied during the first phase, with a site visit by a team of experts.

The Palermo Convention against Transnational Organized Crime

The United Nations Convention against Transnational Organized Crime[14] is the first instrument of criminal law designed to combat the phenomenon of transnational organized crime. It is a multi-purpose instrument supplemented by three additional protocols bearing respectively on the treatment of individuals, trafficking of migrants over land, air and sea and the illegal manufacture and trafficking of firearms.

Under the Convention, four offenses considered to comprise the structural characteristics of organized crime are required to be addressed by the States in their domestic law: criminal association, money-laundering, corruption and obstruction of justice.

The definition of money-laundering is provided in Article 6 of the Convention, which in fact adopts the definition of the 1988 Convention against Illicit Traffic in Narcotic Drugs. Article 7 requires the institution of a supervisory and regulatory regime to deter and detect all forms of money-laundering in financial institutions and other particularly susceptible entities, including, in particular, rules for identifying clients and the reporting of suspicious operations. It calls upon the States to institute a financial information service and to supervise international capital transfers.

The Convention has been signed by 147 States to date, but has been ratified by only 28 of them[15].

The Convention for the Suppression of the Financing of Terrorism[16]

This Convention, whose negotiation was launched at the initiative of France in 1999, is a precursor of the international strategy against the financing of terrorist activities. The negotiations received little attention and did not provoke any real controversy, as the stakes were not at that time apparent to many in the international community. The events of

[14] Signed in Palermo (Italy) on December 15, 2000, G.A. res. 55/25, annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001).

[15] At 12 December, 2002

[16] Signed in New York (USA), December 09, 1999, no. 38349, GA Resolution no. A/RES/54/109

September 11 have since brought to light the critical need for cooperation among States to combat the networks financing terrorism, implemented by this Convention.

The definition used by the Convention for the offense of financing terrorism is particularly broad as it covers the act of providing or collecting funds with a view to carrying out a terrorist act, and the funds in question can be of any type and have a legal origin. Consequently, the definition goes beyond the single framework of money-laundering. The Convention targets the "originators" as well as their accomplices and other contributors, including legal entities such as associations and companies. For the offense to exist, it is not necessary for the funds to have been used; it suffices that the funds have been collected for the purpose of committing a terrorist act.

The definition of terrorist action provided by the Convention refers to the anti-terrorist treaties annexed to the Convention or to *"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 such act, by its nature and context, is to intimidate a population or to compel a government or an international organization to do or abstain from doing any act."*(Article 2). Terrorists acts are also defined in the Convention as "an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex"[17]. The annex lists 9 treaties in force relating to terrorist acts such as taking of hostages, highjacking, terrorist bombings, etc.

The Convention requires the States to set up an effective system to suppress the financing of terrorism *(Article 4).* It commits the States Party to the convention to make it possible under their domestic law to establish the liability of legal entities engaged in the financing of terrorism *(Article 5).* It requires the States to adopt the measures necessary for the identification, freezing, seizure, as well as confiscation, of targeted funds, which funds can be used to compensate the victims of offenses and their families *(Article 8).*

The most remarkable aspect of this Convention, beyond the harmonization of offenses and the implementation of a common strategy for all the States Party, relates to its desire to attack the problem of offshore finance, which is not contemplated by any other instrument or initiative currently in effect, and particularly to combat the establishment of shell companies that depart from all the customary standards in the area of establishing commercial companies: identification of management bodies, establishment of capital actually paid in, publication of annual accounts, etc. The Convention provides that the States require *"that financial institutions, when necessary, take measures to verify the legal existence and structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity." (Article 18-b-ii).*

Finally, according to the Convention, the States agree to provide *"the greatest measure of assistance in connection with criminal investigation."* (Article 12). The Convention provides that neither bank secrecy (Article 12) nor the fiscal nature of a violation (Article 13) can be invoked by a State to deny a request for mutual legal assistance or extradition. The

[17] Art. 2, 1.a. and b.

Convention has 132 signatories, 64 of which have ratified it, most of them since the events of September 11[18].

B. The FATF 40 Recommendations

The international legal framework has been largely shaped by the 40 recommendations of the Financial Action Task Force (FATF) created by the 1989 G7 Summit. At the request of the seven most industrialized countries meeting in Paris at the "Arch Summit," the FATF submitted an extremely detailed report in 1990 on money-laundering phenomenon, issuing 40 recommendations to strengthen the fight against the recycling of capital derived from criminal activities. These recommendations seek to achieve three objectives:

- *Improve national systems to combat money-laundering,* in consideration of and consistent with the Vienna Convention, by criminalizing all aspects of money-laundering crimes, even for offenses not associated with drugs, and by setting up an effective confiscation procedure;

- *strengthen the role of the financial system*, in the broadest sense, i.e., banking institutions and non-banking financial institutions. These recommendations, consistent with the Basel Statement of Principles, seek to make better provision within financial institutions for the identification of clients, the detection of unjustified or suspicious transactions and the development of secure and modern transaction techniques;

- *strengthen international cooperation*, at the administrative level through the exchange of information on international foreign currency flows, and at the judicial level through the development of mutual judicial assistance for purposes of investigation, seizure and confiscation of funds, and extradition.

The FATF was later commissioned by the G7 to follow up the implementation of its recommendations. To do so, it conducts an analysis of world financial flows, banking and financial systems and money-laundering methods. It proceeds with an evaluation of the mechanisms put in place by the States participating in the Task Force,[19] suggests improvements to combative measures already instituted, and develops dynamic actions directed to non-member States to ensure the broadest possible implementation of its recommendations. Its mandate has been extended to 2004.

The 40 recommendations of the FATF were revised in 1996, and are currently being revised again in order to take into account new developments in combating money-laundering, and to draw on nearly 15 years of experience in combating dirty money. In addition, following the attacks of September 11, 2001, eight new recommendations were issued to more specifically combat the financing terrorism. These recommendations specifically call on the States to:

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[18] See http://untreaty.un.org/english/terrorism.asp

[19] 29 States as well as the European Union and the Gulf Cooperation Council are currently members of the FATF: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, France, Finland, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, New Zealand, Norway, the Netherlands, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

- Take immediate steps to ratify and fully implement the 1999 United Nations Convention for the Suppression of the Financing of Terrorism, as well as United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly United Nations Security Council Resolution 1373;

- criminalize the financing of terrorism, terrorist acts and terrorist organizations;

- freeze without delay funds or other assets of terrorists and those who finance terrorism and terrorist organizations;

- require that financial institutions or other entities subject to anti-money laundering obligations report their suspicions to the competent authorities, when they suspect that funds may be linked, related to. or are to be used for financing terrorism, terrorist acts or terrorist organizations;

- afford other countries the greatest possible assistance in connection with criminal, civil or administrative inquiries, investigations or proceedings in this area,

- ensure that they do not provide safe havens for individuals being sought for financing terrorist, terrorist acts or terrorist organizations;

- institute supervisory measures applicable to individuals or legal entities that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, particularly “Hawala” networks;

- require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on fund transfers and related messages that are sent, and

- give particular attention to non-profit organizations, such as charitable organizations, that can be used or exploited by terrorist organizations.

C. Other Initiatives and Instruments

The European Directives of 1991 and 2001

Since 1991 the European Commission has had a directive that the European States have the obligation to implement within their internal law provisions to "prevent the utilization of the financial system for money-laundering."[20] The directive has made it possible, within Europe, to harmonize the mechanisms intended to prevent the utilization of financial institutions to launder dirty money, and has been extended to the member states of the European Free Trade Association (EFTA) under the terms of the agreement ratifying the European Economic Area. All the States of the European Union have adopted legislation applying the provisions of the European regulations to domestic law.

This directive, which presents first of all the principle of the interdiction of money-laundering activities,[21] defines all the obligations imposed on the financial sector to lend their support to preventing money-laundering. The directive refers to credit institutions, i.e., any institution "whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account" and financial institutions, defined as undertakings whose activity is included among those stipulated under Directive 89/646/EEC on banking coordination.

A second directive[22] was adopted by the European Parliament in December 2001 to amend the 1991 Directive. In particular, it extends the requirements of the directive to branches of credit and financial institutions, and stipulates clearly that currency exchange offices and money transmission/remittance offices are covered by the directive. It also includes investment firms, as well as a number of professions that have apparently been used by criminal organizations as money-laundering vehicles. These include in particular:

- auditors and accountants;
- real estate agents;
- notaries and other independent legal professions when they represent or assist clients in the context of the following activities:

  (a) buying and selling of real property or business entities;

  (b) management of client money, securities or other assets;

  (c) opening or management of bank, savings or securities accounts;

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[20] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering. Official Journal L 166 , 28/06/1991 P. 0077 – 0082.

[21] The criminalization of money-laundering activities was not presented as a requirement in the directive, as the Council did not feel it was within its competence to do so. Here we also see the limits of a "judicial" Europe in which the harmonization of criminal policy is not the order of the day.

[22] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering - Commission Declaration. Official Journal L 344 , 28/12/2001 P. 0076 – 0082

(d) creation, operation or management of trusts, companies or similar structures;

(e) performance of other financial transactions.

- dealers in high-value goods, such as precious stones or metals;
- transporters of funds; and
- managers, owners and directors of casinos.

Finally, it is important to note among the most notable changes introduced by the draft amendment to the directive is the consideration given to new problems that "direct banking" practices create with respect to the identification of clients. A specific procedure is thus introduced for identifying clients when credit institutions engage in "direct banking."

"Blacklists"

The FATF list of Non-Cooperative Countries and Territories (The NCCT List)

Based on FATF recommendations 20 and 21, urging that financial institutions pay particular attention to financial relations with "countries or territories that apply the recommendations insufficiently or not at all," the FATF has undertaken to establish a list of such States through an initiative known as the list of "non-cooperative countries and territories" (NCCTs). The stated objective of this initiative is to limit the financial system's vulnerability to money-laundering by ensuring that all financial markets adopt and implement measures to prevent, detect and punish money-laundering according to recognized international standards.

The initial tasks under this initiative consisted of defining twenty-five criteria by which to identify harmful rules and practices, based on the 40 recommendations and analyzing how States matched up with these criteria. The first report was published in June 2000 identifying 17 states and territories with shortcomings in their anti-money laundering provisions or an obvious unwillingness to cooperate in this area. This list is updated every year, and since the first report four countries have been removed from the list (the Bahamas, the Cayman Islands, Liechtenstein and Panama), but seven other states have been added (Egypt, Grenada, Guatemala, Hungary, Indonesia, Myanmar, Nigeria and the Ukraine). Thus, the list now includes the following States: the Cook Islands, Dominica, Egypt, Grenada, Guatemala, Hungary, Indonesia, Israel, Lebanon, the Marshall Islands, Myanmar, Nauru, Nigeria, Niue, the Philippines, Russia, Saint Christopher and Nevis, Saint Vincent and the Grenadines, and the Ukraine. The FATF is currently studying counter-measures that could be introduced by task force members to deal with recalcitrant countries. However, it should be noted that many of these countries have begun to take legislative measures designed to remedy the indicated deficiencies and gaps.

Nonetheless, the establishment of this list has led to much criticism based on the fact that the countries concerned were not involved in the process of establishing the criteria, which represented concerns specific to the FATF countries, itself a creation of the G7. The most serious criticism is based on the fact that the FATF applies different standards to evaluate the compliance of member states (the 40 recommendations) and the compliance of non-member states (the 25 criteria). It is in this context that the IMF has been commissioned to establish a uniform, cooperative and voluntary methodology for evaluating the compliance of States with

the 40 recommendations of the FATF, which the IMF Committee has recognized as being the principal standard of reference.

The List of Countries Accused of "Harmful Tax Practices" by the OECD

During the same period as the FATF conducted its work, the OECD, in the context of a working group on harmful tax practices, obtained from 31 countries considered to be tax havens a commitment to cooperate to improve transparency and to proceed with effective exchange of information. It established a list of countries that had not undertaken such commitments, and were thereafter considered to be non-cooperating tax havens. These are Andorra, the Principality of Liechtenstein, Liberia, the Principality of Monaco, the Marshall Islands, Nauru and Vanuatu.

The List of Offshore Financial Centers. The Financial Stability Forum

The Financial Stability Forum was established by the G7 in 1999 to promote international financial stability through the exchange of information and international cooperation in the area of financial supervision. In a report presented on April 5, 2000, the working group on offshore financial centers divided the countries and territories considered to be offshore financial centers into three groups: offshore financial centers with a high quality of supervision,[23] potentially cooperative offshore financial centers with deficient supervision,[24] and non-cooperative offshore financial centers with deficient supervision.[25] Despite the subjective nature of the notion of "cooperation" or "non-cooperation," this list may represent a basis for consideration or a reference point for differentiating offshore financial centers that are potentially in a position to develop an ability to combat money-laundering and those that have no expertise in the area of financial engineering nor any viable supervisory structure and which should be the subject of particularly vigilant attention on the part of the international community.

The Naples Action Plan

The World Ministerial Conference on Organized Transnational Crime[26] developed an action plan to combat organized transnational crime that laid the foundations for a strategy based on combating criminal economic power, prefiguring the architecture of the Palermo Convention. It called upon the States to "ensure that the fight against organized transnational crime is based on strategies aimed at defeating the economic power of criminal organizations."[27]

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[23] Group I: Hong Kong, Luxembourg, Singapore and Switzerland

[24] Group II: Andorra, Bahrain, Barbados, Bermuda, Gibraltar, Labuan (Malaysia), Macao, Malta and Monaco

[25] Group III: Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Belize, British Virgin Islands, the Cayman Islands, the Cook Islands, Costa Rica, Cyprus, Lebanon, Liechtenstein, the Marshall Islands, Mauritius, Nauru, the Netherlands Antilles, Niue, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Samoa, Seychelles, the Turks and Caicos Islands, and Vanuatu

[26] Supra Note 1

[27] Political Declaration and Global Action Plan against Organized Transnational Crime, report to the United Nations General Assembly, *op. cit.*. para. 35.

In this respect, the global action plan provides an interesting analysis of the inseparable ties that exist between organized crime and money-laundering. According to the signatory states, laundering of illicit proceeds, "whether in furtherance of criminal activity or to infiltrate the legal economy," constitutes one of the "structural characteristics" in the definition of organized crime.[28] Thus, money-laundering is not simply an activity that is specific to criminal organizations, or that presupposes the existence of a criminal organization. It is also an intrinsic component of the concept of organized crime.

The New York Action Plan

The political declaration adopted in June 1998 during the special session of the United Nations General Assembly on drugs[29] reaffirms the validity of this strategy. Ten years after the 1988 Convention, the General Assembly improved and updated the strategy with an "Action Plan against Money-Laundering" intended to strengthen and more precisely guide actions carried out by the international community against the world criminal economy. This action plan represents all the most recent and most widely accepted anti-money-laundering standards. It was unanimously adopted by the 185 Member States of the United Nations.

[28] Ibid., para. 12.

[29] UN General Assembly resolution A/RES/S-20/2

Conclusion

International strategies and standards for combating money-laundering have been in development for a period of less than fifteen years, which in terms of law-making, would still be considered to be in its early stages. Yet, the environment in which organized crime develops is constantly evolving. New threats, particularly that of terrorism and its financing, require ongoing review of the validity of the strategies put into place. Moreover, the balance sheet in the fight against money-laundering is very mixed. Many financial markets, and particularly tax havens, offer too many shelters for drug traffickers and money-launderers. The transparency that has been introduced into financial transactions has not been reproduced at the level of corporate law. International judicial cooperation is in its infancy and does not provide the ability to respond quickly enough in view of the nearly instantaneous speed of electronic funds transfers.

Should we, therefore, question the effectiveness of the current strategy? In fact, the strategies are sound, however, it must be noted that the objectives the international community set for itself in combating money laundering and terrorism financing are far from being attained, given the lack of universal implementation of the established standards. It is on this point that all efforts must henceforth be brought to bear, in order to ensure sufficient financial transparency for tracking the movements of funds of criminal origin. The mobilization of governments must be incessantly pursued, and the collaboration of both the financial sector and more generally the private sector must also be thorough.

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