Exporting Criminality: Money Laundering in a Domestic and International Context

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In an increasingly globalized world made smaller by the information and communication technology revolution, it has become ever more difficult to accurately monitor financial transactions. Money laundering, which sustains the financial activities of organized crime, is particularly problematic; with the click of a button, extraordinary sums of money can be transferred from a drug cartel in Brazil to an anonymous bank account in Antigua. Thus, anti-money laundering measures across national borders focus primarily on countering those technological advances that enable money laundering to continue. However, taking a postmodernist approach, I argue that the practice of money laundering today is not, in fact, the sole function of advances in technology. Rather, money laundering has evolved in reaction to the process of criminalization, crossing international borders and thereby creating a highly profitable shadow economy in previously impoverished nations. Taking US policies as my case study, I examine how the practice of money laundering has been shaped by current anti-money laundering processes.

In an increasingly globalized world, the international system of states, corporations, and private individuals has come to resemble a dense web connected by transnational transactions, wherein many actors have multiple national links and identities. Globalization, along with the information and communication technology (ICT) revolution, has contracted the temporal and spatial dimensions on which human activity occurs. As a result of globalization, any action, no matter its territorial origin, can immediately impact events on the other side of the globe. Human activities, no longer bounded by geographical space, can reach any part of the world, cancelling the physical distance in between while astronomically reducing the time necessary for carrying out the action itself.[1] Economically, this is reflected in the speed with which international money transfers take place, the complex structure of financial contracts, and the multi-country networks of international corporations.

Yet this information revolution is not without consequences. ICT, coupled with financial liberalization and the removal of capital controls, provides opportunities for criminals to use international markets for illicit activities.[2] Drug trafficking, human trafficking, and arms sales take place in an underground economy made possible by the conveniences of ICT. Money laundering functions as a critical nexus connecting the ‘shadow economy’ of these criminal activities with the economically regulated world. Utilizing the high-speed, border-spanning telecommunications networks of the digital age, criminals can more easily obscure the illegal source of their profits and thus use tainted money in the legitimate financial system. Consequently, law enforcement agencies, regulatory authorities, and policymakers worldwide bemoan the insufficient capacity of anti-money laundering (AML) measures to counter such technological advancements.

How critical is the information revolution to the spread of money laundering across borders and the consequent failure of AML processes? Recent domestic and international AML initiatives focus their resources on closing the technological gap, mainly by constructing an enhanced monitoring and surveillance system within existing financial institutions. In effect, they are fighting fire with fire; states hope to find the cure for a problem in the very technology that seems to breed it.[3] Yet while the digital age has greased the wheels of the money-laundering machine, it is itself not responsible for the configuration of that machine. Rather, money laundering has evolved in *reaction* to AML policies. The shape of money laundering today is not, in fact, the sole function of technological advancements, but of the process of criminalization itself. Domestic policies, specifically those in the United States, inspired new approaches to money laundering, shifting the network of complicit banks and companies to states whose lenient policies allowed and subsequently came to depend on the profitability of criminal activity. Thus, the greatest obstacle to successful AML policies is not new technology, but the reluctance of these ‘safe haven’ states to enact sincere AML legislation.

Money laundering: structure and significance

Money laundering involves the transfer of a

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significant amount of currency over a vast transnational network composed of banks, companies and private actors. By some estimates, $1 billion USD of criminal profits are exchanged in the world's financial markets each day. The annual sum of drug profits moving through the U.S. financial system alone may be as high as $100 billion USD.[4] Michael Camdessus, former director of the International Monetary Fund, estimates that in 2000 the yearly global value of illicit money laundered constituted between two and five percent of world production – roughly between billion and $1.8 trillion USD.[5] These funds represent both the assets of criminal activity and their financial source, because criminal actors reinvest their profits into the activities that initially generated them. This cycle "is the lifeblood of organized crime;"[6] terrorists need money to buy weapons and bombs, drug smugglers need money to pay off customs and immigration inspectors, and weapons traffickers need money to purchase and transport their arms.[7] These criminal actors turn to the churnings of the legitimate financial system to 'clean' their dirty money so that it may be used freely.

The money laundering process typically involves three stages: placement, layering and integration. First, criminals introduce large amounts of illegally obtained cash into the financial system through smaller and less conspicuous deposits or money transfers or through the purchase of high-dollar goods. The purpose is to transform the money into other kinds of assets as quickly as possible. In the layering step, money transfers circulate illicit funds through various financial institutions and across multiple jurisdictions in order to obscure their source and ownership.[8] These electronic funds transfers are by far the most common layering technique.[9] In the final step of the process, funds are integrated into the mainstream financial world, often by conversion into financial instruments (stocks and bonds), the purchase of real estate, or investment in legitimate businesses.[10]

Domestic AML: The case of the United States

The United States was the first nation to officially criminalize money laundering with the Money Laundering Control Act of 1986, which made money laundering a federal crime.[11] Since then, U.S. domestic AML measures have been two-pronged, focusing on both prevention and repression of money laundering. This article focuses primarily on the prevention aspects of AML, which target 'choke points' – stages in the process that the launderer finds difficult to avoid and that are vulnerable to detection – within the placement and layering phases of the money laundering process. This legislation seeks to engineer regulatory and surveillance mechanisms within the financial system.

The first choke point in the money laundering system is the placement stage. Law enforcement agencies can identify money launderers if they detect a large amount of funds transferred by financial institutions. To this end, the Bank Secrecy Act of 1970 requires banks to file currency transaction reports (CTRs) on all deposits of $10,000 or more.[12] Furthermore, the Money Laundering Suppression Act of 1994 requires all banks to file additional suspicious activity reports (SARs) if it suspects that money laundering may be taking place.[13] The U.S. PATRIOT Act, in an attempt to combat the terrorist-financing aspect of money laundering, extends both of these requirements to a host of other institutions, including casinos, money transmitter services, car dealers and insurance companies.[14] The Financial Crimes Enforcement Network, created in 1990, is specifically responsible for analyzing the SARs and CTRs from the 21,000 depository institutions and 200,000 non-bank financial institutions.[15] Title III of the PATRIOT Act, the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, also established a "know your customer" (KYC) requirement for financial institutions, compelling banks to collect specific information to verify the identity of their customers and to conduct due diligence, namely comparing customers' transactions to their recorded profile and customer history. Organizations that fail to comply with these requirements or else participate in money laundering – with or without knowledge – face large monetary penalties of up to $50 million from the Treasury Department.[16]

Reporting requirements enacted in 1996 target the 'layering' stage. These force domestic banks to include all identifying information in the payment order of wire transfers. Identifying information thus travels with the transfer from the first bank to the last, thereby preventing launderers from obscuring the origins of their funds with the cycling of wire transfers.[17]

Crossing borders: transnational money laundering

The failure of these measures to successfully combat money laundering illustrates a key aspect of the crime, namely its ability to react to AML initiatives and evolve accordingly. For example, in order to avoid the $10,000 threshold for CTRs, criminal actors simply "smurf" funds into the system – multiple individuals make a large number of small deposits and then later aggregate those funds into a single larger account.[18] Money launderers also use means outside of the financial system that may not even involve ICT developments. Trade-based money laundering, for instance, is the process of disguising the proceeds of crime using trade transactions wherein the price, quantity, or quality of imports and exports are misrepresented.[19] Thus, the growth of trade based money laundering has little relation to ICT, but is instead a function of the reactive nature of money laundering.

Most significantly, U.S. domestic AML initiatives have failed because they have forced money laundering to migrate across borders, thus contributing to the transnational nature of the crime. Given the increased regulation in the U.S. financial system, it is not surprising that criminal activity shifts to states where the risk of detection and expected sanction are lowest.[20] In other words, the existence of controls has made it necessary for money launderers to circumvent them, utilizing convenient technological developments in the process. Wire-transfers provide a simple illustration of this phenomenon: because of the institution of the 1996 reporting requirements, criminal actors can no longer use wire transfers between U.S. banks to obscure the origin of their funds. However, wiring a transfer through a foreign bank that has strict bank secrecy easily solves this problem – the identifying information is erased and the wire transfer leaves the foreign bank clean. This one step foils the efforts of U.S. reporting requirements as it allows criminal financing to continue unchecked. Because AML initiatives target criminals through the disruption of their financing, the fact that it continues outside of U.S. territorial borders regardless of U.S. domestic efforts renders much of these AML measures useless.

Given that transnational money laundering involves the utilization of resources in foreign states with lax regulatory systems, ICT technology serves a critical function. In a world shrinking as a result of digital technology, remote banks are just as easily accessible as the one next door. Offshore financial centers serve as "safe havens" for international criminal organizations – such centers are the sites of shell companies, international business companies, offshore trusts, and rogue banks through which criminals can and do run their illicit funds.[21] For instance, some launderers take advantage of bank secrecy at these locations, which criminalizes the release of customer information, in order to scatter money across multiple accounts. Offshore shell banks have professional relationships with banks in more highly regulated, legitimate businesses, allowing the criminal customer to take advantage of the financial structure of the more highly regulated bank. The instantaneous wire transfer of funds, a direct result of globalization, is the string that ties the operation together.[22] Alternatively, criminals can use anonymous offshore shell companies to receive illicit funds through seemingly legitimate business arrangements. Indeed, most money laundering schemes involve a series of complex financial transactions moving funds through more than one of these offshore financial centers. While an investigating agency can sometimes spot the path of questionable funds flowing into and out of such a scheme, if the foreign country will not disclose the necessary identification information, the exact links between the funds and the illegal act that generated them are entirely lost.[23]

Exporting criminality: international AML

In light of the transnational character of money laundering and America's persistent domestic interest in halting such crimes, in the 1980s the U.S. exported its criminalization of money laundering into the international arena. The 1988 Vienna Convention on Narcotics – opened for signature at the height of the American fixation with preventing drug smuggling and on the coattails of the U.S. 1986 Anti-Drug Abuse Act – compelled countries to directly target narcotics trafficking through new criminal statutes, prosecutions, and extraditions. As part of this measure, it encouraged states to establish money laundering as a crime.[24]

Similarly, the U.S. spearheaded the creation of the Financial Action Task Force by OECD countries in 1989. This institution uses a 'name and shame' approach to pass judgment on countries, both members and nonmembers, regarding their controls over money laundering. A set of graduated sanctions backs up the system of mutual review, varying from a scolding letter, to expulsion from the Financial Action Task Force (FATF).[25] Furthermore, in its "Forty Recommendations," FATF calls on states to ratify the 1988 Vienna Convention, prohibit anonymous accounts, adopt effective seizure and forfeiture laws, and sanction non-cooperative nonmembers.[26] More concretely, in 2000, the finance ministers of G7 countries threatened that if institutions on the FATF list did not take immediate steps to fight money laundering, the G7 would consider additional measures, such as restricting financial transactions with those jurisdictions and conditional support from financial institutions.[27]

Shortly after the September 11 terrorist attacks on the US, the UN Security Council passed a resolution requesting that UN members cooperate in the fight against terrorist financing and ratify the Convention for the Suppression of Terrorist Financing.[28] The Convention requires countries to criminalize terrorist financing and to establish mechanisms that allow authorities to freeze the assets of charities, businesses and individuals believed to be financing terrorism.[29]

This carrot and stick, multilateral 'soft law' approach has experienced some success. States have been 'shamed' by international pressure into instituting minimal AML standards. By the beginning of 2001, seven of the 15 targets of FATF action – the Bahamas, the Cayman Islands, the Cook Islands, Israel, Lichtenstein, the Marshall Islands and Panama – had reinvented their AML policies. For example, money laundering is now a crime in Israel and customer identification is mandatory in the Cayman Islands.[30] Further, FATF members and non-members are trying to adopt its recommendations to combat terrorist financing.[31] Nevertheless, several countries continue to resist implementing AML and CTF initiatives; in its most recent jurisdictional review of non-cooperative countries and territories, the FATF listed 23 states as non-cooperative.[32]

Shortcomings of international AML: non-cooperative states

Strategies using FATF and other transnational measures may force some states to make superficial changes in their laws, but new criminal statues rarely achieve lasting differences in enforcement patterns. While almost all industrialized countries now agree that money laundering is a crime, few have regulations as broad as those used in the US approach. Only some states have instituted comprehensive reporting of all cash transactions above a threshold amount as most banks have lobbied their governments to reject this style of record-keeping and reporting.[33] States either do not want to enforce AML measures, or are unable to do so. Given that the U.S. Treasury Department operates the largest currency transaction reporting system in the world, at an estimated cost to the banking industry of $136 million annually,[34] it is no surprise that developing nations with severely limited resources cannot even come close supporting U.S.-like measures.

Some smaller jurisdictions have a vested interest in not enforcing AML: their role as off-shore financial centers allows them to compete for funds in the world market. As a result of the migration of criminal finance across borders, remote and resource-poor nations like Nauru, Niue, Vanatu, Antigua, Barbuda and Bahrain have moved from the fringes of the international banking system to full integration in the global economy,[35] and the banking industries in these countries constitute a relatively large part of the GDP.[36] Therefore, the economic incentive to pursue lax policies is strong and persists regardless of the rise of the international apparatus against money laundering. Indeed, one can argue that strict regulation in certain states actually *creates* the opening and high profitability of rogue banking in foreign jurisdictions. Moreover, the constitutive acts of money laundering – opening bank accounts, wiring funds, and moving assets through companies – are not in themselves crimes. Money laundering is a derivative offense: its criminality is a function of the predicate crime (i.e. drug production, arms trafficking, terrorism). If there is no consensus on the harmfulness of the predicate crime – for instance, drug production in Columbia – there is little incentive to view money laundering related to that specific offence as a pressing national interest.

The international criminalization of money laundering and the subsequent reluctance of certain states to implement AML measures evidence the problems inherent in exporting Western definitions of criminality. U.S. domestic interests in protecting the stability of the U.S. economy and fighting terrorism drive international AML initiatives at almost every turn. While money laundering indirectly undermines the world economy and finances predicate crimes that are of international concern, in the case of safe haven states, negative externalities – the spillover effects caused by the economic transaction – are either removed from the state, or else the state tolerates the crime for its economic benefits. Just as legal casino gambling in Monte Carlo and narcotics farming in Columbia support local employment and state economies,[37] so too does rogue banking provide government revenue and confer benefits on the public.

Exportation of criminality illustrates a postmodern understanding of criminology: the process of naming and combating the crime of money laundering has exacerbated the crime as we know it today. The institution of governmental controls forces money launderers to circumvent those controls, utilizing ICT developments and global currents to do so. Thus, money laundering has assumed a far more transnational character than in the past. Furthermore, state-created restrictions on U.S. banks have contributed to the profitability of off-shore banking havens. Subsequent attempts to export foreign notions of criminality to regions that do not share the Western social values or policies illustrate the fact that crime is a social construct controlled by established norms of a society. Individual nations will only enact the costly and privacy-reducing regulations that constitute AML measures if they are motivated by their own domestic interests.

Conclusion: a realist defense

The purpose of this analysis has been to illustrate the causal connection between three phenomena in the money laundering process: 1) the way in which Western states' domestic criminalization has unintentionally shaped the crime by forcing it across borders; 2) how these enforced laws create the openings for and high profitability of off-shore financial havens; and 3) given these financial boons and the fact that the impetus for criminalization did not arise in their jurisdictions, non-compliant states have little incentive to enact AML regulations. The question of regulating money laundering, therefore, does not hinge on the U.S.'s ability to keep up with ICT developments, but on whether safe haven states will impose any regulation at all. While ICT certainly lubricates the money laundering process, the ability of states to stop money laundering depends on the establishment of a harmonized regime of crime control. Disparities between states' national policies will create opportunities for money launderers to continue financing their nefarious acts, and thus AML initiatives cannot succeed if small off-shore financial havens continue to pursue their own capitalist interests.

Political realism asserts that states first and foremost pursue their own interests. Arguably, the U.S. is attending to its own domestic protection concerns – though its approach presumably benefits the international community as well– and safe haven states are similarly pursuing their own economic gains. Indeed, it is not clear whether the threat that rogue banking poses to the developed world is significantly or at all more damaging than the history of colonialism and economic exploitation by developed nations. Regardless, a state's ability to pursue its own interests in an international context depends on the power behind that state. Thus, states, like the US, who are concerned with non-cooperative safe haven nations, can raise the incentives for cooperation through political coercion. Thus far, the FATF's multilateral approach of political pressure on the part of the developed world has been quite successful. Another possible approach is the unilateral widening of criminal jurisdiction. The United Nations Convention Against Corruption and the UN Convention Against Transnational Organized Crime establish jurisdiction where the offence in question is committed in whole or *in part* in the territory of the prosecuting state party.[38] If an individual draws a check connected to money laundering on American soil, the U.S. can bring the entire case within its jurisdiction. Furthermore, the Conventions provide optional criteria with which states can consider establishing jurisdiction in additional instances: for example, when the offence is committed against[39] or by[40] one of their own citizens, the offence is linked to money laundering planned to be committed in state territory,[41] or the offence is committed against the State party.[42] In recent years, the U.S. has expanded its jurisdiction without precedent, mainly to prosecute US nationals who commit crimes outside of traditional US jurisdiction (i.e. sex tourism laws). While expanding jurisdiction to prosecute non-nationals outside of U.S. jurisdiction for attempted money laundering against the state has not been attempted, it is not impossible. Indeed, between the question of power and profit, perhaps the mere threat of expansive U.S. criminal jurisdiction may be a sufficient incentive for non-compliant states to make AML a domestic concern.

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