

New Challenges Posed by Money Laundering and Possible Solutions Offered by International Conventions

When Professor Theodore Levitt coined the term “globalization” in 1983, referring to world markets, little did he imagine that this phenomenon would affect every aspect of social organization. Globalization has clearly affected the way criminals conduct their businesses and the way law enforcers and jurists must conduct their investigations. Organized crime has transcended traditional borders with the aid of technology, posing an important challenge for prosecutors and investigators.

Several aspects of technology have facilitated the globalization of crime. The communications network has turned the world into a very small place, where telephone calls, emails, text messages and faxes have eliminated the distance between people. This improvement in the communication system has led at the same time to a growth in international commerce and banking. Through wire transfers, letters of credit, automated teller machines, credit and debit cards and countless other tools we are able to move enormous amounts of money in seconds from one place to the other, in some cases with great discretion and anonymity. These developments have made it easy for criminals to conduct their activities and harvest their earnings in one region of the world and hide them in a different one.

This shouldn't come as a surprise if we take into consideration that throughout history certain criminal groups have evolved to mimic the structure of a corporation, assigning roles to its members in order to maximize profit. This is why when it comes to legislation we can find attempts to prohibit this kind of structural organization as early as the 1970 Organized Crime Control Act, issued by the U.S. Congress to prohibit the creation of gambling organizations involving 5 or more people if: a) it had been in business for over thirty days, or b) if it had accumulated over US \$2,000.00 in profit on the course of one day.

Back in 1970, The Organized Crime Control Act only reflected the early stages of the business like development of a criminal organization. However, the definition has evolved to where the FBI now defines it as “a group of individuals with an identified hierarchy or comparable structure engaged in significant criminal activity”.

Dr. Mohsen Mohamed El-Aboudy, from El Ahram Center for Political Strategic Studies in Cairo, on the other hand, has defined organized crime as the kind “practiced by an institutional body that comprises a large number of professional individuals who work within it in accordance with a work system that divides the work...”

The United Nations Convention against Transnational Organized Crime (UNTOC), to which all of your countries are signatories and which has also been ratified by Egypt, Lebanon and Morocco, was adopted in November 2000. It finally unified the concept of organized criminal group as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”.

Several elements must be underlined from this definition. First of all, we must rescue the concept of structured group. UNTOC itself gives content to this element, by defining it as “a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure”. This means that this group of people did not come together spontaneously before the commission of a crime but with the aim of engaging themselves in a criminal activity. This implies a certain direction. The second element to keep into consideration is time. UNTOC, the European Council and most civil law legislations require the organization to exist for a prolonged period of time. Again, this implies a certain endeavor or direction.

As the last element of the definition is the aim to obtain a material benefit, UNTOC also refers to the criminalization of money laundering in article 6. States party to this convention agreed to criminalize the following conducts when committed intentionally: a) the conversion or transfer of property with the purpose of disguising its illicit origin; b) the concealment of the rights of ownership to property of illicit origin; c) the acquisition or possession of property, knowing that it proceeds from criminal activities; and d) the participation (aiding, abetting, facilitating, counseling) in any of the above.

This structure of the criminal organizations allows the possibility of the criminal activity and its profits to be moved across borders. Transnational crime then poses a

challenge to law enforcers in the sense that the traditional concept of “territoriality” established as a principle in criminal codes is then broken (or expanded). Article 3 of UNTOC settles when an offence should be considered transnational, which is basically when it is committed, prepared, planned or controlled in more than one state, when it is committed by a group that normally operates in more than one state or when it has substantial effects in a different state from where it was committed.

The combination of these three elements, namely organized crime, transnational delinquency and money laundering, as they were originally conceptualized and perceived have evolved even since the creation of UNTOC and vary according to each region. Accordingly, the Middle East and North Africa Financial Action Task Force, or MENAFATF, has come up with a list of non-traditional typologies for payment methods available in the region, as follows:

1. **Hawala Dar.** It consists of the remittance of money outside of the official payment system channels. As the systems is based on secrecy, verbal instructions and mostly trust among the parties involved, it becomes a convenient instrument for the movement of money anywhere in the world.
2. **Cash Couriers.** This is the actual physical movement of the money or bearer negotiable instruments from one country to another. This, of course, poses a problem when the displacement refers to cash. In regards to bearer negotiable instruments, no matter how many times they might change hands it is always possible to trace them back to their origin.
3. **Online payment services.** Systems such as Pay-Pal, widely used to purchase online products and services, allow the user to send money through their email accounts. Because it was conceived as a payment method to be used in online sales, one of its most publicized characteristics is privacy.
4. **Digital Currency Services.** These refer to e-gold, e-silver, e-platinum and e-palladium. The concept of digital gold currency (DGC) is a form of electronic money denominated in gold weight, which means that it is backed by gold through unallocated or allocated gold storage. There are a number of companies which issue DGC, however, it was started in 1996 by e-gold Ltd., a company located in Nevis. On 27 April 2007, a federal grand jury in Washington, D.C.

indicted e-Gold Ltd and its owners, Douglas Jackson and Barry Downey on charges of money laundering, conspiracy, and operating an unlicensed money transmitting business.

5. **Stored Value Cards.** A stored-value card is similar to a debit card in the sense that it stores money deposited with the issuer. A difference between the both, however, is that debit cards are usually issued in the name of individual account holders, while stored value cards are usually anonymous. The value associated with the card is usually accessed through a magnetic stripe embedded in the card, on which the card number is encoded; using radio-frequency identification (RFID); or by entering a code number, printed on the card, into numeric keypad. They are commonly used as transit fare cards or as telephone cards. Stored value cards are classified into closed system cards (non-re loadable) and open system cards (re loadable).
6. **Electronic Wallet or Smart Cards.** They consist of electronically stored value on a magnetic strip or a chip inserted in a card, such as a credit card. This allows the holder to make small disbursements, such as in public transportation or at vending machines. The advantage of, or problem posed with using smart cards, however, is that they give the possibility to store money and transfer it to another person without the transaction passing through an intermediary account.
7. **E-cash Banking.** This system refers to the transfer and receipt of funds through licensed institutions which deal with money by electronic means on behalf of their customers for a fee, such as Western Union or Money Gram. This system allows for large quantities of money to be transferred between countries without the involvement of banking institutions.

Aside from the hawala dar system and the cash couriers, all of the new payment typologies appear to be internet related. The problems posed emerge from the fact that the internet is yet to be subject to governmental regulation. Some countries, like the United Kingdom, have already taken steps towards this, with instruments like the Electronic Commerce Directive, issued in 2002. However, this refers mostly to on line shopping and still leaves out financial intermediation.

In 1990, the FATF adopted 40 recommendations with views to combat the misuse of the financial systems by the laundering the proceeds of drug trafficking. Soon the scope of predicate offenses for money laundering was broadened to include other crimes, such as corruption, which led to a review of the recommendations to include these activities. This is covered by the first recommendation, which refers to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, as well as the UNTOC. Furthermore, it specifies that all serious offenses should be considered predicate offenses to money laundering. It also allows an extent of extraterritoriality as it establishes that predicate offenses may have occurred in a different jurisdiction.

The challenge for investigators and prosecutors would be the investigation of these new typologies utilizing the 40 FATF recommendations, UNTOC, UNCAC and every resource available.

All of the countries represented in this forum are part of MENAFATF, which means that the 40 recommendations are in place and can be used as an important tool for preventing money laundering as well as investigating these offences.

One of the most difficult enemies to tackle when dealing with money laundering is anonymity. The payment typologies described above make use of this characteristic to attract customers. For the traditional financial sector, Section B of the FATF's recommendations refers to the "Know Your Customer" policy, specially in the case of "politically exposed persons" (PEPs) as key to prevent the concealing of proceeds of illegal activities. The FATF refers not only to financial institutions in the traditional sense, but also to non financial institutions as described on a punctual list on recommendation 12. Unfortunately, this list does not yet include on line activities.

A great help for the investigation of money laundering is the information gathered through suspicious activity reports, as recommended by the FATF. In regards to this particular point, the role of the Financial Investigation Units (FIUs) must be underlined. A good relationship between the Public Prosecutor's Office and investigators with the FIU's will always guarantee faster results. This is also a principle contained in the 40 Recommendations. However, these informal tools to obtain information quickly should

always be validated through the formal channels later on in order to incorporate the evidence gathered.

The FATF extends this cooperation between FIU's and law enforcement agencies and makes it transcend country borders. As the criminals themselves have started to operate regionally and even more spread out around the globe, national jurisdictions must understand the need to cooperate and work together in order to prevent becoming a hiding place for ill gotten profits as well as to be able to trace and retrieve moneys that have been maliciously stolen from them. This can only be achieved through international legal assistance. The 40 FATF recommendations, the UNTOC and more recently the United Nations Convention against Corruption (UNCAC) make emphasis on this.

Of course, if governments do not provide with the necessary legal platform, the practitioners cannot impose cooperation through formal, more expedite legal tools as it is required. The option would be turning to the informal levels and establishing networks of prosecutors in the region. When dealing with international legal assistance it is always important to follow up on the document sent overseas and to establish contact with the person in charge of collecting the information requested. This way, it is guaranteed that the information would be available swiftly and that it will be comprehensive.

UNTOC enumerates on article 18 a wide range of examples of information that may be accessed through mutual legal assistance (MLA). The catalog is practically unlimited. Through MLA it is possible to collect documentary evidence; statements of persons (which, if are reflected on police reports could be later incorporated in trial even in the most accusatory of systems); effect service of judicial documents; execute searches, seizures and freezing of assets; examination of objects and sites; obtain expert evaluations; or, as UNTOC itself words it, "any other type of assistance that is not contrary to the domestic law of the requested State Party". UNCAC echoes this provision.

Furthermore, both conventions establish the need to create a central authority to process all the MLAs received from State Parties. They even go beyond and list the requirements for the MLAs to be processed. It is important for the requesting parties to keep in mind that the MLA must be submitted "in a language acceptable to the requesting State Party", which should normally be one of the official languages of the concerned

country. The document must always identify the authority making the request; the nature of the investigation; a brief summary of all the relevant facts; a detail of the assistance sought; the identity, location and nationality of any person concerned and the purpose for which the evidence is required. The lack of any of these formalities allows the requested party to refuse rendering help.

Technology evolves quickly and so should investigators and prosecutors. White collar criminals are not the typical delinquent. They are usually highly educated and have access to the most sophisticated tools to infringe the law. The FATF recommendations are a helpful platform to prevent money laundering and to facilitate its investigation. UNTOC and UNCAC are important international instruments with the same aim. However, it is up to the prosecutors and investigators to apply the tools provided by these instruments in combating money laundering. The new typologies of payment are nothing more than a challenge. These are not impenetrable mechanisms to disguise criminal's identities and the origin of their assets.

It is true that the internet is yet to be regulated. The recent birth of electronic commerce and electronic banking facilities dare our capacity. However, this lack of regulation must not discourage prosecutors and investigators, as money will always leave a trail. With the exception of small amount cash transactions, which do not require filling out cash operations forms, all of the typologies described require the purchase of electronic currency or services through the use of credit cards and bank accounts. This only means that our work will become more complex and the investigations should look into the smallest detail of the banking information gathered. However, any significant unjustified increase in a target's wealth is most likely to be recorded in his banking information and will be available to the investigator through the appropriate legal channels, be it domestically, through court orders, or internationally, through letter rogatories or mutual legal assistance requests.

As criminal organizations specialize so must we. As criminal organizations transcend boarder so must we. In fact, to ultimately be successful, we must strive to stay ahead of the electronic evolution in the 'globalization' of criminal business. Forums like this one are an important mechanism to build the capacity of public prosecutors and investigators, to familiarize our selves with the tools provided by the international

community and tools available regionally, These are perfect opportunities to network, to establish contact with prosecutors and investigators from the same region who are faced with the same problems and who might also have great ideas on how to tackle the new challenges that we encounter.