ARTICLE

FOLLOW THE MONEY? DOES THE INTERNATIONAL FIGHT AGAINST MONEY LAUNDERING PROVIDE A MODEL FOR INTERNATIONAL ANTI-HUMAN TRAFFICKING EFFORTS?

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I. Introduction

Trafficking in human beings, characterized as "modern day slavery," has emerged as a global problem. According to the U.S. State Department's 2008 Trafficking in Persons Report, 170 of the world's countries have a significant trafficking problem and are countries of destination, origin, and/or transit.[1] Through the mechanism of money laundering, the proceeds derived from a multiplicity of criminal activities are integrated into international or domestic financial and banking sectors so that perpetrators of the crimes may enjoy their profits within the legitimate economy.

In 2000, the United Nations Convention Against Transnational Organized Crime (Transnational Crime Convention)[2] and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)[3] were opened for signature. In the same year,[4]

1. U.S. Dep't of State, Trafficking in Persons Report 3, 8, 10 (2008) [hereinafter 2008 TIP Report].

2. United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex I, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter Transnational Crime Convention].

3. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter Trafficking Protocol].

4. In fact, the two instruments were adopted within a month of each other.

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the U.S. Congress enacted the Trafficking Victims Protection Act[5] (TVPA) as part of a package of legislation that included efforts against domestic violence and child kidnapping. The international and U.S. domestic instruments offer multilateral and unilateral methodologies and frameworks for understanding and combating the modern traffic in human beings.

Not least of these methodologies is the U.S. State Department's annual Trafficking in Persons Report (TIP Report), issued pursuant to congressional mandate, which directs that countries be ranked according to their level of compliance with the minimum level of anti-trafficking efforts specified by Congress. Countries whose efforts do not satisfy the specified standards face the threat of U.S. sanctions. Eight years after the passage of the international and U.S. instruments, while information gathering, scholarly analysis and writings, legislative enactments, and law enforcement task force formation and enforcement actions have increased internationally and domestically, there is little evidence that the anti-trafficking efforts are succeeding in forging and creating compliance with global anti-trafficking standards.[6] The 2008 TIP Report included fourteen countries ranked Tier 3 and forty countries ranked in the Tier 2 watch list.[7] Many of these countries had been listed at these noncompliant levels in previous TIP Reports.[8]

In contrast, in 2000, the Financial Action Task Force (FATF), an independent inter-governmental organization that was created by the Group of Seven countries (the G-7)[9] in 1989 and whose Forty Recommendations

5. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 2A, 114 Stat. 1464 (codified at 22 U.S.C. §§ 7101–7112 (2000)).

6. Some estimates of the number of trafficking victims have declined over the years. U.S. Gov't Accountability Office, Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad (2006) [hereinafter 2006 GAO Report]. However, each year, the TIP Report features newly added countries with trafficking problems. For example, in 2008, the Republic of the Congo was added to the Tier rankings for the first time. *See* 2008 TIP Report, *supra* note 1, at 44.

7. 2008 TIP Report, *supra* note 1, at 44. The Tier system of the TIP Report is discussed in detail in Part II. Compare the Tier rankings in the 2008 TIP Report with the Tier rankings in the 2007 and 2006 TIP Reports. U.S. State Dep't, Trafficking in Persons Report 42 (2007) [hereinafter 2007 TIP Report]; U.S. State Dep't, Trafficking in Persons Report 46 (2006) [hereinafter 2006 TIP Report].

8. For example, Burma and Saudi Arabia were first included on the list at Tier 3 in 2001. U.S. State Dep't, Trafficking in Persons Report 12 (2001) [hereinafter 2001 TIP Report]. Burma has been ranked at Tier 3 on every subsequent report. Saudi Arabia, after a brief flirtation with Tier 2 on the 2003 and 2004 TIP Reports, has rested comfortably at Tier 3 in each subsequent TIP Report. U.S. State Dep't, Trafficking in Persons Report 17 (2002) [hereinafter 2002 TIP Report]; U.S. State Dep't, Trafficking in Persons Report 21 (2003) [hereinafter 2003 TIP Report]; U.S. State Dep't, Trafficking in Persons Report 39 (2004) [hereinafter 2004 TIP Report]; U.S. State Dep't, Trafficking in Persons Report 42 (2005) [hereinafter 2005 TIP Report]; 2006 TIP Report, *supra* note 7, at 46; 2007 TIP Report, *supra* note 7, at 42; 2008 TIP Report, *supra* note 1, at 44.

9. The Group of Seven (G-7) is an international organization consisting of seven large industrialized countries (Canada, France, Germany, Great Britain, Italy, Japan, and the United States). The organization coordinates the economic policy of its member states and, by virtue of the strength of their economies, global economic policy. For example, the October 2008 meeting

form the baseline standards for the international prevention of and fight against money laundering by countries and banking and financial systems and institutions, issued a list of Non-Cooperative Countries and Territories (NCCTs). The list named countries whose banking and financial laws and regulations did not meet the standards set forth in the Forty Recommendations.[10] The Initial NCCT Report included fifteen countries and territories; six additional jurisdictions were named as NCCTs in the 2001 Report. In late 2007, the FATF issued the 2006/2007 list of NCCTs.[11] No countries or territories remained on the list; all of the formerly noncompliant states and territories are now compliant or their compliance is in the process of being confirmed.[12]

The contrasting levels of compliance engendered by inclusion of individual countries on the two lists appear to indicate that the international fight against money laundering is more successful than are the international efforts to combat the traffic in human beings. This article therefore seeks to explore whether the FATF's international anti-money laundering regime may serve as a useful model for international anti-trafficking efforts and whether the institutional standards and methodologies of the anti-money laundering regime can be adapted and successfully deployed in the fight against trafficking in human beings.

I have asserted elsewhere that the dominant conceptual and legal frameworks deployed to combat the trafficking in humans, including the law enforcement framework, are inadequate.[13] However, I have acknowledged the value of those frameworks even as I have advocated a more struc-

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of the G-7 responded to the world financial and credit crisis, formulating a coordinated policy by G-7 member states.

10. *See* FIN. ACTION TASK FORCE, REPORT ON NON-COOPERATIVE COUNTRIES AND TERRITORIES 1 (2000) [hereinafter INITIAL NCCT REPORT]; FIN. ACTION TASK FORCE, REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES: INCREASING THE WORLDWIDE EFFECTIVENESS OF ANTI-MONEY LAUNDERING MEASURES 12 (2000) [hereinafter 2000 NCCT REPORT]. In two subsequent reports, the Financial Action Task Force (FATF) identified countries and territories that the organization would investigate and review in order to determine Non-Cooperative Country or Territory (NCCT) designation. FIN. ACTION TASK FORCE, REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES: INCREASING THE WORLDWIDE EFFECTIVENESS OF ANTI-MONEY LAUNDERING MEASURES 18–19 (2001) [hereinafter 2001 NCCT REPORT]; FIN. ACTION TASK FORCE, REVIEW TO IDENTIFY NON-COOPERATIVE COUNTRIES OR TERRITORIES: INCREASING THE WORLDWIDE EFFECTIVENESS OF ANTI-MONEY LAUNDERING MEASURES 19–20 (2002) [hereinafter 2002 NCCT REPORT].

11. FIN. ACTION TASK FORCE, ANNUAL REVIEW OF NON-COOPERATIVE COUNTRIES AND TERRITORIES 2006–2007: EIGHTH NCCT REVIEW (2007) [hereinafter 2007 NCCT REPORT].

12. That is, within eight years, all the territories identified as an NCCT had taken steps to comply with the standards of the Forty Recommendations, and had been investigated/monitored and delisted. Only Myanmar is currently subject to monitoring. 2007 NCCT REPORT, *supra* note 11, at 5; *see also supra* note 8 (summarizing Myanmar's/Burma's response to the TIP Reports). Both the names "Burma" and "Myanmar" are used in this article. The dual usage reflects references to "Myanmar" in FATF publications and to "Burma" in the TIP Reports.

13. *See* Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 240–43 (2007).

tural assault on the trade.[14] The international anti-money laundering model analyzed here, if adapted to the international fight against human trafficking, would strengthen the implementation of existing frameworks, especially the already dominant law enforcement approach.

Prior to embarking on that analysis, the article will assess the extent to which the anti-money laundering regime's apparent success can be substantiated. In order to perform this assessment, while maintaining its focus on the use of name-and-shame lists in the fight against trafficking, the article compares and contrasts human trafficking and money laundering.[15] In doing so, the article examines, among other things, the nature of the two illicit markets, as well as the theoretical and legal frameworks used to understand and combat these markets. In addition, the article analyzes the international and domestic interests that are affected by the existence of and fight against the markets. The analysis conducted here highlights how the international system views and prioritizes the exploitation of monetary and financial systems in comparison with the exploitation of human persons. Additionally, this analysis explores the effectiveness of different types of international and transnational coordination in fighting global problems, including formulating, harmonizing, and enforcing international legal standards.

Part II describes and compares the trafficking in humans and the laundering of money, and contrasts the use and effectiveness of the two naming-and-shaming lists deployed to combat them. Part III broadens the scope of analysis to place the anti-money laundering and anti-human trafficking efforts, including the two lists, within the relevant historical and political contexts and assesses the effectiveness of the two regimes. Part IV discusses the potential for and challenges to adapting the international anti-money laundering model for deployment in the international efforts against human trafficking. The article concludes that the principal challenge to adoption of this course of action is the formation of international political will.

II. Two Global Problems: Laundering Money and Trafficking in Humans

A. *Introduction*

Both the human-to-human exploitation of trafficking in persons and money laundering, the exploitation of legitimate financial and monetary

14. *See* Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 Transnat'l L. & Contemp. Probs. __ (forthcoming 2009).

15. The discussion and description of anti-money laundering efforts, which would be very basic and of less interest to a scholar of money laundering, is directed to scholars of human trafficking and anti-trafficking activists who may be less knowledgeable about the mechanisms and institutions of the anti-money laundering model. As such, the descriptions of the FATF's anti-money laundering efforts laid out in this article are more detailed than are the descriptions of the international anti-trafficking efforts with which scholars of human trafficking and anti-trafficking activists are more familiar.

networks, have evoked responses from a variety of international actors—the United Nations, the G-7, the Council of Europe, and powerful nations such as the United States of America. Money laundering and human trafficking share several characteristics. Both activities have been criminalized domestically and internationally. Both may take place solely within the domestic sphere of individual nations or territories, but often exploit interstices in domestic and international law in order to access transnational and transborder markets. The two are also linked at two stages of their operation: the availability and use of money laundering is linked to the causes of human trafficking; and, like profiteers from other predicate crimes, the trafficker in human beings uses money laundering services to move proceeds and profits into the legitimate economy.

1. Trafficking in Human Beings

Trafficking in human beings—the uncompensated exploitation, for profit, of a human being—is often described as modern slavery. To extract services and to trade the person, the trafficker in human beings exercises control over the trafficked person not through legal *ownership*,[16] but rather through illegal use of physical force or coercion and/or the application of psychological forms of coercion. The trafficked person is bought and sold, and services, that is, sexual or other types of labor, are extracted from the person with no or token compensation. The individual may be victimized in order that the trafficker may profit from the services s/he will provide or because the physical, racial, gender, age, or other attributes of that individual make him or her vulnerable to exploitation. The trafficked human is targeted both as a provider of labor services that may be extracted and as an item that is tradable and transportable and from which profit may be derived. Liability attaches to the trafficker, but not to the person subject to trafficking, who, under international law, is to be treated as a victim by the state in which s/he is located.[17] However, the trafficked person may be subject to liability on independent grounds, depending on the activity in which that person has been engaged, such as the voluntary crossing of nation-state borders in violation of applicable immigration laws.

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16. The prohibition against slavery has attained the status of a peremptory or *jus cogens* norm under customary international law. *See* A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN. ST. INT'L L. REV. 809, 810 (2005). Customary norms of international law which have attained the status of *jus cogens* are nonderogable. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n and reporters' note 11 (1987). No country or territory legally sanctions the chattel ownership (that is, slavery) of human beings. However, the customs or practices in some countries may produce exploitation that is experientially tantamount to slavery. For example, scholars have identified Mauritania as a state where slavery continues to exist. *See, e.g.*, DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 330 (2006).

17. *See* Trafficking Protocol, *supra* note 3, arts. 6–7 (respectively detailing protections that State Parties should provide to victims of trafficking and providing that State Parties should con-

The Trafficking Protocol defines human trafficking as

> [T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.][18]

The Council of Europe Convention on Action Against Trafficking in Human Beings adopts the same definition.[19]

In contrast to these international instruments, the U.S. domestic statute, the TVPA, identifies two types of trafficking that are distinguished by their varying levels of ascribed severity. The TVPA defines "sex trafficking" as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."[20] According to the TVPA, "severe forms of trafficking" are defined as:

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
>
> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[21]

The domestic definition employed by the United States is arguably as important as the definition provided by the Trafficking Protocol, since it is the United States that has created and continues to maintain a list of foreign countries (the TIP Report) that attempts to track those countries' compliance with anti-trafficking obligations.[22]

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sider the adoption of domestic legislation providing trafficking victims a right to remain, either temporarily or permanently, in the receiving State).

18. Trafficking Protocol, *supra* note 3, art. 3(a). The Trafficking Protocol is the first international instrument to define trafficking in persons.

19. Council of Europe, Convention on Action Against Trafficking in Human Beings and Its Explanatory Report art. 4, May 15, 2005, C.E.T.S. 197 [hereinafter Council of Europe Trafficking Convention], *available at* http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/FSConv_en.asp#TopOfPage (last visited Jan. 30, 2009). The Convention, the first European treaty in the field of human trafficking, was opened for signature on May 15, 2005. *Id.* On October 24, 2007, the Convention received its tenth ratification, triggering its entry into force on February 1, 2008. *Id.*

20. Trafficking Victims Protection Act § 103(9), 22 U.S.C. § 7102(9) (2006).

21. *Id.* § 7102(8).

22. *See infra* Part II.C. (regarding the framing of those obligations).

2. *Laundering Money*

Through the laundering of money, an individual or entity attempts "the conversion of criminal incomes into assets that cannot be traced back to the underlying crime."[23] The purpose of laundering the proceeds and profits from criminal activities is to allow the criminal to enjoy the fruits of that activity outside the criminal sphere, that is, within the legitimate economy, while at the same time disguising the criminal source of that money.[24] The money is and is *not*, simultaneously, the object of the targeted activity. The would-be launderer already has obtained money and profits through the underlying criminal activities. That is, for the owner of the illegally obtained money, profits already have been earned; the provider of laundering obtains a service fee and perhaps other benefits from performing the service. Possession of the money itself evidences engagement in the underlying (or predicate) criminal act. Concealment of the criminal origins allows the owner to openly enjoy the funds.

The process of laundering money is "conventionally divided into three phases: *placement* of funds derived from an illegal activity, *layering* of those funds by passing them through many institutions and jurisdictions to disguise their origin, and *integration* of the funds into an economy where they appear to be legitimate."[25] Both the criminal owner of the dirty funds and the service provider, whether natural or juridical, who participates in the laundering activity, are referred to as money launderers. Both actors are criminally liable.

B. *Comparing and Linking Trafficking in Humans and Money Laundering*

While the laundering of money is the performance of an illicit service, the trafficking in human beings is the buying, selling, and exploitation of a person as an item of "merchandise"—a commodity that provides a service.

1. *Comparing*

An important difference is that while the trafficking of humans is regarded as *malum in se* (that is, evil by its very nature) because of the human exploitation at its heart, as well as the disapprobation evoked by the consequent damages to individuals and societies, the laundering of money is criminalized and disapproved because of the harms it may cause. In the past, money laundering was regarded as an ill because it allowed the inte-

23. PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 1 (2004).

24. GUY STESSENS, MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL 83 (2000).

25. REUTER & TRUMAN, *supra* note 23, at 3. For a more detailed discussion of money laundering techniques, see *id.* at 27–40.

gration of criminal proceeds into the legitimate economy, (1) allowing the criminal to enjoy the fruits of criminal activity, and (2) hiding the evidence of the illegal and illicit sources of the funds. As a result, money laundering increases the existing incentives to commit crimes and makes it more difficult for law enforcement to apprehend and the legal system to punish perpetrators of the underlying criminal act(s). Through legislation, the laundering of money has been criminalized.[26] As a result, the provider of money laundering services, even if unconnected to the commission of predicate criminal offenses, now faces criminal liability.

The two phenomena share some similarities. For example, governments, organizations, and scholars of the two activities have great difficulty in estimating their size and scale.[27] Further, the difficulty of identifying the activities due to the mutability (from legal to illegal) of the trade service or goods serves to disguise both activities from outsiders. Both money and humans, as the subject of money laundering and the trafficking of persons, present challenges to prohibition and law enforcement due to their fungibility and ease of concealment. Money may become illicit due to the manner in which it was obtained[28] and the mechanisms to which it is subjected to cleanse it of its origins. However, money by itself does not readily provide evidence of its illegal source. It moves in and out of legality and illegality, licitness and illicitness, based on the legal systems and processes and social norms applied to it. Superficially, money appears to be legitimate and may easily blend with funds that are produced by legal activities.

Similarly, trafficked persons may be easily blended with other human beings into legitimate industries. Only the application of legal rules and definitions to the circumstances of the individual, particularly with respect to the nature and extent of the control exercised over the individual, distinguishes the trafficked person from a person who is exploited in other ways but not trafficked,[29] or, indeed, one who is appropriately or inappropriately

26. Most jurisdictions now criminalize money laundering itself, not only the underlying crime(s), and, indeed, the Forty Recommendations of the FATF demand that they do so. FIN. ACTION TASK FORCE, THE FORTY RECOMMENDATIONS 1 (2003), *available at* http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html [hereinafter FORTY RECOMMENDATIONS]. For an example of anti-money laundering legislation, see 18 U.S.C. § 1956.

27. *See, e.g.*, 2006 GAO REPORT, *supra* note 6, at 65 (discussing challenges of data collection with respect to the trafficking of humans); Kamala Kempadoo, *Introduction: From Moral Panic to Global Justice; Changing Perspectives on Trafficking*, *in* TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK, AND HUMAN RIGHTS vii, xx (Kamala Kempadoo et al. eds., 2005) ("Accurate figures about trafficking do not exist . . . ."); *see also* Jackie Johnson & Desmond Lim, *Money Laundering: Has the Financial Action Task Force Made a Difference?*, 10 J. FIN. CRIME 7, 7 (2002) (asserting, with respect to money laundering, that "judging the size of the problem is virtually impossible, given its secretive nature").

28. For example, drug trafficking proceeds, bribery and corruption, fraudulent activity, or theft.

29. For example, through underpayment or nonpayment of wages.

targeted for prosecution.[30] As a result of the fungibility and ease of concealment, to an extraordinary extent, laundered money and trafficked persons present significantly similar challenges to those attempting to identify and prevent these proscribed activities.

Even more difficulties are presented by transborder movements of money and people, so that harmonization of standards of identification, criminalization, and punishment become crucial. The dealers in human cargo and dirty money take advantage of the interstices and lacunae between domestic and international law, as well as among different domestic legal regimes. For example, the operative definitions of "human trafficking" and "money laundering" may change, so that movement across a border may eliminate the criminality of the activity, risk of criminal prosecution, and/or the scope of the applicable punishment. As a result, the creation of transnational systems to deal with money laundering and human trafficking activities is crucial to curtailing these activities.

The two activities can also be compared with respect to other attributes—the level of sophistication of the crimes, the nature of the victim and victimization on which it is based, and societal attitudes toward the activity. Money laundering appears to be the more sophisticated crime, requiring the interconnection of financial systems and technical expertise in the mechanics and functioning of domestic and international financial and banking institutions.[31] In order to cleanse the dirty money, the successful launderer must be familiar with (and indeed, master) and weave the money in and out of divergent potentially and actually applicable laws and regulations, sophisticated financial instruments, and reporting and monitoring requirements. As such, money laundering may be more dependent on its connection to legitimate institutions and enterprises than is the traffic in humans.

The trafficking in human beings appears to be less sophisticated. The trafficker must create schemes to bring individuals under his or her control, and must dominate the individual to maintain that control, either through psychological or physical means. More sophisticated tools and methods of control and service extraction may be required, depending on the location and nature of the trafficked person's exploitation and/or the necessity of crossing borders. For example, while traffickers may use sophisticated schemes to engineer the issuance of valid travel documents, they may also use simpler schemes entailing corruption of border control and/or immigration officials. Once dominated, the trafficked person may be hidden in the

30. For example, domestic prostituted women are typically prosecuted as wrongdoers with insufficient thought devoted to the question of whether *they* are trafficking victims.

31. *See, e.g.*, Alison S. Bachus, Note, *From Drugs to Terrorism: The Focus Shifts in the International Fight Against Money Laundering After September 11, 2001*, 21 ARIZ. J. INT'L & COMP. L. 835, 845–46 (2004) (describing various money laundering methodologies and the variety of financial instruments and institutions involved).

open as a foreign agricultural worker, restaurant employee, or prostituted dancer who is concealed behind cultural and language barriers. If exploited in a domestic (household) worker/service situation, the trafficked person may be completely concealed.[32]

The two activities also differ with respect to the identity of the victim and nature of the victimization. With respect to the trafficking of humans, at first glance it appears that it is the individual trafficked person alone who is victimized. However, broadening the scope of analysis reveals that families as well as societies of origin and destination also are victims.[33] Money laundering, on the other hand, appears to be a victimless crime since the predicate crimes have already been completed. However, the availability of mechanisms that facilitate the enjoyment of the fruits of the predicate crimes and the concealment of the evidence of commission of those crimes serves as an incentive and context for the commission of additional predicate crimes. The laundering of the funds may be viewed as the last stage in the series of acts that constitute the perpetration of the crime.[34] The victims of the underlying crimes may be unable to recover monetary compensation

32. That is, the trafficked person may never meet anyone other than his/her trafficker, or may be concealed behind the role of (subservient) domestic servant. *See* Lisa Frank, *Couple Convicted of Harboring Maid*, MILWAUKEE J. SENTINEL, May 26, 2006, *available at* http://www.jsonline.com/story/index.aspx?id=428675.

33. *See, e.g.*, Bravo, *supra* note 13, at 276–77 (discussing damage caused to origin and destination societies by the traffic in humans).

34. That the apparent victimlessness of money laundering is a mere illusion was brought home in the aftermath of the events of September 11, 2001. Global fears about the use of international financial and banking networks led to expansion of the FATF's mandate and to UN Security Council resolutions against terrorist financing, among other things. UN Security Council Resolution 1267 provides for the establishment of the committee to oversee the implementation of sanctions against Taliban-controlled Afghanistan. S.C. Res. 1267, ¶ 6, U.N. Doc. S/RES/1267 (Oct. 15, 1999). Several subsequent Security Council Resolutions expanded the sanctions regime to cover individuals and entities associated with Al-Qaida, the Taliban, and Osama bin Laden worldwide. The Al-Qaeda and Taliban Sanctions Committee, General Information on the Work of the Committee, http://www.un.org/sc/committees/1267/information.shtml (last visited Jan. 17, 2009). The committee is now known as the Al-Qaida and Taliban Sanctions Committee, and it is made up of all fifteen members of the Security Council. *Id.* The main function of the Committee is to maintain the Consolidated List, a list of individuals and entities associated with Al-Qaida, the Taliban, and Osama bin Laden. *Id.* Member states propose individuals and entities for listing and provide detailed statements in support of their proposals. The Al-Qaeda and Taliban Sanctions Committee, Fact Sheet on Listing, http://www.un.org/sc/committees/1267/fact_sheet_listing.shtml (last visited Jan. 17, 2009). The Committee makes final listing decisions by consensus. *Id.* There are currently approximately five hundred names on the list. The Al-Qaeda and Taliban Sanctions Committee, General Information on the Work of the Committee, http://www.un.org/sc/ committees/1267/information.shtml (last visited Jan. 17, 2009). Individuals and entities on the Consolidated List face mandatory sanctions. The Al-Qaeda and Taliban Sanctions Committee, The Consolidated List, http://www.un.org/sc/committees/1267/consolist.shtml (last visited Jan. 17, 2009). Through multiple Security Council resolutions, states are required to freeze the assets of, prevent the entry into or transit through their territories by, and prevent the supply of arms to individuals and entities appearing on the list. *Id.* For a brief discussion of potential human and civil rights implications of this regime, see *infra* note 324.

because the full extent of the proceeds of the wrongdoing is hidden.[35] In addition, the mingling of dirty funds with legitimate funds may damage and pervert the domestic and international financial and banking systems of host societies.[36]

The apparent victimlessness of money laundering mutes the outrage of society. The efforts against money laundering, notably its investigation and monitoring, which appear to be more bloodless and technical pursuits, are the creature of technocrats, banking experts, financial institutions, and governments. In contrast, the average person is viscerally affected by images and narratives about the trafficking of human beings. The human-to-human exploitation of the trafficking in persons thus elicits more societal interest and greater involvement on the part of civil society actors.

As a result of these differences, nation-state authorities inveigh publicly, in emotional tones and evocative rhetoric, against the traffic in humans.[37] In contrast, the fight against money laundering is conducted quietly in intergovernmental spheres, with input by technically adept bankers, financiers, accountants, and other experts. The civil society represented in anti-money laundering circles is a thin and largely invisible sliver of the broader society.[38]

2. *Linking*

Money laundering is intimately linked to the foundations of the trafficking in human beings. Firstly, economic and political instability are among the push factors identified as a cause of the vulnerability and movement of trafficked persons from countries of origin.[39] To the extent that corrupt leaders and/or governments are able to capture national resources

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35. For example, money stolen by kleptocratic leaders and governments may be impossible to locate and thus cannot be returned to the nations from which it was stolen.

36. *See* Bachus, *supra* note 31, at 838–41 (discussing the harmful effects of money laundering).

37. For example, in an address to the UN General Assembly, President George W. Bush stated,

> We must show new energy in fighting back an old evil. Nearly two centuries after the abolition of the transatlantic slave trade, and more than a century after slavery was officially ended in its last strongholds, the trade in human beings for any purpose must not be allowed to thrive in our time.

President George W. Bush, Speech Before the United Nations General Assembly (Sept. 23, 2003) (transcript available at http://www.cnn.com/2003/US/09/23/sprj.irq.bush.transcript/index.html).

38. For example, the list of international organizations that have been granted the status of FATF observers is dominated by intergovernmental and professional organizations. They include the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the International Association of Insurance Supervisors, the International Monetary Fund, the World Bank, and the World Customs Organization. FIN. ACTION TASK FORCE, Members & Observers, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236869_1_1_1_1_1,00.html (last visited Feb. 3, 2009) [hereinafter Members & Observers].

39. *See, e.g.*, Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 WIS. INT'L L.J. 131, 137–39 (2008) (discussing some causes of the trafficking in humans).

for personal benefit and to launder and hide the proceeds of such theft in transborder financial institutions, money laundering contributes to the poverty and instability that makes nationals of those countries vulnerable to exploitation.[40]

The second link between the two ills is the utilization of domestic and transborder money laundering services by the trafficker in human beings. Human trafficking is one of the predicate crimes served by the laundering of money.[41] The incentive of the traffickers is the same as the incentive of perpetrators of other underlying crimes—the trafficker seeks to hide the illegitimate source of the proceeds and to enjoy the proceeds within the legitimate economy.

C. Name-and-Shame Tactics

Both activities have stimulated international and individual nation-state responses. A central feature of both the international fight against human trafficking and the international anti-money laundering regime is the use of lists as a naming-and-shaming device that is aimed at encouraging or compelling nation-states to comply with the issued standards. The list deployed in the anti-money laundering effort is the NCCT list, issued by the FATF, an international intergovernmental group with limited membership. The FATF received a specific anti-money laundering mandate, and possesses a limited, but extendible, term of existence.[42] The anti-trafficking naming-and-shaming list is the United States' congressionally mandated, annual TIP Report.[43] The standards used were formulated by the U.S. Congress.

The two lists vary with respect to the methodologies and mechanisms underlying inclusion and placement of individual countries on the lists, the sources and application of the criteria against which jurisdictions are measured, the information-gathering methodologies, as well as their effectiveness. The divergent responses of states to their placement on the lists may result from the differing methodologies and may indicate the greater success of the international anti-money laundering regime compared with the international anti-trafficking regime.

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40. *See, e.g.*, SHELDON X. ZHANG, SMUGGLING AND TRAFFICKING IN HUMAN BEINGS: ALL ROADS LEAD TO AMERICA 111–14 (2007) (discussing links among corruption, poverty, and human trafficking).

41. Recommendation 1 of the Forty Recommendations requires that, in determining which crimes constitute predicate offenses for the crime of money laundering, countries "should at a minimum include a range of offences within each of the designated categories of offences." FORTY RECOMMENDATIONS, *supra* note 26. The Glossary to the Forty Recommendations includes "trafficking in human beings and migrant smuggling" among the designated categories of offenses. *Id.*

42. FIN. ACTION TASK FORCE, REVISED MANDATE 2008–2012, 2 (2008), *available at* http://www.fatf-gafi.org/dataoecd/3/32/40433653.pdf.

43. *See* 2008 TIP REPORT, *supra* note 1.

1. *Anti-Human Trafficking*

The two most significant legal instruments in the state-level international efforts against human trafficking are the UN Trafficking Protocol and the U.S. TVPA.[44] The central purposes of both instruments include the prevention of trafficking, the protection of victims, and the prosecution of traffickers. To those ends, both instruments adopt broad definitions of trafficking[45] and the component activities encompassing trafficking are criminalized.

a. *U.S. Extraterritorial Efforts: The TIP Report*

Deeply disturbed by the congressional findings and testimony before Congress regarding the rise and spread of the trafficking in human beings, U.S. federal legislators took a determined anti-trafficking stance.[46] In addition to the main thrust of the TVPA—the criminalization of trafficking within the United States, provisions for prevention of the traffic, and protec-

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44. Opened for signature and signed into law only a month apart in 2000, the two instruments share many characteristics, although some potential conflicts are apparent. Other international instruments that specifically respond to the expansion in the trafficking of humans are more regional in scope. *See, e.g.*, Council of Europe Trafficking Convention, *supra* note 19. On October 24, 2007, the Convention received its tenth ratification, triggering its entry into force on February 1, 2008. *Id.* The Convention is the first European treaty in the field of human trafficking, and it is focused on protecting victims, prosecuting traffickers, preventing trafficking, and setting up a system to monitor the implementation of the Convention. *Id.* The Convention adopts the definition of trafficking from the UN Trafficking Protocol, but employs language that is more mandatory in its formulation of the anti-trafficking obligations of States Parties than is the UN Trafficking Protocol. *Id.* For example, where the Protocol asks that states protect the privacy and identity of victims "[i]n appropriate cases and to the extent possible under its domestic law," Trafficking Protocol, *supra* note 3, art. 6(1), the Convention requires that "[e]ach [state] party shall protect the private life and identity of victims." Council of Europe Trafficking Convention, *supra* note 19, art. 11. The Protocol only requires that States "consider implementing measures to provide for the physical, psychological and social recovery of victims," which may include housing, counseling, medical care, and employment or education. Trafficking Protocol, *supra* note 3, art. 6(3). In contrast, the Convention requires that each State adopt measures necessary to assist victims in their physical, psychological, and social recovery, which at a minimum must include appropriate accommodations, emergency medical treatment, translation and interpretation services, counseling, and access to education for children. Council of Europe Trafficking Convention, *supra* note 19, art. 12. However, it is yet too early to assess the long-term impact of this regional instrument. Other regional anti-trafficking instruments include the SAARC [South Asian Association for Regional Cooperation] Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking___Prostitution.pdf (last visited Feb. 11, 2009), and two Organization of American States instruments: the American Convention on Human Rights "Pact of San Jose, Costa Rica," http://www.oas.org/juridico/english/sigs/b-32.html (last visited Feb. 11, 2009), and the 1994 Inter-American Convention on International Traffic in Minors, http://www.oas.org/juridico/english/Treaties/b-57.html (last visited Feb. 11, 2009).

45. *See* definitions *supra* Part II.A.

46. *See* Trafficking Victims Protection Act § 102, 22 U.S.C. § 7101(b)(21) (2006) (finding, among other things, that "[t]rafficking of persons is an evil requiring concerted and vigorous action by countries of origin, transit or destination").

tion of and benefits for specified trafficked persons,[47] U.S. legislators put in place a system aimed at combating the trade outside the borders of the United States.[48] The annual report on trafficking submitted to Congress by the Secretary of State and the threat of U.S. sanctions have bolstered the intended extraterritorial effect of the United States' anti-trafficking regime.[49]

Section 110 (Actions Against Governments Failing to Meet Minimum Standards) requires that the U.S. Secretary of State produce and submit, by June 1 of each year, a report on the anti-trafficking efforts of foreign governments.[50] The provision requires that the report include three lists:

> (A) a list of those countries, if any, to which the minimum standards for the elimination of trafficking are applicable and whose governments fully comply with such standards;
>
> (B) a list of those countries, if any, to which the minimum standards for the elimination of trafficking are applicable and whose governments do not yet fully comply with such standards but are making significant efforts to bring themselves into compliance; and
>
> (C) a list of those countries, if any, to which the minimum standards for the elimination of trafficking are applicable and whose governments do not fully comply with such standards and are not making significant efforts to bring themselves into compliance.[51]

A fourth category, the Tier 2 Watch List, was created by the 2003 reauthorization of the TVPA.[52] The provision reads, in pertinent part:

> Countries that have been [ranked at Tier 2] pursuant to the current annual report, where—
>
> (I) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing;
>
> (II) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the

47. *Id.* § 106, 22 U.S.C. § 7104 (prevention of trafficking); *id.* § 107, 22 U.S.C. § 7105 (protection and assistance for victims of trafficking); *id.* § 111, 22 U.S.C. § 7108 (actions against significant traffickers in persons); *id.* § 112, 22 U.S.C. § 7109 (strengthening prosecution and punishment of traffickers).

48. *See id.* § 102(b)(24), 22 U.S.C. § 7101(b)(24) (noting, among other things, that "[t]he United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes").

49. As discussed *infra* Part III.E.1, the annual TIP Reports have prodded many countries to adopt anti-trafficking legislation. In addition, the information gathered in the report has been a boon to anti-trafficking advocates and to scholars of human trafficking. *See* ZHANG, *supra* note 40, at 110.

50. Trafficking Victims Protection Act § 110(b)(1), 22 U.S.C. § 7107(b)(1) (2006).

51. *Id.* § 110, 22 U.S.C. § 7107(b)(1)(A)–(C). The three lists have evolved into the Tier 1 and Tier 2 watch list, and Tier 3 rankings of countries used in the annual TIP Reports.

52. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, § 6(e), 117 Stat. 2875 (codified at 22 U.S.C. § 7107(b) (2006)).

> previous year, including increased investigations, prosecutions and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials; or
>
> (III) the determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.[53]

Section 108 (Minimum Standards for the Elimination of Trafficking) of the TVPA[54] further delineates the minimum standards applicable to countries of "origin, transit or destination for victims of severe forms of trafficking"[55] in order to eliminate trafficking. The provision specifies the nature and some substantive characteristics of anti-trafficking legislation that should be adopted by such countries,[56] as well as the criteria to be used in evaluating the efforts of the referenced countries.[57]

Subparagraph (b)(3) of Article 110 of the TVPA further outlines the criteria to be used by the Secretary of State in determining whether a country is "making significant efforts to bring itself into compliance with [the minimum standards for the elimination of trafficking]."[58] Those criteria include the extent of the occurrence of severe forms of trafficking in that country, the extent of governmental noncompliance with the standards set forth in the TVPA, and the nature of the measures which might reasonably be undertaken to bring the country into compliance with those standards.[59]

Section 109 of the TVPA[60] (Assistance to Foreign Countries to Meet Minimum Standards) authorizes the President of the United States to provide to foreign countries that fail to meet the minimum standards specified in the TVPA assistance for programs, projects, and activities designed to meet the minimum standards for the elimination of trafficking. Conversely, Section 110 of the TVPA requires that, within ninety days of the submission of an annual report on or after January 1, 2003,[61] the President of the United States is required to submit notification to "the appropriate congressional committees" of his determinations with respect to the treatment of

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53. *Id.* § 110, 22 U.S.C. § 7107(b)(3)(A)(iii).

54. *Id.* § 108, 22 U.S.C. § 7106.

55. *Id.*

56. *Id.* (including, among other things, the standard of intent to be applied in criminalizing an act of human trafficking).

57. *Id.* (specifying prosecution of traffickers, provision of assistance to victims, monitoring of immigration and emigration patterns, and cooperation with transborder law enforcement, such as extradition).

58. *Id.* § 110(b)(3), 22 U.S.C. § 7107(b)(3)(A)(iii)(III).

59. Trafficking Victims Protection Act § 110(b)(3)(A)–(C), 22 U.S.C. § 7107(b)(3)(A)–(C) (2006).

60. *Id.* § 109, 22 U.S.C. § 2152d.

61. *Id.* § 110(c), 22 U.S.C. § 7107(c) (specifying "not less than 45 or more than 90 days after the submission, on or after January 1, 2003, of an annual report").

each country which "does not comply with the minimum standards for the elimination of trafficking [and] is not making significant efforts to bring itself into compliance." Section 110(d) provides that, among other things, the president may withhold from such countries nonhumanitarian, non-trade-related assistance, continue such assistance if such continuation is in the national interest of the United States, and/or exercise waiver authority and continue or initiate assistance.[62] Specifically, the President has the discretion to withhold nonhumanitarian, non-trade-related assistance, all multilateral assistance to a country described in paragraph (1)(B), or one or more programs, projects, or activities of such assistance.[63] As a result of the availability of presidential discretion, a ranking of Tier 3 on the annual TIP Report (signifying lack of compliance with the standards and inadequate efforts to do so) does not automatically trigger the implementation of mechanisms to encourage compliance with the minimal standards.[64]

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62. *Id.* § 110(d)(1), (3), (5), 22 U.S.C. § 7107(d)(1), (3), (5).

63. *Id.* § 110(d)(5)(A), 22 U.S.C. § 7107(d)(5)(A).

64. On September 9, 2003, President George W. Bush issued the Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, Presidential Determination No. 2003-35, 3 C.F.R. 332–333 (2003), *reprinted in* 22 U.S.C. § 7107 [hereinafter Presidential Determination 2003]. In this determination, pursuant to section 110(d)(1)(A)(ii) of the TVPA, the president imposed sanctions on educational and cultural exchange programs for the fiscal year 2004 with respect to Burma, Cuba, Liberia, North Korea, and Sudan. *Id.* That year, each of these five countries were categorized as Tier 3 countries in the TIP Report. 2003 TIP REPORT, *supra* note 8. The president determined that, pursuant to section 110(d)(3) of the TVPA, the remaining countries categorized as Tier 3 countries in the TIP Report that year came into compliance with the minimum standards or were making significant efforts to bring themselves into compliance, and therefore, sanctions were not imposed upon their governments. Presidential Determination 2003. These countries included Belize, Bosnia, the Dominican Republic, Georgia, Greece, Haiti, Kazakhstan, Suriname, Turkey, and Uzbekistan. *Id.* Moreover, the president determined that, pursuant to the TVPA's waiver authority under section 110(d)(4), certain multilateral assistance to Sudan was necessary to implement a peace accord and to Liberia would promote the purposes of the TVPA or was otherwise in the national interest of the United States. *Id.*

On September 10, 2004, President George W. Bush issued a Presidential Determination whereby, pursuant to section 110(d)(1)(A)(i) of the TVPA, the president imposed sanctions on nonhumanitarian, non-trade-related foreign assistance to the governments of Equatorial Guinea and Venezuela for the fiscal year 2005. Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, Presidential Determination No. 2004-46, 3 C.F.R. 288–289 (2004), *reprinted in* 22 U.S.C. § 7107. The president also imposed sanctions on educational and cultural exchange programs for the fiscal year 2005, pursuant to section 110(d)(1)(A)(ii) of the TVPA, with respect to Burma, Cuba, North Korea, and Sudan. *Id.* The president determined that the remaining countries categorized as Tier 3 countries in the TIP Report that year, specifically Bangladesh, Ecuador, Guyana, and Sierra Leone, came into compliance with the minimum standards or were making significant efforts to bring themselves into compliance, and therefore, sanctions were not imposed upon their governments. *Id.* In accordance with the Act's waiver authority, the president determined that certain assistance to Equatorial Guinea, Sudan, and Venezuela would promote the purposes of the TVPA or was otherwise in the national interest of the United States. *Id.*

On September 21, 2005, President Bush issued a Presidential Determination whereby pursuant to section 110(d)(1)(A)(i) of the TVPA, the president imposed sanctions on nonhumanitarian, non-trade-related foreign assistance to the governments of Cambodia and Venezuela for the fiscal year 2006. Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, Presidential Determination No. 2004-46, 3 C.F.R. 268–269 (2005), *re-*

Further, Section 104 (Annual Country Reports on Human Rights Practices) of the TVPA requires that annual country reports describing the human rights records of foreign country recipients of U.S. aid include descriptions of "the nature and extent of severe forms of trafficking in persons, as defined [by U.S. legislation], in each foreign country."[65] The report is required to specify, among other things, the preventative measures against human trafficking undertaken by foreign governments, the assistance to victims of trafficking, and the extent of those governments' cooperation with other governments in anti-human trafficking activities.[66]

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printed in 22 U.S.C. § 7107. The president also imposed sanctions on educational and cultural exchange programs for the fiscal year 2006, pursuant to section 110(d)(1)(A)(ii) of the TVPA, with respect to Burma, Cuba, and the Democratic People's Republic of Korea. *Id.* The president determined that, pursuant to section 110(d)(3) of the TVPA, the remaining countries categorized as Tier 3 countries in the TIP Report that year came into compliance with the minimum standards or were making significant efforts to bring themselves into compliance, and therefore, sanctions were not imposed upon their governments. *Id.* These countries included Bolivia, Jamaica, Qatar, Sudan, Togo, and the United Arab Emirates. *Id.* However, in accordance with the Act's waiver authority, the president determined that provision of certain bilateral and multilateral assistance to the governments of Cambodia, Venezuela, Ecuador, Kuwait, and Saudi Arabia would promote the purposes of the TVPA or was otherwise in the national interest of the United States. *Id.*

On September 27, 2006, President Bush imposed sanctions on nonhumanitarian, non-trade-related foreign assistance to the governments of Burma, Venezuela, and Zimbabwe pursuant to section 110(d)(1)(A)(i) of the TVPA for the fiscal year 2007. Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, Presidential Determination No. 2006-25, 3 C.F.R. 312–314 (2006), *reprinted in* 22 U.S.C. § 7107. The president also imposed sanctions on educational and cultural exchange programs for the fiscal year 2007, pursuant to section 110(d)(1)(A)(ii) of the TVPA, with respect to Cuba, the Democratic People's Republic of Korea, Iran, and Syria. *Id.* The president determined that, pursuant to section 110(d)(3), Belize and Laos came into compliance with the minimum standards or are making significant efforts to bring themselves into compliance, and therefore, sanctions were not imposed upon their governments. *Id.* However, in accordance with the Act's waiver authority, the president determined that provision of certain bilateral and multilateral assistance to the governments of Iran, Saudi Arabia, Sudan, Syria, Uzbekistan, Venezuela, and Zimbabwe would promote the purposes of the TVPA or was otherwise in the national interest of the United States. *Id.*

Finally, on October 18, 2007, President Bush issued a Presidential Determination whereby sanctions were imposed on nonhumanitarian, non-trade-related foreign assistance to the governments of Burma, Syria, and Venezuela pursuant to section 110(d)(1)(A)(i) of the TVPA for the fiscal year 2008. Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, Presidential Determination No. 2008-4, 3 C.F.R. 355–358 (2007), *reprinted in* 22 U.S.C. § 7107. The president also imposed sanctions on educational and cultural exchange programs for the fiscal year 2008, pursuant to section 110(d)(1)(A)(ii) of the TVPA, with respect to Cuba, the Democratic People's Republic of Korea, and Iran. *Id.* The president determined that, pursuant to section 110(d)(3) of the TVPA, Equatorial Guinea and Kuwait came into compliance with the minimum standards or are making significant efforts to bring themselves into compliance, and therefore, sanctions were not imposed upon their governments. *Id.* And, in accordance with the Act's waiver authority, the president determined that provision of certain bilateral and multilateral assistance to the governments of Algeria, Bahrain, the Democratic People's Republic of Korea, Equatorial Guinea, Kuwait, Iran, Malaysia, Oman, Qatar, Saudi Arabia, Sudan, Syria, Uzbekistan and Venezuela, would promote the purposes of the TVPA or was otherwise in the national interest of the United States. *Id.*

65. § 104(A), 22 U.S.C. § 2151n (amending section 116(f) and adding a new provision to section 502B of the Foreign Assistance Act of 1961).

66. *See id.*

b. International Efforts Under the UN Trafficking Protocol

The approach adopted by the parties to the UN Trafficking Protocol differs significantly from that of the United States. The Protocol's approach can be described as a voluntary[67] and nonenforceable self-reporting and cooperation model that eschews naming and shaming.

Article 32 of the Transnational Crime Convention provides that a "Conference of the Parties to the Convention is hereby established to improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of this Convention."[68] Article 37 of the Convention and Article 1 of the Trafficking Protocol provide that the provisions of the Convention apply, *mutatis mutandis*, to the Protocol.[69] The United Nations Office on Drugs and Crime (UNODC) is the custodian[70] of the UN Trafficking Protocol supplementing the Convention.[71]

At its first session, which took place June 28 through July 9, 2004, the Conference of the Parties to the Convention adopted its Rules of Procedure,[72] which lay out the structure, representation, and decision-making procedures of the Conference. Each State Party to the Convention has one representative in the Conference,[73] and with prior written notification, any state or regional economic integration organization signatory to the Convention may participate in the Conference as an observer.[74] Nonsignatory states, intergovernmental organizations, and nongovernment organizations

67. The approach is voluntary in the sense that states affirmatively consent to accede to or to sign and ratify the UN Transnational Crime Convention and the Trafficking Protocol.

68. Transnational Crime Convention, *supra* note 2, art. 32.

69. *Id.*; Trafficking Protocol, *supra* note 3, art. 1.

70. The result of the 1997 merger of the United Nations Drug Control Programme and the Center for International Crime Prevention, the United Nations Office on Drugs and Crime (UNODC) assists UN Member States in combating crimes such as drug trafficking, money laundering, and terrorism. *See* UNODC, About UNODC, http://www.unodc.org/unodc/en/about-unodc/index.html (last visited Feb. 11, 2009).

71. UNODC, UNODC on Human Trafficking and Migrant Smuggling, http://www.unodc.org/unodc/en/human-trafficking/index.html (last visited Feb. 11, 2009).

72. Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Vienna, June 28–July 8, 2004, *Report of the Conference of the Parties to the United Nations Convention Against Transnational Organized Crime on its First Session*, *available at* http://www.unodc.org/documents/treaties/UNTOC/COP/session1/V0587363e.pdf [hereinafter *First Session Report*]. These rules provide that the first three sessions of the Conference will be held annually, and that subsequent sessions will be held at least biennially. UNDOC, RULES OF PROCEDURE FOR THE CONFERENCE OF THE PARTIES TO THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME 2 (2005), *available at* http://www.unodc.org/pdf/ctoccop_2006/05-85142_ebook-E.pdf [hereinafter RULES OF PROCEDURE].

73. RULES OF PROCEDURE, *supra* note 72, at 5. "When the Conference undertakes deliberations concerning a Protocol, any recommendation or decision pertaining solely to the Protocol shall be taken only by the States Parties to that Protocol present and voting." *Id.* at 23.

74. *Id.* at 5. These organizations may attend meetings of the Conference, make statements at the meetings, receive documents from and submit documents to the Conference, and participate in the deliberative process. The organizations may take part in the decision-making process by voting, but they may only cast the number of votes equal to the number of their member states that

may also participate as observers with the permission of the Conference, but in a more limited capacity.[75] The Rules of Procedure provide that the States Parties shall make every effort to make decisions by consensus, but that decisions will be taken by vote if consensus cannot be reached.[76] Each State Party has one vote, and decisions on matters of substance, including amendments to the Convention, must be taken by a two-thirds majority.[77]

At the opening of each session, a president, eight vice-presidents, and a rapporteur are elected to serve as the officers of that session, holding their positions until the election of new officers at the next session.[78] Following each session, the Conference publishes a report on the deliberations held and the decisions made. In the First Session Report, the Conference published its decision to carry out the requirements of Article 32 of the Convention with respect to the Trafficking Protocol by adopting a "programme of work" on the Protocol.[79] Pursuant to this program, the Conference undertook to consider the adaptation of national legislation necessary to conform to the Protocol, to examine the criminalization and legislation difficulties encountered by countries implementing the Protocol, enhance international cooperation, and exchange views and experience with regard to the protection of victims and preventive measures.[80] To these ends, the conference secretariat collected and continues to collect information from States Parties to the Protocol, using a questionnaire drafted by the parties to the Protocol.[81] The First Session Report "[r]equests States parties to respond promptly to the questionnaire circulated by the Secretariat."[82] The secretariat then submits an analytical report to the next session of the Conference based on the information gathered.

The secretariat presented the first analytical report at the second session of the Conference.[83] At that time, the secretariat had received re-

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are parties to the Convention, and these organizations may not exercise their right to vote if their member countries have done so and vice versa. *Id.* at 17–18.

75. *Id.* at 6–7.

76. *Id.* at 17–18.

77. *Id.* at 18. However, any such vote in favor of amendment would require ratification by the parties. Decisions regarding budgetary issues require unanimity, and decisions on matters of procedure are taken by a simple majority. *Id.*

78. *Id.* at 8–9. The Secretariat to the Conference is responsible for receiving, translating, and distributing documents and reports and decisions of the Conference. *Id.* at 11–12.

79. *First Session Report*, *supra* note 72, at 5.

80. *Id.*

81. *Id.* The questionnaire seeks information on each country's compliance with the definition, criminalization, and international cooperation requirements under the Protocol, and inquires whether the country needs assistance in meeting these obligations. Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, July 28, 2004, *Questionnaire on Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, *available at* http://www.unodc.org/pdf/ctoccop_2005/quest_1-5_e.pdf.

82. *First Session Report*, *supra* note 72, at 5.

83. Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Vienna, Oct. 10–21, 2005, *Review of the Implementation of the Protocol to Pre-*

sponses from fifty-six states: thirty-seven were parties to the Protocol, thirteen were signatories, and six were nonsignatories.[84] This means that 43 percent of States Parties had responded.[85]

Despite the fact that the First Analytical Report to the Conference specifically named jurisdictions that had not complied with their obligations under the Protocol, the Second Session Report eschewed naming and shaming, simply "[noting] with concern that a number of States parties had not yet complied with their obligations under the Protocol," and "[u]rged those States parties which had not complied with their obligations under the Protocol to rectify that situation as soon as possible and to provide information on the measures taken to do so to the secretariat."[86] The Second Session Report also "[n]oted with concern that the analytical report prepared by the Secretariat was based on responses of only 43 per cent of States parties to the Protocol" and "[u]rged States parties to respond promptly to the ques-

vent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Sept. 14, 2005), *available at* http://www.unodc.org/pdf/ctoccop_2005/V0588039e.pdf [hereinafter First Analytical Report]. The report contained a summary of the responses to the questionnaires, highlighting the progress made and the difficulties faced by countries in implementing the Protocol. *Id.* at 5. The First Analytical Report noted that most reporting countries had abided by the Protocol's mandates regarding the definition and criminalization of trafficking, though further work to promote consistency of such legislation was necessary. *Id.* at 6. The report also named the countries whose policies deviated from the requirements of the Protocol, and noted that many countries had requested technical assistance in implementing the Protocol. *Id.* at 12. The report also called on more states to respond to the questionnaire. *Id.* at 14.

84. *Id.* at 4–5. The responding States Parties were Azerbaijan, Bahrain, Belarus, Belgium, Brazil, Canada, Chile, Costa Rica, Croatia, Cyprus, Ecuador, El Salvador, Estonia, France, Jamaica, Latvia, Lithuania, Malta, Mauritius, Mexico, Myanmar, Namibia, the Netherlands, New Zealand, Nigeria, Peru, the Philippines, Poland, Portugal, Russia, Romania, Slovakia, South Africa, Spain, Sweden, Tunisia, and Turkey. The responding signatories were Austria, the Czech Republic, the Dominican Republic, Finland, Germany, Greece, Iceland, the Republic of Moldova, Sri Lanka, Switzerland, the United Kingdom and Northern Ireland, the United Republic of Tanzania, and the United States. The responding nonparties were Afghanistan, Angola, China, Honduras, Kuwait, and Malaysia. *Id.* at 15.

85. *Id.* at 5.

86. Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Vienna, Oct. 10–21, 2005, *Report of the Conference of the Parties to the United Nations Convention Against Transnational Organized Crime on its Second Session* (Dec. 1, 2005), *available at* http://www.unodc.org/pdf/ctoccop_2005/V0590521e.pdf [hereinafter Second Session Report].

tionnaire."[87] The Report also laid out the "programme of work" for the 2006 third session of the Conference.[88]

In fulfillment of the mandate of the Second Session Report, the secretariat presented the Second Analytical Report to the Third Session of the Conference.[89] In the Second Analytical Report, the secretariat reported that it had received fourteen additional questionnaire responses: ten were parties to the Protocol, three were signatories, and one was a nonsignatory.[90] Together with the States Parties that had already responded, and taking into account the new accessions and ratifications of the Protocol, this brought the total responding States Parties up to 47 percent. Once again, the updated report noted that most *responding countries* were fulfilling their obligations under the Convention with regard to the criminalization and definition of human trafficking. The report also identified the states whose policies fell short.[91] Again, despite the fact that the secretariat presented the Conference with the information necessary to specifically identify individual countries

87. *Id.* at 7–8. States Parties are obligated under the Convention to provide information to the secretariat. In order to achieve those specific objectives, "the Conference of the Parties shall acquire the necessary knowledge of the measures taken by States parties in implementing the Convention and the difficulties encountered by them in doing so through information provided by them." Transnational Crime Convention, *supra* note 2, art. 32, ¶ 4. Furthermore, the Convention requires States Parties to provide the Conference with information on their programmes, plans and practices, as well as legislative and administrative measures to implement the Convention. *Id.* ¶ 5; First Analytical Report, *supra* note 83, at 3. The Second Session Report also asked the secretariat to continue to compile information from the questionnaires and to present another analytical report at the next session, and asked countries that had already responded to the questionnaire to update these responses as necessary. Second Session Report, *supra* note 86, at 5.

88. Second Session Report, *supra* note 86, at 8. The program included consideration of matters related to assistance to victims of trafficking, repatriation of victims, measures related to border measures and documentation, and the possibility of cooperation with the International Labour Organization.

89. Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Vienna, Oct. 10–21, 2005, *Review of the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime: Updated Information Based on Additional Responses Received from States for the First Reporting Cycle* (Aug. 8, 2006), *available at* http://www.unodc.org/pdf/ctoccop_2006/V0656230e.pdf [hereinafter Second Analytical Report].

90. *Id.* at 5. The States Parties were Albania, Algeria, Argentina, Bulgaria, Colombia, Egypt, Nicaragua, Serbia and Montenegro, Tajikistan, and the Former Yugoslav Republic of Macedonia. The signatories to the Protocol were Ireland, Italy, and Thailand, and the nonsignatory was Kazakhstan. *Id.*

91. *Id.* at 7. The secretariat also presented a report that discussed the updates and clarifications provided by countries identified as noncompliant with certain obligations under the Protocol in the First Analytical Report. *See* Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Vienna, Oct. 9–18, 2006, *Implementation of the United Nations Convention Against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol Against the Smuggling of Migrants by Land, Sea and Air and Programme of Work of the Conference of the Parties Thereto: Clarification from States Parties on Non-Compliance for the First Reporting Cycle* (Aug. 9, 2006), *available at* http://www.unodc.org/pdf/ctoccop_2006/V0656278e.pdf.

as noncompliant, the Third Session Report refrained from doing so,[92] and was very similar in substance to the Second Session Report.[93] The fourth session of the Conference took place in Vienna on October 8 through 17, 2008.[94]

In summation, despite some indication that nonreporting may correlate with failure to comply with the obligations undertaken under the Trafficking Protocol, the Conference of the Parties under the Transnational Crime Convention and the Trafficking Protocol avoids naming and shaming States Parties who have not fulfilled the self-reporting agreed to by the Conference. In addition, no sanctioning mechanisms have been adopted that are aimed at encouraging or coercing compliance of those States Parties.

2. *Anti-Money Laundering: The NCCT List*

The international fight against money laundering is led by the FATF, an independent intergovernmental body whose purpose is to develop and promote international standards and policies to combat money laundering and terrorist financing.[95] The FATF was established in 1989 at the G-7 Summit in Paris as a result of the professed need to internationalize the fight against drug trafficking—then perceived as a key source of laundered money.[96] The priorities of the FATF are to ensure global action to combat money laundering and terrorist financing as well as concrete implementation of the Forty Recommendations,[97] which the organization first issued in 1990.[98] These Recommendations have become the international standard for combating money laundering.[99] In fact, the Forty Recommendations have been referred to as "[t]he crown jewel of soft law" on money laundering.[100]

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92. Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Vienna, Oct. 9–18, 2006, *Report of the Conference of the Parties to the United Nations Convention Against Transnational Organized Crime on its Third Session* (Dec. 22, 2006), *available at* http://www.unodc.org/pdf/ctoccop_2006/V0659538e.pdf [hereinafter Third Session Report].

93. The report urged countries to respond to the questionnaires sent out by the secretariat, noted that most countries that had responded were fulfilling their obligations under the Protocol, and urged states to take further action pursuant to the Protocol.

94. UNODC, Highlights, http://www.unodc.org/unodc/en/ngos/news.html (last visited Feb. 11, 2009).

95. FATF, About the FATF, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1_1,00.html (last visited Feb. 11, 2009) [hereinafter About the FATF].

96. *Id.* The G-7 countries are Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which included a pledge to stop money laundering, served as the impetus for the creation of the FATF. Bachus, *supra* note 31, at 848; PETER ANDREAS & ETHAN NADELMANN, POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS 147–49 (2006).

97. About the FATF, *supra* note 95.

98. *Id.*

99. *Id.*

100. STESSENS, *supra* note 24, at 17.

The Recommendations were revised in 1996 to respond to changes in money laundering techniques.[101] Further, in response to the September 11 terrorist attacks, the FATF expanded its mandate to encompass the issue of terrorist financing,[102] resulting in the organization's issuance of the Eight Special Recommendations.[103] The FATF standards again were updated in June 2003 in order to keep up with emerging money laundering tactics.[104] Finally, a ninth Special Recommendation was added in October 2004 and, overall, the current standards are referred to as the 40+9 Recommendations (Forty Recommendations).[105]

The FATF monitors countries' progress in implementing the anti-money laundering and terrorist financing measures (starting with member countries), studies new money laundering and terrorist financing techniques and countermeasures, and promotes the implementation of the Forty Recommendations globally.[106] The anti-money laundering regime is characterized by a name-and-shame list supported by a sanctioning mechanism which may include financial shunning.

In 1999, the FATF introduced its NCCT initiative, which was created to ensure that all countries adopt anti-money laundering measures.[107] The project was intended to force nonmembers of the FATF with anti-money laundering systems deemed to be deficient by the FATF to adopt new anti-money laundering methodologies. The FATF achieved this goal by adopting a "name-and-shame" mechanism—the publication of a list of noncompliant jurisdictions. The project also encouraged FATF members to take actions to convince NCCTs of the importance of adopting such legislation.[108]

The FATF first outlined the criteria for identifying NCCTs and the actions that would be deployed to encourage their compliance in the 2000 NCCT Report.[109] These criteria consist of a range of detrimental rules and practices within and by individual jurisdictions that obstruct international cooperation against money laundering.[110] There is no specific criterion that

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101. About the FATF, *supra* note 95.

102. *Id.*; *see also* Bachus, *supra* note 31, at 859–60.

103. About the FATF, *supra* note 95.

104. *Id.*

105. *Id.*

106. *Id.*

107. Jared Wessel, *The Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law*, 13 WIDENER L. REV. 169, 174 (2006).

108. *Id.* at 175.

109. INITIAL NCCT REPORT, *supra* note 10.

110. *Id.* ¶ 8. These detrimental rules can be found in an NCCT's financial and other regulatory systems (especially those related to customer and account identification), its rules regarding international administrative and judicial cooperation, and the resources the jurisdiction has available for preventing, detecting, and repressing money laundering. *Id.*

can serve as a litmus test; rather, a jurisdiction should be evaluated based on the entirety of its efforts to combat money laundering.[111]

The 2000 NCCT Report stated that public identification of NCCTs should be the first step in encouraging anti-money laundering action by noncompliant jurisdictions.[112] Once a jurisdiction was identified as an NCCT and placed on the list, the FATF takes further steps to convince that jurisdiction to comply. First, the FATF and its members were encouraged to open a dialogue with the NCCT in order to provide advice and technical cooperation to aid the country in implementing its own anti-money laundering measures.[113] Also, actions may be taken by other multilateral organizations, such as the G-7, the OECD, and the IMF. The FATF would also consider applying Recommendation 21 (which encourages financial institutions to pay "special attention" to transactions with the offending country) to the nonmember jurisdiction that refuses to cure the anti-money laundering deficiencies identified by the FATF.[114] Finally, FATF member jurisdictions should apply countermeasures designed to protect their own economies against laundered money.[115] The suggested countermeasures range from imposing enhanced customer identification requirements by financial institutions in FATF member states with respect to transactions with individuals or entities in the NCCT, up to and including conditioning, re-

111. *Id.* ¶ 35.

112. *Id.* ¶ 38. Possible NCCTs are identified for further investigation in one of two ways: by being named by an FATF member based on recent difficulty in enforcing anti-money laundering procedures or by review by a regional *ad hoc* group. Wessel, *supra* note 107, at 175–76. There are four regional review groups (the Americas, Asia/Pacific, Europe, and Africa and the Middle East) which meet regularly to prepare for NCCT discussions. Also, FATF membership should have no effect on the final listing decision. *Id.* Once a country has been identified for further investigation, the *ad hoc* group "undertakes a fact-finding review of the jurisdiction in question with the assistance of other FATF members, as well as the Secretariat or the relevant [FSRB]." *Id.* at 176; *see also* INITIAL NCCT REPORT, *supra* note 10, ¶ 39. Jurisdictions under review are not necessarily placed on the NCCT list, and they are entitled to certain procedural requirements. Wessel, *supra* note 107, at 176. These countries are informed of their initial status and they are given the opportunity to comment on the *ad hoc* group's report before it is submitted to the FATF Plenary. *Id.*; *see also* INITIAL NCCT REPORT, *supra* note 10, ¶ 41. Further, a dialogue takes place between the FATF and the prospective NCCT prior to the final decision for the purpose of negotiating alternatives to listing. Wessel, *supra* note 107, at 176. Ultimately, the FATF Plenary decides whether or not to list a country. *Id.*

113. INITIAL NCCT REPORT, *supra* note 10, ¶¶ 45–46.

114. *Id.* ¶ 48. Recommendation 21 of the Forty Recommendations requires that

> [f]inancial institutions should give *special attention* to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF 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 competent authorities. *Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate countermeasures*.

FORTY RECOMMENDATIONS, *supra* note 26, ¶ 21 (emphasis added).

115. INITIAL NCCT REPORT, *supra* note 10, ¶ 50. The Initial NCCT Report lays out the recommended countermeasures under the heading "Countermeasures designed to protect economies against money of unlawful origin." *Id.*

stricting, or even prohibiting financial transactions with NCCTs (that is, financial shunning).[116] The Report notes that collective action by FATF members is preferable, but that individual FATF members can ultimately make decisions regarding countermeasures in their individual capacities.

The FATF has issued a total of eight NCCT reports since the Initial NCCT Report.[117] The first round of investigations spanned two NCCT Reports (the June 2000 and June 2001 Reports) and identified nearly every NCCT that has ever been named.[118] NCCT reports divide the jurisdictions that have been investigated into categories: NCCTs and non-NCCTs.[119] NCCTs are grouped into (1) those that have made progress since the last report; (2) those that have not made adequate progress since the last report; and (3) those subject to countermeasures.[120] Jurisdictions falling into the last category are subject not only to the application of Recommendation 21 "special attention" (as to all NCCTs), but the FATF further recommends that FATF members take proportionate, gradual countermeasures against these jurisdictions.[121] The non-NCCTs discussed in NCCT reports include jurisdictions that have been investigated during the preceding year and determined to be sufficiently compliant with FATF standards to avoid listing.[122] NCCT reports also discuss the jurisdictions that have been removed from the NCCT list since the issuance of the last report, as well as the jurisdictions that are subject to enhanced monitoring.[123]

Once a jurisdiction has been listed as an NCCT, it will typically submit an implementation plan as a predicate step toward delisting.[124] In order to determine whether a jurisdiction will be removed from the NCCT list, the

116. *Id.* ¶¶ 49–52.

117. The Initial NCCT Report did not identify NCCTs. Instead, the report simply laid out the criteria for identifying NCCTs and the appropriate actions to be taken by the FATF and its member countries in order to encourage compliance. Under the heading "Steps to Encourage Constructive Anti-Money Laundering Action," the report described in some detail the methods the FATF would use to exact compliance from nonmember countries. Initially, the report describes the first method of exacting compliance, the NCCT listing procedure. *Id.* ¶¶ 35–54.

118. In fact, only two additional NCCTs have been identified since the first round of investigations in 2000 and 2001; Grenada and Ukraine were both identified as NCCTs at plenary meetings in September 2001 after another round of reviews. *See* 2002 NCCT Report, *supra* note 10, at 1. Because the 2001 NCCT Report was issued in June, these countries were not reflected in the NCCT reports until the June 2002 Report was issued. Similarly, many countries have been delisted and/or removed from the list of countries subject to monitoring at plenary meetings taking place in the interim between NCCT reports. When this is the case, the change is reflected in the next report.

119. *See* 2001 NCCT Report, *supra* note 10; *see also* 2002 NCCT Report, *supra* note 10.

120. *Id.*

121. FATF, Annual Review of Non-Cooperative Countries or Territories ¶ 17 (2003) [hereinafter 2003 NCCT Report].

122. Some sufficiently compliant countries were listed in the June 2000, 2001, and 2002 NCCT Reports.

123. Myanmar is the only country that continued to be subject to monitoring. 2007 NCCT Report, *supra* note 11.

124. Wessel, *supra* note 107, at 177.

FATF assesses progress made by the jurisdiction and discusses it at the plenary.[125] Before a jurisdiction is delisted, the FATF must be satisfied that the jurisdiction has instituted a comprehensive and effective anti-money laundering system and has addressed the previously identified deficiencies.[126]

Reinstatement. The FATF has listed the steps (implementation of legislative and regulatory reforms) that NCCTs must take in order to be delisted. The steps to be taken are as follows:

> 1. The NCCT must enact laws and regulations that comply with international standards[127] to address the deficiencies that led to the NCCT's initial listing.
>
> 2. Once these reforms have been made, the NCCT must submit an implementation plan to the FATF, which should address specifically the filing of suspicious transaction reports, analysis and follow-up on such reports, money laundering investigation procedures, monitoring of financial institutions, international cooperation, and the provision of financial and human resources.
>
> 3. The appropriate regional review group will review the implementation. The regional review groups will respond to the NCCT and report regularly on their progress.[128]
>
> 4. At the initiative of the regional review group, the FATF should make an on-site visit to the NCCT to confirm effective implementation of the reforms.
>
> 5. The review group reports progress at FATF meetings, and when the review group decides that the NCCT "has taken sufficient steps to ensure continued effective implementation of the reforms," it will recommend delisting to the FATF Plenary, and the decision will be made based on the plenary's "collective judgment."
>
> 6. If a country is delisted, the FATF President sends a letter to the NCCT reminding the NCCT that delisting does not mean that the money laundering regime is perfect, describing remaining concerns regarding the country and the necessity of monitoring, and proposing a monitoring mechanism which includes submission of regular implementation reports and a follow-up assessment visit.[129]

According to the FATF, the policy "enables the FATF to achieve equal and objective treatment among NCCT jurisdictions."[130] Following delisting, former NCCTs are subject to increased monitoring by both the FATF

125. *Id.*
126. *Id.*
127. *See* FORTY RECOMMENDATIONS, *supra* note 26.
128. There are four regional review groups: Americas, Asia/Pacific, Europe, and Africa and the Middle East. Wessel, *supra* note 107, at 175–76.
129. 2007 NCCT REPORT, *supra* note 11, annex 2, ¶ 6.
130. *Id.*

and the relevant FATF-style regional bodies (FSRBs), which can last for years.[131] The monitoring focuses on the jurisdiction's progress against the implementation plans, the specific concerns raised in the progress reports, and the experience of FATF members.[132] All jurisdictions are subject to monitoring immediately following delisting, but the length of time a jurisdiction remains subject to monitoring varies.[133] The reactions of jurisdictions that have been included on the NCCT lists evidence a high level of compliance with the international anti-money laundering standards of the FATF.

In cases where the NCCT has failed to make adequate progress in addressing the deficiencies in its implementation of the FATF standards discussed above, the FATF may recommend the application of countermeasures in addition to the application of Recommendation 21.[134] The application of such countermeasures should be "gradual, proportionate and flexible regarding their means and taken in concerted action."[135] The suggested countermeasures begin with requiring FATF members to fully implement customer identification measures and to forbid institutions from opening accounts if the applicant fails to supply valid documentation as to the true owner of the account.[136] Next, the report invokes the language of Recommendation 21, stating that FATF members should adopt specific requirements requiring financial institutions to pay "special attention" to transactions with individuals or entities within the NCCT.[137] Finally, the report provides that FATF members should consider "whether it is desirable and feasible to condition, restrict, target, or even prohibit financial transactions" with the NCCTs. The FATF has recommended that only three countries be subject to countermeasures.[138]

The sanctions formally imposed by the FATF against NCCTs in the form of Recommendation 21 and countermeasures are not the only consequences of listing: the NCCT list also can "signal the market that a particular area is a haven for illicit behavior."[139] This means that inclusion on the

131. *Id.* at 12–13. There are eight FSRBs. FSRBs operate like mini-FATFs, performing the same functions as the FATF on a smaller, regional scale. Bachus, *supra* note 31, at 853–54. The FSRBs are discussed in more detail *infra* Part III.C.

132. 2007 NCCT Report, *supra* note 11, at 12–13.

133. For more detailed information, see the eight NCCT Reports, *available at* http://www.fatf-gafi.org/findDocument/0,3354,en_32250379_32237267_1_32247550_1_1_1,00.html and http://www.fatf-gafi.org/document/4/0,3343,en_32250379_32236992_33916420_1_1_1_1,00.html.

134. 2003 NCCT Report, *supra* note 121, ¶ 17.

135. *Id.*

136. *Id.*

137. The United States has adopted such requirements in 31 C.F.R. § 103.18, which "increases the cost of doing business in the jurisdiction via the red-tape of additional reporting requirements." Wessel, *supra* note 107, at 174.

138. The countries subject to countermeasures are Nauru (from December 2001 until October 2004), Myanmar (from November 2003 until October 2004), and Ukraine (from December 2002 until February 2003). 2007 NCCT Report, *supra* note 11.

139. Wessel, *supra* note 107, at 172.

NCCT list may have an impact on a listed jurisdiction's interactions even with other non-FATF jurisdictions.

3. *Contrasting Apparent Effectiveness*

A cursory review of the two naming-and-shaming lists reveals the greater apparent effectiveness of the anti-money laundering regime. After the first two rounds of reviews in 2000 and 2001, a total of twenty-three jurisdictions were identified as NCCTs or potential NCCTs.[140] As a result of the potentially harmful reputational effects, most of those jurisdictions immediately took action to improve their anti-money laundering regimes.[141] Annual NCCT reviews have taken place every year since the first NCCTs were named, and the number of listed jurisdictions has declined steadily during that time.[142] In the most recent NCCT review, the last remaining NCCTs were officially delisted.[143]

On the other hand, the first TIP Report, issued in July 2001, included a total of seventy foreign countries, twelve of which were ranked as Tier 1 (indicating full compliance with the minimum standards of the TVPA) and twenty-three of which were ranked as Tier 3. After eight iterations of the report (the latest TIP Report was issued in June 2008), twenty-nine of 170 countries were ranked as Tier 1. Seventy-one countries (the largest group) were ranked as Tier 2, forty countries were included on the Tier 2 watch list, and fourteen countries were ranked as Tier 3. Thus, the number of Tier 3 countries decreased by over one-third, from twenty-three countries in 2001 to the current fourteen,[144] and the number of compliant countries has almost tripled over the eight-year period.

However, the number of noncompliant countries has ballooned with the increase in the number of countries described and evaluated in the report. Further, a study of the movements of individual countries among the tiers appears to indicate camaraderie and comfort, and little apprehension of sanctioning, on the part of the increasing number of countries listed and continuing for years as Tier 2 and on the Tier 2 watch list. A number of such countries have remained for years at Tier 3 of the annual TIP Report with few signs of any intention to comply.[145] In contrast, with respect to the FATF's anti-money laundering regime, even the most isolationist countries,

140. 2007 NCCT Report, *supra* note 11, ¶ 6.

141. *Id.* ¶ 7.

142. *Id.* at 13.

143. *Id.* ¶¶ 2–3. The last NCCTs were Nigeria and Myanmar. However, Myanmar remains subject to monitoring. *Id.*

144. This change in number does not capture the movement upward in the ranking of several countries originally listed at Tier 3. *See* 2008 TIP Report, *supra* note 1, at 44.

145. The 2008 TIP Report ranks the following countries at Tier 3: Algeria, Burma (Myanmar), Cuba, Fiji, Iran, Kuwait, Moldova, North Korea, Oman, Papua New Guinea, Qatar, Saudi Arabia, Sudan, and Syria. North Korea, Cuba, and Saudi Arabia each has been listed at Tier 3 for a number of years. *Id.*

such as Myanmar, eventually comply with the standards in order to be removed from the NCCT list and to be freed from the FATF's countermeasures.[146]

As contrasted with the FATF's NCCT list, the question arises about the effectiveness of the U.S. TIP Report as a name-and-shame device that encourages adherence to effective minimum standards. The question centers on (1) the value and effectiveness of the minimum standards underlying country placement on the list;[147] (2) the information, mechanisms, and methodologies used for determining placement on the list; (3) the sanctioning device utilized to encourage compliance by foreign countries; and (4) the ethos of all-inclusiveness, where countries seem to be added to the list each year.[148]

At the same time, questions also arise as to whether the apparently greater success of the FATF's NCCT list does indeed indicate the broader dissemination and acceptance of anti-money laundering norms. This seemingly broader dissemination and acceptance of anti-money laundering norms is striking in light of the contrasting international law status of the international instruments implementing the international fight against money laundering and human trafficking. The Forty Recommendations of the FATF are categorized as soft law,[149] issued by an intergovernmental organization with limited membership. On the other hand, the UN Trafficking Protocol is an international treaty, entered into by 124[150] UN Member States in order to undertake the fight against a form of activity that violates the *ius cogens* prohibition against the enslavement of humans. How and why did and could soft law norms become more effective and binding (or evoke more compliance by nation-states) than is an international instrument that creates law and implements a peremptory norm of international law?

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146. 2007 NCCT Report, *supra* note 11, ¶ 2.

147. Does the United States' extraterritorial imposition of its own domestically constructed norms serve to undermine the international norms agreed to and encapsulated in the UN Trafficking Protocol?

148. For example, five countries were added to the list in the most recent TIP Report. *See* 2008 TIP Report, *supra* note 1, at 44. In contrast, the NCCT list includes only noncompliant jurisdictions, and jurisdictions are included after a thorough examination and opportunity to comply. The shame and threat of sanction arising from inclusion on the NCCT list appears to be greater than the analogous reaction to the TIP Report.

149. International law scholars Jeffrey Dunoff and his coauthors describe soft law as "declared norms of conduct understood as legally nonbinding by those accepting the norms." Further, with respect to soft law instruments, they note that they

> assume innumerable forms, ranging from declarations of international organizations, to industry codes of conduct, to experts' reports. Soft law instruments though not enforceable by legal sanction, are often framed in legal language and in many respects may exhibit an authority comparable to that of treaties or custom.

Jeffrey L. Dunoff et al., International Law: Norms, Actors, Process 32 (2002).

150. Trafficking Protocol, *supra* note 3 (there are 124 parties and 117 signatories to the Protocol); Transnational Crime Convention, *supra* note 2 (there are 147 parties and 147 signatories to the Convention).

In order to answer such questions, Part III will review aspects of the historical and political contexts of the international reactions against money laundering and the trafficking of human beings. Among the considerations and factors to be weighed are the stronger political interest of cohesive and powerful groups of states in combating money laundering as opposed to fighting against human trafficking; the availability and commitment of resources toward the fight against money laundering; and a more coordinated anti-money laundering effort by the FATF with more effective norm building, dissemination, and penetration.

III. Two International Reactions

A. *Introduction*

In order to evaluate the relative success of the FATF's international anti-money laundering fight and the combined effect of the United States' and United Nations' international efforts against human trafficking, this article will now broaden the scope of its analysis beyond the apparently greater effectiveness of the FATF's name-and-shame device (the NCCT list) as compared with the United States' own device (the TIP Reports) and the reports and analyses issued by the Transnational Crime Convention's Conference of the Parties.

The article therefore explores the reasons for the greater apparent effectiveness of the anti-money laundering regime, that is, whether and how the institutional, standard-setting, information-gathering, and enforcement framework of which the NCCT list is a part contributes to its apparent success. Further, if that seeming effectiveness stands up to scrutiny, and the reasons for that effectiveness lie with particular aspects of the institutional framework, is it possible to adapt those elements in the fight against human trafficking?

This part therefore summarizes and compares the purposes of the two regimes, the institutions created or involved in the international anti-human trafficking[151] and anti-money laundering efforts, the information-gathering and standard-setting methodologies, the criteria for evaluating jurisdictions, and the nature and extent of civil society input, if any.

B. *The Anti-Human Trafficking Regime*

The international fight against the trafficking in human beings might be said to be centuries old. According to such a perspective, the battle begins with the British abolition of its transatlantic slave trade in 1807 and the British Navy's policing of the high seas in an attempt to end the trading of

151. However, the analysis conducted here will concentrate on the institutional reactions of the United States, at that time (in 2000) the sole superpower in a unipolar world, and of the Member States of the United Nations.

slaves by other nations.[152] The fight continues through the abolition of the African slave trade and the network of antislavery instruments spearheaded by Great Britain,[153] through the white slavery panic of the late nineteenth and early twentieth century, and the adoption by the League of Nations of anti-white slavery conventions.[154] The international efforts against the enslavement of humans continued with the adoption of the Universal Declaration of Human Rights and the adoption, incorporation, and updating by the United Nations (the League of Nations' successor) of preexisting antislavery treaties and conventions.[155] Yet, despite these efforts, the continued viability of the decades-old conventions, and the consensus regarding the *ius cogens* status of the prohibition against human enslavement, the trafficking in human beings has reemerged and expanded in the late twentieth and early twenty-first centuries.[156]

The reemergence and growth of this form of human-to-human exploitation has evoked strong reactions from the public, civil society, national governments, and international institutions. Civil society responses, in particular the role of women's advocacy groups in the international sphere, have played a crucial part in the development of the international efforts against human trafficking. As stated earlier, the Trafficking Protocol and the U.S. TVPA are the most influential anti-trafficking instruments in the international sphere.[157] Both instruments include provisions aimed at protection of victims, including both efforts to *prevent* trafficking and to confer benefits and protection on victims of trafficking once they are identified (and rescued from their exploitative situations).[158]

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152. *See, e.g.*, SUZANNE MIERS, SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM 15–19 (2003).

153. *Id.* at 14–17 (describing Britain's network of bilateral treaties).

154. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 103 B.F.S.P. 244; International Convention on the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 416; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

155. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 (consolidating the foregoing treaties); *see* Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making It Live Up to Its Potential*, 10 HARV. HUM. RTS. J. 213, 216–23 (1997). Other antislavery international instruments include the Slavery Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Apr. 30, 1957, 266 U.N.T.S. 40; and the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Mar. 23, 1976).

156. It may more accurately be said that the traffic has emerged into public consciousness, but has continued in existence throughout the intervening periods despite many ardent efforts against it.

157. *See* discussion *supra* Part II.C.1.

158. *See* discussion *supra* Part II.A.1, Part II.C.1.

The international efforts to combat trafficking are characterized by the dominance of the law enforcement perspective and a contradictory setting of low minimum applicable standards, as well as soft or nonexistent enforcement mechanisms. Further, despite eloquent anti-trafficking rhetoric, there is little mandatory coordination and cooperation to eradicate the exploitation.

Institutional Framework

The institutional frameworks of the anti-trafficking efforts influence the methodologies that can be deployed in the fight; they also illuminate the priorities of the States Parties with respect to the struggle. The Trafficking Protocol does not create a new, separate agency or other body to police and/or monitor trafficking activities. Instead, as a protocol to the UN Transnational Crime Convention, the Conference of the Parties created by that instrument applies with respect to reporting by States Parties to the Protocol.[159] States Parties' compliance with required reporting provisions has been less than optimal.[160]

The UNODC is the custodian of the Transnational Crime Convention.[161] As custodian, the UNODC manages the Global Initiative to Fight Human Trafficking (UN.GIFT) in cooperation with the International Labour Organization, the International Organization for Migration, the United Nations Children's Fund (UNICEF), the Office of the High Commissioner for Human Rights (OHCHR), and the Organization for Security and Cooperation in Europe (OSCE).[162] Launched on March 26, 2007, UN.GIFT is an initiative that was formed for the purpose of coordinating the global fight against human trafficking on the basis of the UN Trafficking Protocol. Its mission is

> to mobilize state and non-state actors to eradicate human trafficking by reducing both the vulnerability of potential victims and the demand for exploitation in all its forms; ensuring adequate protection and support to those who fall victim; and supporting the effi-

159. *See* discussion *supra* Part II.

160. *See* discussion *supra* Part II.

161. That is, the UN Office on Drugs and Crime [hereinafter UNODC] maintains up-to-date records of accessions and ratifications of the Transnational Crime Convention and its protocols. *See* UNODC, UNODC Treaties, http://www.unodc.org/unodc/en/treaties/index.html (last visited Feb. 11, 2009).

162. UNODC, Annual Report 2008: Covering Activities in 2007, at 27 (2008), *available at* http://www.unodc.org/documents/about-unodc/AR08_WEB.pdf. The United Nations Global Initiative to Fight Human Trafficking [hereinafter UN.GIFT] also partners with many other UN entities, international organizations, NGOs, businesses, civil society, academic groups, and individuals (particularly celebrities), all with the purpose of combining different efforts and resources to fight human trafficking.

> cient prosecution of the criminals involved, while respecting the fundamental human rights of all persons.[163]

The UNODC also proposed the Global Programme Against Trafficking in Human Beings (GPAT) in order to bring to the foreground the involvement of organized crime groups in smuggling and human trafficking and to promote the development of effective criminal justice-related responses.[164] The work of GPAT is underpinned by the Transnational Crime Convention and the Trafficking Protocol.[165]

Other entities within the UN are also involved in monitoring and combating human trafficking, and in giving aid to victims of the exploitation. These include the UN Special Rapporteur on Human Trafficking. At its sixtieth session, the Commission on Human Rights adopted decision 2004/110 in which it appointed a special rapporteur on trafficking in persons, especially women and children, to focus on the human rights aspects of trafficking in persons.[166] The Commission also requested that the special rapporteur cooperate with relevant UN bodies, regional organizations, and victims and their representatives.[167] The special rapporteur's mandate is as follows:

> a) Takes action on violations committed against trafficked persons and on situations in which there has been a failure to protect their human rights;
>
> b) Undertakes country visits in order to study the situation *in situ* and formulate recommendations to prevent and or combat trafficking and protect the human rights of its victims in specific countries and/or regions;
>
> c) Submits annual reports on the activities of the mandate.[168]

The special rapporteur is independent of the UNDOC and the Conference of the Parties to the Convention.

The International Organization for Migration (IOM) is perhaps the most important non-UN international organization engaged in the fight

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163. UN.GIFT, About UN.GIFT, http://www.ungift.org/ungift/en/about/index.html (last visited Feb. 11, 2009). In carrying out this mission, UN.GIFT seeks to increase awareness of human trafficking, to promote effective responses, to build capacity of state and nonstate actors (particularly by providing technical assistance), and to foster joint action against human trafficking. UN.GIFT also conducts research in order to create a knowledge base and formulate effective anti-trafficking strategies. UN.GIFT, Goals, http://www.ungift.org/ungift/en/about/goals.html (last visited Feb. 11, 2009).

164. UNODC, Global Programme Against Trafficking in Human Beings: An Outline for Action 3 (1999), *available at* http://www.uncjin.org/CICP/traff_e.pdf.

165. UNODC, UNODC on Human Trafficking and Migrant Smuggling, http://www.unodc.org/unodc/en/human-trafficking/index.html (last visited Feb. 11, 2009).

166. Office of the UN High Commissioner for Human Rights, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, http://www2.ohchr.org/english/issues/trafficking/index.htm (last visited Feb. 11, 2009).

167. *Id.*

168. *Id.*

against human trafficking.[169] It is an independent intergovernmental organization formed in 1951 out of the chaos and displacement of Western Europe following the Second World War.[170] The IOM was mandated to help European governments identify resettlement countries for migrants uprooted by the war. The organization later "broadened its scope to become the leading international agency working with governments and civil society to advance the understanding of migration issues, encourage social and economic development through migration, and uphold the human dignity and well-being of migrants."[171] The reports generated by the IOM and the UN Special Rapporteur, as well as the reports of the UNODC and UN.GIFT publications[172] have contributed substantially to knowledge about, and the international fight against, human trafficking.

In contrast to the Trafficking Protocol, the U.S. TVPA formed a new domestic institutional framework to combat human trafficking. The TVPA created the Interagency Task Force to Monitor and Combat Trafficking,[173] and authorized the Secretary of State to establish an Office to Monitor and Combat Trafficking.[174] The primary purpose of the Office is to support the Interagency Task Force and to assist the Secretary of State in carrying out the purposes of the Act.[175] Other obligations include working with NGOs involved in anti-trafficking activities, trafficked persons, and others affected by trafficking in humans.[176] The impact of the information gathering and

169. International Organization for Migration (IOM), Counter-Trafficking, http://www.iom.int/jahia/page748.html (last visited Feb. 11, 2009). The IOM has implemented almost five hundred projects in eighty-five countries, and has provided assistance to approximately fifteen thousand trafficked persons. *Id.*

170. IOM, History, http://www.iom.int/jahia/Jahia/lang/en/pid/11 (last visited Feb. 11, 2009).

171. *Id.*

172. *See, e.g.*, UN.GIFT, MULTI-AGENCY SYNOPSIS OF MANDATES AND RESEARCH ACTIVITIES RELATED TO HUMAN TRAFFICKING (2008), *available at* http://www.ungift.org/docs/ungift/pdf/knowledge/Multy-Agency%20Synopsis.pdf (discussing the anti-trafficking mandates and efforts of the founding members of UN.GIFT and other organizations); UN.GIFT, THE VIENNA FORUM REPORT: A WAY FORWARD TO COMBAT HUMAN TRAFFICKING (2008), *available at* http://www.ungift.org/docs/ungift/pdf/vf/ebook2.pdf (describing the discussions and activities that took place at the Feb. 13 and 15, 2008 Vienna Forum to Fight Human Trafficking). UN.GIFT also publishes information gathered from its research on human trafficking. *See* UN.GIFT, HUMAN TRAFFICKING: AN OVERVIEW (2008), *available at* http://www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf. The organization has also published a number of best practices reports. UN.GIFT, Best Practices Reports, http://www.ungift.org/ungift/knowledge/practices.html (last visited Feb. 11, 2009).

173. Trafficking Victims Protection Act § 105, 22 U.S.C. § 7103 (2006). Members of the task force, to be appointed by the President, include the Secretary of State, the administrator of the U.S. Agency for International Development, the Attorney General, the director of the CIA, the Secretary of Labor, as well as others. *Id.* § 105(b), 22 U.S.C. § 7103(b).

174. *Id.* § 105(e), 22 U.S.C. § 7103(e).

175. *Id.*

176. *Id.*

reporting represented by the annual TIP Report has extended the extraterritorial effect of the efforts of these domestic U.S. institutions.[177]

The international anti-trafficking efforts are centered on information gathering, monitoring, and reporting. However, the effectiveness of the UN bodies' focus on coordinated, cooperative monitoring and reporting to stimulate state action against human trafficking appears to be unclear.[178] Other than the prospect of sanctions arising from a country's ranking on the U.S. TIP Report,[179] there appears to be no anti-trafficking enforcement mechanisms directed at individual states whether or not those states are parties to the Trafficking Protocol. As a result, the United States appears to occupy the field of global anti-human trafficking standard setting and enforcement.

C. The Anti-Money Laundering Regime

The international anti-money laundering regime coordinated and managed by the FATF is characterized by participatory expert-driven standard setting; high level intergovernmental cooperation;[180] effective sanctions; coordinated activity by the rest of the international community against noncompliant entities; the proliferation of regional FATFs; as well as cooperation by a variety of other international financial institutions, such as the World Bank and International Monetary Fund.[181]

The United States' first anti-money laundering legislation was the Bank Secrecy Act of 1970.[182] With the passage of time, the U.S. perspective favoring anti-money laundering initiatives as a mechanism that could effectively locate the proceeds from drug traffickers and lead to more successful prosecutions of those traffickers became more widespread.[183] The internationalization of U.S. anti-drug trafficking efforts culminated in the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psycho-

177. For example, the effect has been extended through norm dissemination. This is especially the case since the U.S. standards are supported by the threat of the imposition of sanctions.

178. While, as of September 26, 2008, 124 states have signed and ratified the Trafficking Protocol, and 117 states have signed and are in the process of ratification, Trafficking Protocol, *supra* note 3, the failure of 53 percent of states to submit reports to the Conference of the Parties, *see, e.g.*, Second Analytical Report, *supra* note 89, at 5, and the years-long lingering of several states on the U.S. TIP Report's Tier 2 and Tier 2 watch list indicate a lack of serious engagement with the issue by national governments.

179. *See* discussion *supra* Part II. The application of the unilateral sanctions has lacked the automaticity that might have made the prospect of application of the sanctions more real. *Id.*

180. REUTER & TRUMAN, *supra* note 23, at 81.

181. Members & Observers, *supra* note 38.

182. U.S. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114–1124, 12 U.S.C. §§ 1951–1959 (1970). Later anti-money laundering legislation includes the Kerry Amendment to the 1988 Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (extending the international reach of the U.S. domestic anti-money laundering regime). ANDREAS & NADELMANN, *supra* note 92, at 148–49.

183. ANDREAS & NADELMANN, *supra* note 92, at 147–49.

tropic Substances.[184] Although some individual states had already criminalized money laundering on the domestic level, it was this instrument that sparked coordinated international anti-money laundering efforts.

The purpose of anti-money laundering efforts is the identification and confiscation of the proceeds of the underlying predicate crimes. By locating the funds and confiscating them, law enforcement and state authorities can strengthen criminal prosecutions of accused suspects, identify sources of compensation for crime victims, and locate and secure, through confiscation, additional funds for law enforcement activities through forfeiture proceedings.[185] Because the standard of proof in civil forfeiture proceedings is only "by a preponderance of the evidence" and not the criminal standard of proof of "beyond a reasonable doubt," there is an additional benefit. Law enforcement may disrupt money laundering operations through civil forfeiture proceedings with less proof than might be required in a criminal proceeding.[186] The primary purpose of anti-money laundering efforts, however, is to disturb the incentive structure that underlies participation in criminal activities.[187] At the same time, anti-money laundering efforts seek to protect legitimate financial networks from the corruptive effects of the tainted funds.[188]

Institutional Framework

As previously stated, the necessity of internationalizing the fight against money laundering arises from the gaps between legal systems and jurisdictional challenges where the money launderer exploits facilities and institutions located in more than one jurisdiction and subject to potentially divergent domestic laws. The intergovernmental effort initiated by the G-7 expanded the international and transborder reach of anti-money laundering efforts and purposes.[189] The original membership of the FATF consisted of

184. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 1582 U.N.T.S. 164, 28 I.L.M. 497.

185. *See* STESSENS, *supra* note 24, at 85–87.

186. On the other hand, the relative ease of obtaining such forfeitures may lead to law enforcement's abuse of the forfeiture process.

187. To the extent that the possession of the proceeds of criminal activity increases the probability of criminal liability and punishment and that confiscation deprives the wrongdoer of the financial benefits of the crime, it is thought, the incentive to participate in criminal activities will decrease.

188. *See, e.g.*, Bachus, *supra* note 31, at 840–41; STESSENS, *supra* note 24, at 86–87 (both describing the negative consequences of money laundering).

189. The aftermath of the September 11, 2001 terrorist attacks further broadened the targets of the enforcement actions to include terrorist financing. On September 12, 2001, the United Nations Security Council adopted Resolution 1368, condemning the September 11 attacks and urging states to work together to fight terrorism. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). On September 28, 2001, the Security Council passed Resolution 1373, which provides that all states must act to prevent terrorist financing. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

the G-7 countries,[190] the European Commission, and eight other countries.[191] During 1991 and 1992, the FATF expanded its membership to twenty-eight members, then to thirty-one in 2000 and to thirty-three in 2003.[192] In 2007, the FATF expanded to the current thirty-four full members, consisting of thirty-two member jurisdictions and two regional organizations.[193] Additionally, many international organizations with an anti-money laundering mission among their functions are accorded FATF observer status.[194] The FATF also collaborates with the private sector and the general public, although these relationships do not fall within the spectrum of membership.[195] These varying levels of membership increase the FATF's legitimacy since many nonmember jurisdictions are included in FATF proceedings.[196] At the same time, partial membership allows the FATF to limit the influence of certain jurisdictions over the organization's decisions and policies.[197]

The Forty Recommendations are divided into four broad categories: recommendations directed toward legal systems, those directed toward financial institutions and nonfinancial businesses and professions, those addressing institutional and other measures necessary to combat money laundering, and measures intended to ensure international cooperation in

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190. *See supra* note 9.

191. Wessel, *supra* note 107, at 171. The eight other countries are Australia, Austria, Belgium, Luxembourg, the Netherlands, Spain, Sweden, and Switzerland. FATF, ANNUAL REPORT 2006–2007, ¶ 2 (2007) [hereinafter 2007 ANNUAL REPORT].

192. About the FATF, *supra* note 95.

193. The current FATF members are Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, the Gulf Cooperation Council, Hong Kong, Iceland, Ireland, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. 2007 NCCT REPORT, *supra* note 11, at 18, ¶ 6. In order to qualify for membership, a country must

> (a) be strategically important;
>
> (b) be a full and active member of a relevant FATF-style Regional Body;
>
> (c) provide a letter from an appropriate Minister or person of equivalent political level making a political commitment to implement the FATF Recommendations within a reasonable time frame and to undergo the mutual evaluation process; and
>
> (d) effectively criminalize money laundering and terrorist financing; make it mandatory for financial institutions to identify their customers, to keep customer records and to report suspicious transactions; and establish an effective FIU [Financial Intelligence Unit], so that the country will be assessed fully or largely compliant with Recommendations 1, 5, 10 and 13, and Special Recommendations II and IV.

FATF, Member Countries and Observers FAQ, http://www.fatf-gafi.org/document/5/0,3343,en_32250379_32236869_34310917_1_1_1_1,00.html (last visited Feb. 11, 2008).

194. Members & Observers, *supra* note 38. These include, among others, Interpol, the Organisation for Economic Cooperation and Development (OECD), the International Monetary Fund, the World Bank, and the UNODC. *Id.* All FATF members are expected to comply with the Forty Recommendations. *Id.*

195. 2007 ANNUAL REPORT, *supra* note 191, ¶¶ 47–51.

196. Wessel, *supra* note 107, at 195.

197. *Id.*

the fight against money laundering.[198] The Recommendations are not binding international law—they are merely "soft law," so that their effectiveness depends on countries' compliance.[199] However, the voluntary nature of the Recommendations has been questioned as a result of the actions taken against noncompliant jurisdictions.[200] Although the FATF itself has no enforcement mechanism, the organization has used a variety of methods (including the NCCT list) to exact compliance by both member and nonmember jurisdictions.[201]

The membership of the Organization for Economic Cooperation and Development (OECD)[202] overlaps significantly with that of the FATF,[203] and the Paris headquarters of the OECD currently houses the FATF Secretariat. The OECD and the FATF are fully independent bodies.[204] Nevertheless, the work of the OECD, particularly in the area of combating economic crimes like corruption and tax fraud, is relevant to the work of the FATF.[205] For example, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions requires signatory states to take measures against laundering of money derived from the bribery of public officials.[206] Further, the OECD's campaign against jurisdictions that the organization determines are harmful tax havens, that is, employ harmful tax practices, is closely intertwined with the FATF's anti-money laundering

198. *See* Herbert V. Morais, *Fighting International Crime and Its Financing: The Importance of Following a Coherent Global Strategy Based on the Rule of Law*, 50 VILL. L. REV. 583, 596–600 (2005).

199. Bachus, *supra* note 31, at 847.

200. *Id.* at 851.

201. *Id.* at 852; *see* discussion *supra* Part II.C.2.

202. The OECD grew out of the Organisation for European Economic Co-operation (OEEC). THE OECD, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 9–10 (2008), *available at* http://www.oecd.org/dataoecd/15/33/34011915.pdf. The OEEC was formed in 1948 in order to implement the Marshall Plan. *Id.* at 9. The OECD, which was created as the economic counterpart to NATO, took over for the OEEC in 1961. *Id.* The OECD is composed of thirty "countries committed to democracy and the market economy." OECD, About the OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Feb. 11, 2009). The mission of the OECD is to "support sustainable economic growth, boost employment, raise living standards, maintain financial stability, assist other countries' economic development, and contribute to growth in world trade." *Id.*

203. *Id.* Several countries are members of the OECD, but not the FATF and vice versa.

204. FATF, General FAQ, http://www.fatf-gafi.org/document/26/0,3343,en_32250379_32236836_34312026_1_1_1_1,00.html (last visited Feb. 11, 2009).

205. FATF, International Organisations, http://www.fatf-gafi.org/document/9/0,3343,en_32250379_32236869_35809865_1_1_1_1,00.html#CICADOAS (last visited Feb. 11, 2009).

206. *Id.* The Convention institutes a peer-review system to ensure that signatory states implement OECD anti-bribery instruments, and this review process involves an assessment of anti-money laundering measures in the context of bribery. *Id.* Because of the common goals of these distinct international bodies, experts from the OECD and FATF share information and experience in order to combat these activities. *Id.*

work and there is a close overlap between the list of tax havens issued by the OECD and the jurisdictions included on the FATF's NCCT list.[207]

FATF Evaluation Mechanisms

In order to ensure compliance with the FATF's anti-money laundering standards and procedures, two monitoring mechanisms are in place: self-assessment exercises and mutual evaluation procedures.[208]

Self-Assessment. Each member country completes a yearly self-assessment exercise, consisting of responses to questionnaires aimed at evaluating the effectiveness of the country's implementation of the Recommendations.[209] These questionnaires are examined by the FATF to determine individual and FATF-wide performance.[210]

Mutual Evaluations. Mutual evaluations, the second monitoring mechanism, are much more detailed than are the self-assessment exercises. These evaluations assess whether the laws and regulations required by the Recommendations are in force and effective.[211] The FATF has developed very detailed procedures to conduct these evaluations, with the aim of ensuring fair and consistent evaluation.[212] The assessment process lasts about ten months to one year, and is conducted by a team of four to six selected experts in the legal, financial, and law enforcement fields, together with up to two members of the FATF Secretariat.[213] The assessment team makes an on-site visit to the country and produces a detailed written report assessing the jurisdiction's anti-money laundering system.[214] These reports are shared with all FATF members and observers, discussed at the plenary meetings of the FATF, and published once adopted.[215] The FATF has emphasized the importance of the free exchange of these reports among all assessor bodies, including the FATF, the FSRBs,[216] and the internal financial regulatory bodies of each jurisdiction, in order to assure consistent application of the

207. When the lists were first released in the summer of 2000, ten countries appeared on both the FATF's NCCT list and the OECD's list of harmful tax havens: the Bahamas, the Cook Islands, Dominica, the Marshall Islands, Niue, Nauru, Panama, Liechtenstein, St. Kitts-Nevis, and St. Vincent and the Grenadines. Benjamin R. Hartman, *Coercing Cooperation from Offshore Financial Centers: Identity and Coincidence of International Obligations Against Money Laundering and Harmful Tax Competition*, 24 B.C. INT'L & COMP. L. REV. 253, 254, 261 (2001).

208. Bachus, *supra* note 31, at 851.

209. *Id.*

210. *Id.*

211. 2007 ANNUAL REPORT, *supra* note 191, ¶ 16.

212. *Id.* ¶ 17. The methodology for these evaluations is laid out in the AML/CFT Assessment Methodology, *available at* http://www.fatf-gafi.org/dataoecd/16/54/40339628.pdf. Also, the AML/CFT Evaluations and Assessments Handbook for Countries and Assessors provides instruction for parties conducting the assessments. It is available at http://www.fatf-gafi.org/dataoecd/7/42/38896285.pdf.

213. 2007 ANNUAL REPORT, *supra* note 191, ¶ 18.

214. *Id.*

215. *Id.* ¶ 20.

216. *Id.* For more detail, see *infra* note 225.

Recommendations.[217] To that end, almost all assessor bodies have agreed to share their reports and most have agreed to publish them.[218] Two years after a mutual evaluation, each member jurisdiction must submit a report to the FATF indicating the progress it has made in areas identified as deficient by the assessment.[219]

Compliance Mechanisms

As outlined earlier,[220] the consequences to a FATF member of a failure to comply vary broadly, beginning with less aggressive enforcement measures and building in severity as a country persists in noncompliance.[221] The least aggressive measure entails application of peer pressure and requiring that the errant member submit progress reports at plenary meetings.[222] If there is further noncompliance, the FATF President may send a letter or a delegation to the country's government, and upon further noncompliance, the FATF may invoke Recommendation 21.[223] Finally, the country's membership in the FATF may be suspended.[224]

Nonmember Evaluation and Compliance

By virtue of their membership in an FSRB, some jurisdictions that are not FATF members have agreed to become subject to the Forty Recommendations and to mutual evaluations.[225] These countries undergo the mutual evaluation processes conducted by their respective FSRBs, which are con-

217. 2007 ANNUAL REPORT, *supra* note 191.

218. *Id.*

219. *Id.* ¶ 21.

220. *See supra* Part II.C.2.

221. FATF, Monitoring the Implementation of the Forty Recommendations, http://www.fatf-gafi.org/document/60/0,3343,en_32250379_32236920_34039228_1_1_1_1,00.html (last visited Feb. 11, 2009).

222. *Id.*

223. *Id.* This allows the FATF to issue a statement encouraging financial institutions to pay "special attention" to transactions with that country. *Id.*

224. *Id.*

225. Wessel, *supra* note 107, at 182–83. Thus, FSRB member countries that are not members of the FATF have accepted FATF money laundering standards through their membership in the FSRB. *Id.* at 184. Some countries with full FATF membership are also members of an FSRB, but many members of FSRBs are not FATF members. Members & Observers, *supra* note 38. Five FSRBs hold associate member status with the FATF. *Id.* These include the APG (Asia/Pacific Group on Money Laundering), the CFATF (the Caribbean Financial Action Task Force), MONEYVAL (the Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism), GAFISUD (the Financial Action Task Force on Money Laundering in South America), and MENAFATF (Middle East and North Africa Financial Action Task Force). *Id.* The three remaining FSRBs hold FATF observer status. *Id.* These include the EAG (the Eurasian Group), ESAAMLG (Eastern and Southern Africa Anti-Money-Laundering Group), and GIABA (Intergovernmental Action Group Against Money-Laundering in Africa). *Id.* Because the FSRBs are able to consult with FATF members during the decision-making process, the interests of many countries outside the FATF are taken into consideration.

ducted in the same manner as the FATF evaluations.[226] Also, in 2002 the FATF initiated a self-assessment process for nonmember countries, in which more than one hundred countries have participated.[227] However, the FATF's most effective mechanism for dealing with nonmember noncompliance with the standards is the NCCT list.[228]

D. Comparing the Regimes

The international anti-trafficking and anti-money laundering regimes can be compared on a number of levels. Although other avenues of comparison and research would also be valuable in assessing the two regimes, this article focuses on the following aspects: (1) the nature and forms of coordination (or lack thereof) among nation-states and the international organizations involved in or spearheading the efforts; (2) the institutional framework created to combat the problems; (3) standard setting methodologies; (4) targets of the regimes; (5) the nature and deployment of sanctioning mechanisms used to encourage compliance; and (6) the reputation of the regimes.

1. Coordination and Cooperation

The FATF effort is a top-down effort, initiated by powerful states (the G-7) in order to combat a perceived threat of lawlessness, in particular, the illicit drug trade.[229] In contrast, the anti-human trafficking regime responds to bottom-up pressure from civil society: in the international sphere, human rights and women's rights NGOs pushed for an international instrument specifically targeting human trafficking, while domestic activists (and some engaged lawmakers) were the impetus for the passage of the TVPA.

The top-down approach and the political support of powerful states (strengthened after September 11, 2001) have had significant effects on the power, structure, and organization of the anti-money laundering institution. A key example is the seemingly inevitable acquiescence of individual states to the standards proposed by the FATF. Even though the standards do not enjoy treaty status under international law, political support for the FATF and the organization's ability to demand from its members the economic shunning of Recommendation 21[230] have engineered the dissemination and spread of the Forty Recommendations as the preeminent anti-money laundering norm regime. In order for individual states to comply with the norms, they become part of the network of self-assessments, mutual evaluations, and monitoring coordinated by the FATF and the regional FSRBs.

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226. 2007 ANNUAL REPORT, *supra* note 191, ¶ 16.

227. FATF, 2002–2003 ANNUAL REPORT ¶ 29 (2003).

228. The NCCT list was discussed *supra* Part II.C.

229. As mentioned *supra* Part III.C., the scope of the anti-money laundering regime has been broadened to target terrorist financing.

230. *See supra* note 114 and accompanying text.

In contrast, the UN Trafficking Protocol, although a treaty under international law, has evoked less complete compliance and/or coordinated response both by the States Parties and nonsignatories. The lack of compliance may be related to the bottom-up approach[231] as well as to the consensus-based negotiations that ended in the creation of the instrument.[232] This contrast in compliance levels may reflect both the creation of weaker norms due to the need for consensus in negotiating the provisions of the Protocol as well as an inability to put in place an enforceable sanctioning mechanism that would create greater incentive for compliance.

2. *Institutional Framework*

The institutional frameworks of the two regimes also contrast. The anti-money laundering fight is spearheaded and monitored by a single purpose intergovernmental international organization funded by annual contributions from its members.[233] The limited membership allows greater ease of decision-making,[234] as only thirty-four viewpoints must be accommodated.[235] Further, the fight against money laundering has given rise to regional anti-money laundering organizations that coordinate with each other and with the FATF with respect to information gathering and monitoring in order to ensure compliance with standards and to speed up reactions to new forms of money laundering.[236] Additionally, the anti-money laundering regime is able to link into existing intergovernmental and privately regulated financial and monetary institutions and industries in order to increase the sources of information gathering and scope of monitoring.[237]

In contrast, the efforts of the institutions involved in the international efforts against human trafficking are less coordinated or focused. The negotiations leading to the drafting and opening for signature of the Transna-

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231. A bottom-up approach may elicit less ardent reactions from states, to the extent that the issue does not appear to affect the interests or survival of the leaders or governments of individual states and arises among the general population.

232. That is, the challenges of achieving consensus among a large number of negotiators are less likely to result in either hard obligations or effective sanctioning mechanisms.

233. 2007 ANNUAL REPORT, *supra* note 191, ¶ 55.

234. All decisions of the FATF are taken by consensus of these thirty-four members. *Id.* ¶ 8.

235. *See supra* note 225 (regarding the representation of nonmember interests through the mechanism of the FSRBs).

236. *See* discussion *supra* Part III.C.; *supra* notes 193, 225 and accompanying text.

237. *See supra* Part III.C. (regarding the organizations and groups that are FATF observers). Both the International Monetary Fund and the World Bank are also supportive of the FATF's anti-money laundering efforts. *See* Bachus, *supra* note 31, at 856–57. In addition, Recommendation 26 of the Forty Recommendations provides that each country should establish a central FIU (Financial Intelligence Unit), which "serves as a national centre for the receiving (and, as permitted, requesting), analysis and dissemination" of money laundering information. FORTY RECOMMENDATIONS, *supra* note 26. The Interpretive Note to Recommendation 26 provides that when a country develops a FIU, the FIU should consider becoming part of the Egmont Group—the international organization of FIUs. *Id.* The Egmont Group fosters international cooperation and information sharing. *See* Bachus, *supra* note 31, at 855–56.

tional Crime Convention and Trafficking Protocol were conducted within the United Nations—the preeminent universal membership international organization. More voices and interests could be aired and considered before consensus could be reached. This reality inevitably weakened the obligations created under the treaty as well as the treaty's coercive power.

The Trafficking Protocol did not create an independent, special-purpose standing body with oversight over human trafficking, the power to create standards, or the power to sanction. The United Nations itself is a multipurpose organization, and the Conference of the Parties created by the Transnational Crime Convention is not dedicated solely to the efforts against human trafficking. The Convention's Conference of the Parties, which meets annually, has oversight over both the reporting required by the Transnational Crime Convention itself and the reporting required by the other Protocols to the Convention.[238] Although the UNODC was made custodian of the Convention, including the Trafficking Protocol, the UNODC's responsibilities are broad, encompassing many other transnational crimes. In addition, while the UNODC has the power to monitor and issue reports on trafficking and other crimes, it does not have the power to create standards nor to enforce them. The other UN agencies or officials with mandates or responsibilities related to human trafficking (such as the UN Special Rapporteur on Human Trafficking) also do not have sanctioning or standard-creation power. UN.GIFT, the new anti-trafficking initiative that came into being in 2007, creates opportunities and a framework for cooperation and coordination among UN and other anti-trafficking organizations, but lacks coercive power.[239] Moreover, until the formation of UN.GIFT, there was no official framework through which to cooperate and to coordinate anti-trafficking efforts.

As discussed in Part II, the United States applies its own internally generated anti-trafficking standards with extraterritorial purpose and effect. Some scholars have expressed concern that those standards may conflict with or undermine the standards of the Trafficking Protocol.[240] Further, the unilateral enforcement mechanism deployed by the United States lacks both the deterrent effects of the coordinated activities of FATF members and nonmember adherents to the Forty Recommendations as well as the self-assessment and mutual evaluation components of the international anti-money laundering regime.

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238. The other Protocols to the Transnational Crime Convention are the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/383 (Nov. 15, 2000) Annex 3; and the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/255, U.N. Doc. A/RES/55/383/Add.2 (May 31, 2001).

239. *See* discussion *supra* notes 162–63 and accompanying text.

240. *See, e.g.*, Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 466–74 (2006).

3. *Standard Setting Methodologies*

The standards formulated, issued, and enforced by the FATF, including the Forty Recommendations, the Nine Special Recommendations, and the NCCT criteria, are the product of a collaborative expert-rich process that involves constant monitoring and review of the information gathered by the FATF and the regional FSRBs. Within the FATF, the Ad Hoc Committee identifies new money laundering methodologies, and works toward countering those methodologies through revision of the operative standards.[241] In addition, the standards deployed by the FATF are global in scope: they are used in the self-assessments and mutual evaluations conducted by individual jurisdictions and under the auspices of the FATF and the FSRBs.[242]

In contrast to the FATF effort, the international anti-trafficking actors' efforts are not coordinated and directed within a coherent and cohesive umbrella. In issuing the annual TIP Report, in order to determine the appropriate Tier placement of countries that are deemed to have a significant trafficking problem, the U.S. State Department employs the unilateral U.S. standards enunciated by the U.S. legislators in the TVPA.[243] The measurement of an individual country's efforts is conducted by the State Department based on information gathered from various sources within individual countries, including government officials from those countries.[244] Unlike the FATF, the United States does not publicize the reports and other information gathered in its monitoring and information gathering process.[245]

Other international anti-trafficking entities and initiatives, such as the Council of Europe and UN.GIFT, are engaged in formulating global anti-trafficking standards.[246] However, these efforts at coordinating international anti-trafficking efforts are not bolstered by sanctioning mechanisms analogous to those deployed toward the international propagation of anti-money laundering efforts.

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241. *See* discussion *supra* note 112. To that end, the Forty Recommendations have been revised twice since their first issuance in 1990. For more detailed discussion of the revisions, see *infra* note 265.

242. *See supra* note 131.

243. The State Department employs a threshold figure of "100 or more victims" to determine whether a country is a country of destination, transit, or origin. *See* 2008 TIP REPORT, *supra* note 1, at 12.

244. As described in the 2008 TIP Report, the State Department

> use[s] information from U.S. embassies, foreign government officials, non-governmental organizations (NGOs) and international organizations, published reports, research trips to every region, and information submitted to tipreport@state.gov. . . . U.S. diplomatic posts reported on the trafficking situation and governmental action based on thorough research, including meetings with a wide variety of governmental officials, local and international NGO representatives, officials of international organizations, journalists, academics and survivors.

2008 TIP REPORT, *supra* note 1, at 11–12.

245. *See* ZHANG, *supra* note 40, at 121.

246. *See, e.g.*, *supra* note 172 (listing the anti-trafficking publications of UN.GIFT).

4. *Targets of the Regime*

The international anti-money laundering regime more successfully targets the private actors actively involved in the illicit activity than does the anti-trafficking regime. The FATF anti-money laundering regime imposes obligations on government actors[247] to adopt the FATF standards and to transpose those standards into domestic law. The global spread of the FATF's standards and compliance by even the most recalcitrant NCCTs have resulted in the imposition of a relatively uniform regulatory web focused on financial institutions and industries worldwide, including banking, insurance, and others related to the movement of money.[248] The obligations imposed on state actors also includes the creation and empowerment of domestic regulatory agencies with independent power to regulate domestically, share information across borders, and otherwise cooperate internationally.[249] The standards, therefore, connect and intertwine with the functioning of both public and private actors.

The international anti-trafficking regime involves acceptance by individual countries, through accession to the Trafficking Protocol, of obligations to prevent and prosecute human trafficking and to extend protection to victims of trafficking. Obligations under the Trafficking Protocol are, in many respects, less mandatory and more hortatory.[250] The Trafficking Protocol requires that States Parties criminalize the trafficking of humans, but does not identify specific industries or professions that should be targeted for regulation and monitoring.

The U.S. TIP Report, through individual country narratives, praises the formation of task forces created to address an individual country's trafficking problem and the promulgation of anti-trafficking legislation in fulfillment of obligations under the Trafficking Protocol.[251] However, perhaps because the trafficking of humans manifests differently in each country, no one particular profession or industry is necessarily targeted. Neither the model anti-trafficking legislation issued by the United States[252] nor UN.GIFT targets specific industries.

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247. Those obligations include criminalization of money laundering, creation of regulatory agencies, and international cooperation. *See* description of the Forty Recommendations, *supra* Part III.C.

248. Other industries and professions targeted for regulation by the FATF include accountants, lawyers, real estate brokers, casinos, and car dealers, among others.

249. That is, each jurisdiction must create a domestic entity to monitor its financial system (a financial intelligence unit or FIU). *See* discussion *supra* note 237 and accompanying text.

250. Contrast, for example, the language of the Trafficking Protocol and the Council of Europe Anti-Trafficking Convention discussed *supra* note 44. *See also* Chuang, *supra* note 240, at 448 (noting the aspirational nature of the Trafficking Protocol's delineation of States Parties' obligations to victims of trafficking).

251. *See, e.g.*, 2008 TIP REPORT, *supra* note 1, at 245–46 (describing the anti-trafficking efforts of the government of Timor-Leste).

252. *See generally* Model Law to Combat Trafficking in Persons (2003), *available at* http://www.humantrafficking.com/humantrafficking/toolkits_ht3/DOS_Model_Law.htm.

5. *Sanctioning Mechanisms*

The sanctioning mechanisms at the disposal of the FATF surpass by far the sanctioning mechanisms available in the fight against human trafficking. Pursuant to Recommendation 21 of the Forty Recommendations, the FATF has the power to deploy escalating coercive mechanisms that may conclude in the financial shunning of the recalcitrant country or jurisdiction.[253] With respect to FATF member states, the FATF first will apply peer pressure and require the noncompliant member to submit progress reports at Plenary meetings.[254] If the noncompliant member continues to be uncooperative, the FATF President may send a letter or a delegation to the country's government and, upon further noncompliance, the FATF may invoke Recommendation 21.[255] This procedure allows the FATF to issue a statement encouraging financial institutions to pay "special attention" to transaction with the noncompliant member.[256] Finally, the noncompliant member's membership in the FATF may be suspended.[257] With respect to nonmember countries and jurisdictions, the naming-and-shaming device of the NCCT list is brought to bear. The negative reputational effects are bolstered by the power and threat of the application of Recommendation 21.

The only sanctioning mechanisms deployed in the international anti-trafficking regime are the unilaterally imposed sanctions of the United States. The United States does not coordinate with other States Parties to the Trafficking Protocol to target noncompliant territories and countries and encourage their adherence to international standards. Further, as discussed in Part II.C.1, sanctions have been imposed against only a small subset of noncompliant jurisdictions.

6. *Reputation*

Finally, the reputations of the two regimes contrast sharply. The international anti-trafficking regime is widely perceived as ineffective,[258] and demonstrates shortcomings that are similar to the shortcomings of the international human rights regime generally—the inability to impose credible sanctions, and reliance on sometimes ineffective and politically flawed naming-and-shaming efforts.

Secondly, the U.S. TIP Report is marred by suggestions of U.S. exceptionalism[259] and the apparent role of political considerations in determining

253. *See supra* note 114 for the text of Recommendation 21.
254. *See supra* note 114 for the text of Recommendation 21.
255. *See supra* note 114 for the text of Recommendation 21.
256. *See supra* note 114 for the text of Recommendation 21.
257. *See supra* note 114 for the text of Recommendation 21.
258. *See, e.g.*, 2006 GAO Report, *supra* note 6.
259. The U.S. State Department does not rank the anti-trafficking efforts of the United States in the annual TIP Reports, nor is the United States assigned a Tier ranking. However, the TIP Reports now describe U.S. anti-trafficking efforts, and include an acknowledgement that the

country rankings and the imposition of sanctions.[260] And, as discussed in Part III.D.3, the universality of inclusion on the list has tended to diminish the impact of its intended naming-and-shaming value.

In contrast, the FATF standards may be described as the "gold standard" in the international anti-money laundering sphere.[261] The placement (or not) of individual territories on the NCCT list[262] has been somewhat marred by the suggestion of political maneuverings.[263] Nevertheless, the targeted jurisdictions are generally held to deserve their inclusion on the list based on perceived noncompliance with the widely accepted FATF standards.[264]

The aura of independence and fairness may also stem from the FATF's participatory information gathering methodologies and the availability of avenues for input by experts as well as actors within the targeted industries.[265] The methodology underlying listing and placement on the U.S. TIP Report, which contrasts with the information gathering mechanisms that lead to the FATF's NCCT Reports, undoubtedly also contributes to the skepticism regarding the objectivity and accuracy of the TIP Reports.[266]

United States, like other countries, could improve its anti-trafficking efforts. *See, e.g.,* 2008 TIP REPORT, *supra* note 1, at 51.

260. *See, e.g.*, Chuang, *supra* note 240, at 482–85; *see also* ZHANG, *supra* note 40, at 120–21 (describing conflict between aggressive anti-trafficking policies and diplomatic needs).

261. *See, e.g.*, STESSENS, *supra* note 24, at 17 (describing the Forty Recommendations as "the crown jewel of soft law" on money laundering). In addition to urging UN members to implement the Forty Recommendations, the Security Council took note of the primacy of FATF anti-money laundering standards. *See* S.C. Res. 1617, ¶ 7, U.N. Doc. S/RES/1617 (July 29, 2005).

262. As well as on the harmful tax haven list issued by the OECD.

263. *See, e.g.*, KRIS HINTERSEER, CRIMINAL FINANCE: THE POLITICAL ECONOMY OF MONEY LAUNDERING IN A COMPARATIVE LEGAL CONTEXT 24 (2002) (discussing political maneuverings to omit some European jurisdictions from the NCCT list); *see also* Wessel, *supra* note 107, at 181.

264. *See* Wessel, *supra* note 107, at 176 (noting that "political considerations do not . . . always dominate" and that Israel and Russia, two powerful states, have been designated NCCTs).

265. In addition to input from FSRBs and other observer organizations, the policies and initiatives of the FATF are discussed during Plenary meetings which are held three times per year. *See* FATF, The Financial Action Task Force on Money Laundering-FATF, *available at* http://www.fatf-gafi.org/dataoecd/32/31/34048008.pdf [hereinafter FATF Brochure]. Additionally, emerging money laundering methods, trends, and threats, as well as effective countermeasures, are reviewed at a yearly typologies meeting. *Id.* Also, Ad Hoc groups discuss issues relevant to particular geographic regions and special topics requiring detailed analysis. *Id.* Ad Hoc groups have specific mandates, and they meet on the margins of the Plenary meetings and report to the Plenary. *Id.* The FATF also holds a Financial Services Forum every two years to discuss topics of common concern with members of the financial services sector. *Id.* All decisions of the FATF are taken by consensus of the FATF members and are based on papers prepared by the Secretariat and written and oral reports from various groups. *Id.*

266. The U.S. TIP Report is based on information from consular officers of the United States, as well as NGO and media sources within specific jurisdictions. *See supra* note 244. The information and assessments underlying placements on the NCCT list, or other designation of noncompliance, are based on a more in-depth evaluation, often from expert sources. The detailed standards for inclusion are published in the FATF's Annual Reviews. *See, e.g.*, 2007 ANNUAL REPORT, *supra* note 191.

Finally, while self-evaluations are an integral part of the FATF's processes, despite reported information gathering from government officials, it is unclear that self-evaluations by individual countries play a role in TIP Report rankings. There is very limited involvement of jurisdictions in monitoring and evaluating themselves—ranks are assigned by the U.S. State Department. The participatory process of regular self-evaluations and mutual self-assessments creates active engagement in norm assessment and evaluation at the governmental and leadership levels. This active engagement stimulates norm dissemination and penetration in individual jurisdictions in a manner that is quite different from the governmental reactions to the U.S. TIP Reports, which are viewed as the imposition of blame by outsiders.

E. Assessing the Regimes

Has either the FATF's international anti-money laundering or the international anti-human trafficking regime been successful in decreasing, preventing, and prosecuting trafficking and/or in decreasing the opportunities for criminals to launder dirty money and enjoy that money in the legitimate economy? Does the apparently greater success of the FATF's NCCT list, as compared with the U.S. TIP Report and the efforts of the Conference of the Parties of the UN Transnational Crime Convention indicate that the international anti-money laundering regime is more effective than are the international anti-trafficking efforts? Success could be evaluated through assessment or measurement of, among other things, the following proxies: (1) a decrease in the incidence of the targeted activity; (2) greater compliance with the standards formulated to combat the activity; (3) evidence of norm building and penetration within civil society, interest groups, regulated industries, and governmental spheres; and/or (4) participation in and coordination of activities against the targeted activity.

1. Anti-Human Trafficking

The combination of the U.S. TIP Reports and the Reports of the Conference of the Parties to the Transnational Crime Convention tells a complicated story. The prodding and threatened sanctions of the U.S. TIP Reports have awakened the majority of the world's territories and countries[267] to the fact that individual countries and the international community as a whole have a significant trafficking problem (at least, as determined by the standards of the U.S. legislation and regulations) and that it is not merely a problem that occurs "elsewhere."

In the face of the threat of the imposition of U.S. sanctions, the vast majority of countries have been persuaded to take action against human

267. One hundred and seventy countries are listed, ranked, and described in the 2008 TIP Report. 2008 TIP REPORT, *supra* note 1, at 44.

trafficking within their borders. Those countries have moved up in the rankings from Tier 3 to Tier 2 or Tier 2 watch list through efforts such as the creation of task forces, the passage of domestic anti-trafficking legislation, and the prosecution of traffickers. A perhaps even more critical step for individual jurisdictions is the signature and ratification of the Transnational Crime Convention, the Trafficking Protocol, and other international instruments, accession to which the United States has determined demonstrate a good faith attempt on the part of a jurisdiction to address its trafficking problem and participate in the international efforts against human trafficking.[268]

However, the failure of a substantial proportion of the States Parties to the Trafficking Protocol to submit reports to the Conference of Parties may indicate a problem with this sunny picture. The failure to report may simply indicate a jurisdiction's lack of resources to conduct the required self-evaluation. On the other hand, it may indicate that accession to the Trafficking Protocol and its obligations is seen as no more than an instrumentalist strategy designed to avoid the opprobrium of the United States, as well as a resistance to and/or refusal to allow the penetration of U.S.-formulated anti-trafficking norms into domestic policy making levels. Indeed, resentment of the United States for the TIP placement, often without prior warning, of an individual country may serve to harden resistance to attempted norm penetration. For example, the minute movement upward from Tier 3 to Tier 2, then a stubborn, years-long sojourn on the Tier 2 watch list by a country such as Armenia lends credence to this hypothesis.[269]

The 2008 TIP Report depicts mixed developments with respect to the prosecution and conviction of suspected traffickers: according to the Report, in 2003, 7992 prosecutions were brought, resulting in 2815 convictions.[270] By 2007, 5682 prosecutions resulted in 3422 convictions.[271] A review of the numbers indicates that, despite the increase in the adoption of anti-trafficking legislation,[272] the number of cases prosecuted has de-

268. The rankings of individual countries on the TIP Report are influenced by, among other things, their accession to and/or ratification of the following international instruments: the Trafficking Protocol; ILO Convention 182, Elimination of Worst Forms of Child Labour; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; Optional Protocol to the Convention on the Rights of the Child in Armed Conflict; ILO Convention 29, Forced Labour; and ILO Convention 105, Abolition of Forced Labour. 2008 TIP REPORT, *supra* note 1, at 280–83.

269. Armenia was first ranked as a Tier 3 country in 2002. Its efforts in response to that ranking were rewarded in 2003 by its ranking at Tier 2. After maintaining its Tier 2 ranking in 2004, the country was placed on the Tier 2 watch list in 2005 and has remained at that ranking on the 2006, 2007, and 2008 TIP Reports.

270. 2008 TIP REPORT, *supra* note 1, at 37.

271. *See id.*

272. The 2008 TIP Report indicates that there were 24, 39, 40, 21, and 28 new anti-trafficking legislative adoptions in 2003, 2004, 2005, 2006, and 2007, respectively. 2008 TIP REPORT, *supra* note 1.

creased. However, both the percentage and absolute numbers of successful convictions have increased. The gap between prosecutions and/or convictions and the number of individuals estimated to be trafficked[273] is both conspicuous and daunting.

With respect to the question whether the international anti-trafficking efforts have resulted in a decrease in the incidence of trafficking, this author has seen and is aware of no such claim. Estimates of the scope of the occurrence of human trafficking vary, and numbers of estimated victims vary according to the organization or person issuing such numbers (perhaps due to variations in operative definitions). However, this author knows of no organization that claims to have noted a decrease in the trafficking of humans. Instead, new countries (and new cases of trafficking) are added each year to the TIP Reports,[274] and with the growth in awareness and possible law enforcement (and perhaps community) disapprobation, victims may be subjected to more secrecy and the victims' exploitation more successfully hidden.

The inspiring tales of anti-trafficking warriors give great heart.[275] However, might the expansion in the number of anti-trafficking activists and organizations merely indicate a logical response, in individual aid-dependent countries, to the incentive provided by the attention, resources, and criteria for the disbursement of monies devoted by the United States and other countries toward anti-trafficking efforts?

Nevertheless, trafficking scholar Professor Susan Tiefenbrun opines that "the TVPA has not only made progress in the domestic fight against trafficking, but it has also positively impacted attempts made by other nations to deter this transnational crime."[276] The factors highlighted by Professor Tiefenbrun as the bases for this conclusion include the increase in anti-trafficking aid given by the United States to other countries, the increase in anti-trafficking investigations, arrests and prosecutions in foreign countries, and the anti-trafficking efforts, including the passage of legislation, by governments of foreign countries.[277]

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273. For example, antislavery activist Kevin Bales estimates that 27 million individuals are enslaved worldwide. KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 8–9 (2004). The International Labour Organization estimates that 12.3 million individuals are enslaved. INT'L LABOUR ORG. OFFICE [ILO], ILO MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD 2 (2005) (*prepared by* Patrick Belser, Michaelle de Cock, & Farhad Mehran), *available at* http://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-declaration/documents/publication/wcms_081913.pdf.

274. The 2001 TIP Report listed and ranked 70 countries; the 2008 TIP Report lists and ranks 170 countries. 2001 TIP REPORT, *supra* note 8; 2008 TIP REPORT, *supra* note 1.

275. *See, e.g.*, 2008 TIP REPORT, *supra* note 1, at 40–43.

276. Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249, 280 (2006–2007).

277. *Id.* at 272–78.

2. *Anti-Money Laundering*

Despite the fact that the FATF's Forty Recommendations were first published in 1990 and the NCCT initiative began in 2000, there has been surprisingly little research into the FATF's effectiveness. Currently, there is no empirical method to assess the effectiveness of the anti-money laundering regime.[278] Peter Reuter and Edwin Truman, leading scholars of the anti-money laundering regime, note that research on money laundering is even more difficult than it is for most other crimes, because there are no victimization surveys, and population surveys are unlikely to provide much information.[279] However, Reuter and Truman assert that anti-money laundering regimes are amenable to research and that such research will be helpful in the fight against money laundering.[280]

Despite the research difficulties, some sources give the overall impression that the success of the FATF has been relatively limited. For example, according to Reuter and Truman:

> Sifting of the limited available information suggests that the global [anti-money laundering] regime has made progress in the general area of prevention, but without much effect on the incidence of underlying crimes. Critics argue that the regime has done little more than force money launderers to change their methods . . . . Critics may well be right.[281]

Evaluation of the success of the work of the FATF turns on the definition of "success." For example, one may take the stance that levels of cooperation with the FATF by member and nonmember jurisdictions in assessment and endorsement of the Forty Recommendations is the appropriate measure of effectiveness.[282] Pursuant to this stance, in light of the number of mutual evaluations of nonmembers that have been carried out by the FSRBs and the IMF and the number of countries that have endorsed the Forty Recommendations through FSRB membership, there is little question that the work of the FATF has been tremendously successful.

Some studies have attempted to address the effectiveness of the FATF, but, due to the difficulties mentioned above, the approaches taken are indi-

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278. REUTER & TRUMAN, *supra* note 23, at 190–92.

279. This research challenge is strikingly similar to that confronted in the fight against human trafficking. The trafficked person is often unable or reluctant to self-identify as such, making the quantitative gathering of information quite challenging, and creating barriers to effective law enforcement.

280. REUTER & TRUMAN, *supra* note 23, at 190–92 (the coauthors suggest, among other methodologies, the tracking of the use of suspicious activity reports, measurement of the costs of anti-money laundering regimes, and the use of economic modeling).

281. *Id.* at 192.

282. Wessel, *supra* note 107, at 186–87 ("To a significant degree, the procedural carrots given to non-members have succeeded in inducing compliance; the FATF has received completed self-assessment questionnaires from 130 jurisdictions, many of which are non-members. This number mirrors the level of jurisdictions that have endorsed the Forty Recommendations.").

rect. For example, scholars Jackie Johnson and Y.C. Desmond Lim adapted another researcher's method to evaluate the effectiveness of the FATF in decreasing the relationship between countries' banking sectors and money laundering.[283] Johnson and Lim claim that it is virtually impossible to judge the size of the money laundering problem because of its secretive nature.[284] As a consequence, to measure the link between banks and the legal and illegal economies in FATF member and nonmember countries during the pre- and post-FATF periods, they used the crime rate as a proxy variable for the "illegal economy."[285] The study found that, following the formation of the FATF, a majority of FATF member countries saw a decreased correlation between the banking sector and the illegal economy.[286] Further, the study found that in the post-FATF period, on average there is a much stronger relationship between banks and the illegal economy in non-FATF countries.[287]

Although this study casts the work of the FATF in a positive light, it is important to acknowledge its limitations. First, in order to capture both the pre- and post-FATF periods, the time frame of the study ranges from 1980 to 1996. The first NCCT list was not published until 2000. As a result, this study cannot be seen as a reflection of the success of that initiative. Therefore, this study reflects only the success of the FATF's Forty Recommendations among FATF member countries. Further, the research methodology used is far from perfect: Reuter and Truman assert that the research methodology from which this study was adapted is "at a very aggregate level that reflects only the most schematic knowledge of money laundering."[288] In sum, the proxies selected for examination in the study may be ill-suited to measurement of the standards' effects, if any, on money laundering in the jurisdictions examined.

In a recent study, Professor Johnson analyzes the mutual evaluation data of sixteen FATF members and twenty-one non-FATF countries to determine the similarities and differences between the two groups.[289] Profes-

283. *See* Johnson & Lim, *supra* note 27 (that is, whether the standards operate to successfully close off the banks as an avenue for the laundering of money).

284. *Id.* at 7.

285. *Id.* at 10.

286. *Id.* at 18.

287. *Id.*

288. REUTER & TRUMAN, *supra* note 23, at 191. Johnson and Lim recognize the limitations of using the crime rate as a proxy variable for money laundering, noting that "critics may argue that crimes such as murder and rape are not motivated by financial gain." Johnson & Lim, *supra* note 27, at 10. They respond that this criticism is not totally justified, given that many of these violent crimes are used by organized crime groups that profit indirectly from them. *Id.* While this may be true, it is still difficult to justify the inclusion of all crimes in the proxy variable for money laundering.

289. Jackie Johnson, *Is the Global Financial System AML/CFT Prepared?*, 15 J. FIN. CRIME 7, 7 (2008). The study was possible because, unlike in previous years, the FATF made available to the public the reports from the third round of mutual evaluations, which began in 2005. At the time of the study, sixteen FATF members had been evaluated. *Id.* at 8. The countries evaluated

sor Johnson describes the global anti-money laundering regime as "porous."[290] He found the anti-money laundering systems of both FATF members and nonmembers to be poor and that countries' lack of compliance with the global standards "leaves so many holes in these countries' regulatory, financial, and legal systems that money laundering with or without any relationship to the financing of terrorism, would be relatively easy to achieve."[291] According to Professor Johnson's study, average compliance levels for both member and nonmember countries vary significantly; however, the spread of average compliance scores is wider for non-FATF members.[292] Although FATF members have greater average compliance levels, both member and nonmember jurisdictions have low compliance ratings with regard to certain recommendations.[293] Self-evaluations indicated that FATF members believed that they were close to full compliance with the nine Special Recommendations, but the mutual evaluation reports imply that this is not the case.[294] According to Johnson, the lack of compliance among jurisdictions that have demonstrated a commitment to an anti-money laundering regime through their FATF or FSRB membership creates doubts about the anti-money laundering regimes in less regulated countries.[295] In addition, Johnson expresses doubt about the possibility that there will ever be a united global response to money laundering.[296]

Despite Professor Johnson's bleak assessment, this study may not necessarily invalidate the FATF's work against money laundering. The study assesses one point in time after the Forty Recommendations had already been in place for a number of years. While the study shows disappointing levels of compliance among member and nonmember countries, there are no pre-FATF numbers with which to compare the results, and it is possible that the work of the FATF has greatly improved the global anti-money laundering framework, but there is still much work to be done.[297]

Other commentators and scholars have pointed to deficiencies in the international anti-money laundering regime. Herbert Morais notes that

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were Australia, Belgium, China, Denmark, Greece, Iceland, Ireland, Italy, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Id.* FSRBs conduct mutual evaluations of their member countries using the same assessment criteria used by the FATF in assessing its members, and the FSRBs have begun making these public as well. *Id.* In these mutual evaluation reports, the reviewers assess a country as noncompliant, partially compliant, largely compliant, or fully compliant with each of the Forty Recommendations. *Id.*

290. *Id.* at 20.

291. *Id.*

292. *Id.* at 16–17.

293. *Id.* at 16.

294. *Id.* at 20.

295. Johnson, *supra* note 289, at 20.

296. *Id.* at 20–21.

297. Similarly, through public education and greater public awareness, the work of the United Nations and the United States may have had substantial impact on the incidence of trafficking. It is difficult to capture quantitatively the number of persons who were *not* trafficked because of increased anti-trafficking efforts.

countries' and financial institutions' levels of compliance with substantive anti-money laundering rules have been "somewhat disappointing" and identifies several reasons for this problem.[298] Likewise, Alison Bachus notes that although some progress has been made, further anti-money laundering initiatives are necessary.[299] For example, Bachus points to the surprising fact that, as of April 2003, only $3 billion in laundered funds had been seized in the twenty-year fight against money laundering—an amount equal to the monies thought to be laundered in three days![300] Another commentator, Todd Doyle, gives a mixed review of the success of the FATF. He notes that the reporting and disclosure requirements imposed on banks by the Forty Recommendations have, according to "almost universal assessment," done little or nothing to curb the practice of money laundering.[301] In light of these criticisms, the argument might be made that the FATF's efforts, including the NCCT list, are merely a superficial success.

Further, some aspects of the FATF's international anti-money laundering initiatives raise questions regarding their legitimacy. Firstly, the power of a limited-member intergovernmental organization to impose binding standards on nonmember countries and territories appears to challenge the principle and practice of sovereign equality—a foundational principle of international law. According to Doyle, the NCCT initiative seems to have been successful in accomplishing the FATF's goals, but the use of sanctions in order to exact compliance would violate international law.[302] The demand to and the acquiescence of juridically coequal nation-states that domestic resources and priorities be changed so as to satisfy standards created without their participation or consent raises additional questions regarding the democracy of the process. It removes the ability of the governments of those territories and countries to make their own considered determinations of the legislative, policy-making, and resource-commitment priorities for their domestic spheres.

Secondly, the fact that the G-7 created the FATF, and the seeming overlap of the FATF's anti-money laundering efforts with OECD/G-7 priorities of combating "harmful tax havens" fuels the suspicion that the FATF's efforts are part of a calculated anticompetitive campaign by more powerful nations. Pursuant to this perspective, the G-7 and its agents—the

298. Morais, *supra* note 198, at 626. Among them are the disparities in the national laws between jurisdictions, weakness of institutions responsible for enforcement (particularly in small Pacific islands), the high cost of compliance, and the lack of political will. *Id.*

299. Bachus, *supra* note 31, at 870.

300. *Id.*

301. Todd Doyle, *Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law*, 24 HOUS. J. INT'L L. 279, 294 (2001–2002).

302. *Id.* at 297–98 ("[O]n one hand the FATF is to be commended for its heavy-handed and almost instantly effective approach, especially after a decade of lukewarm results; on the other, the group's threatened 'ultimate recourse,' if instituted, might well jeopardize the integrity of some of the most important documents undergirding the anti-money laundering effort.").

OECD and FATF, among others—create and maintain coercive rules and structures that uphold their dominance and control of the institutions, rules, and mechanisms of international economic law.[303] It is certain that, for many nations, the interaction of money laundering and terrorist financing efforts with the legitimate financial structures and networks have raised fundamental national security concerns.[304] However, the possibility is real that the anti-money laundering initiatives and frameworks perpetuate the dominance of already powerful countries.[305]

The anti-money laundering model may represent the triumph of a model that makes an end-run around the principles and doctrines of traditional international law because the model would and could not have been created and maintained with the full *consent* of sovereign states. Countries and jurisdictions comply *despite* the affronts to sovereign equality because they, particularly island territories with limited natural resources or ability to engage fully and/or benefit from globalization, are dependent on continued access to world markets, financial institutions, and networks.[306]

The crucial role of Recommendation 21 of the Forty Recommendations (authorizing the "tak[ing] of appropriate action")[307] in achieving the levels of state compliance is clear. Unfortunately, the international anti-trafficking regime has no analogous mechanism. Sanctions by the United States alone (to the extent that they are indeed imposed)[308] do not have the same effect as does the "financial shunning" deployed by the FATF and its members as well as jurisdictions that adhere to FATF standards. The monitoring and evaluation conducted pursuant to the UN Transnational Crime Convention (and Trafficking Protocol) are a pale shadow of the monitoring networks and institutions of the anti-money laundering regime.

Nevertheless, it could be argued that both the international anti-money laundering and international anti-human trafficking regimes have succeeded in increasing awareness about their targeted illicit activities. However, the actors that they target differ. The international anti-money laundering regime, which is viewed as highly technical, targets governments (for adop-

303. *See, e.g.*, UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL 35–63 (2008) (analyzing the international economic framework as a system of neocolonial exploitation).

304. That concern is evidenced by the following Security Council Resolutions: S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001), and S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

305. *See, e.g.*, HINTERSEER, *supra* note 263, at 248, 254–57 (discussing the overlap between the FATF's efforts and the OECD's harmful tax initiative, as well as the issue that the OECD's initiative is anticompetitive).

306. In this regard, it is noteworthy that even such an isolationist government as Myanmar's was finally forced to comply with the FATF's standards despite its initial recalcitrance.

307. *See supra* note 114 for the text of Recommendation 21.

308. *See supra* note 64 (describing sanctions actually imposed by the United States on countries ranked as Tier 3).

tion of anti-money laundering legislation and processes) and law enforcement (for increased investigations and prosecutions of money launderers), while the fight against human trafficking stimulates governments and law enforcement *as well as* greater engagement of civil society participants.

Further, it may be argued that the great success of the anti-money laundering regime is the creation of a regulatory structure of global reach and with global impact.[309] The difference in the institutional frameworks of the two efforts is striking. Perhaps due to the fact that awareness about human trafficking arose among civil society groups, the anti-trafficking efforts are less integrated and coordinated, and more atomized, while the more coordinated response to money laundering results from the fact that awareness about and reactions against money laundering arose from the state, specifically the law enforcement community.[310]

In addition, the greater acquiescence of individual states to the imposed anti-money laundering standards may evidence the convergence of the interests of the elites and governments of those states with the interests of the initiators of the international efforts against money laundering. That is, it is more important and central to the survival of those governments and elites that they be able to access international monetary and financial systems than that they comply with anti-human trafficking standards. Indeed, to the extent that the perpetuation of human trafficking and other forms of exploitation are vital to the health of the economies of some countries,[311] and also serve to enrich those elites and benefit those governments, the contrasting rates and nature of compliance is completely logical.

Finally, it may be argued that the apparently more effective international anti-money laundering effort may owe its success to a longer history of coordinated law enforcement and nation-state mobilization against international money laundering. After all, the FATF was formed in 1989, a full decade before the 2000 adoption of the Trafficking Protocol by the UN General Assembly. Several counterarguments occur with respect to this issue. Firstly, as discussed in Part III.B, the international fight against the enslavement of humans is *centuries* long, and there is general consensus that human trafficking is a modern form of slavery. Further, under international law, the prohibition against human slavery has attained the status of a peremptory norm of international law—no state may derogate from the duty to prohibit the activity and enforce the norm. Lastly, the prohibition against

309. On the other hand, does it merely create more bureaucracy?

310. *But see* Wessel, *supra* note 107, at 190 ("[T]he FATF is heavily influenced by the law-and-order contingent of the civil-liberties/security spectrum.").

311. Examples might include Thailand and Vietnam, countries that are well known for their sex-tourism industries. The question may also be asked whether the role of money laundering in the economic development of some states is similar to the role of human trafficking and/or human smuggling in the economic development of other states.

slavery is repeated in fundamental international law instruments, such as the Universal Declaration of Human Rights, among others.

In light of the long history, it appears that the contrasting successes and differing types and levels of efforts to combat the two global problems may stem from contrasting degrees of political will. The fight against money laundering and the corruption of the international financial system may be more important to the powerful countries that have spearheaded the efforts against both activities and to the survival of the global community of nations than is the fight against the trafficking in human beings.[312] This may be the case because the victims of trafficking are most often portrayed as women and children who come from economically vulnerable countries and territories, or are burdened with more vulnerable socioeconomic statuses and/or come from disadvantaged regions and/or groups within individual countries.

IV. Follow the Money?

A. *Introduction*

The modern rise and spread of human trafficking did not elicit from the G-7, the OECD, or the United Nations the coordinated efforts that came in response to the laundering of money. The failure to craft a coordinated reaction to human trafficking may arise from, among other things, a combination of two factors: (1) the perception of human trafficking as a human rights issue,[313] which is traditionally dealt with pursuant to softer, more consensual international law mechanisms, and (2) the perception that the laundering of money and its integration into and corruption of legitimate financial networks is more of a threat to nation-state actors than is the trafficking in human beings.[314] Further, with respect to internal trafficking and/or enslavement,[315] states are more reluctant to interfere with or intervene in issues concerning another state's treatment of its citizens (there appears to be a stronger proprietary interest of states over their citizens than over their economies) as compared to the willingness to intervene in economic mat-

312. This speculation is bolstered by the global financial and monetary upheavals that began in 2008.

313. The fact that the Trafficking Protocol falls under the law enforcement rubric of the UN Transnational Crime Convention does not trump this perception. The Trafficking Protocol is a product of intensive lobbying and interest from civil society, in particular women's rights groups, not only from law enforcement interests. *See, e.g.*, Chuang, *supra* note 240, at 442–43 (discussing the active participation of women's rights NGOs in the negotiations leading to the Trafficking Protocol).

314. Even if the largest estimate of modern human slaves (27 million according to Kevin Bales, *see* Bales, *supra* note 273, at 8–9) is correct, that is a small proportion of the current world human population, which is estimated to be more than 6.5 billion. U.S. Census Clock, http://www.census.gov/main/www/popclock.html (last visited Feb. 11, 2009).

315. The definitions of trafficking do not require that the trafficked person is moved across international and domestic borders. An individual may be trafficked and/or enslaved within the borders of the state in which that individual is a national or resident.

ters.[316] Reluctance may stem from, among other things, a sense that nation-states, individually, "own" or have a proprietary interest in their citizens and inhabitants in a manner that they do not "own" their own access to international financial institutions and networks.

The contrasting effectiveness of the anti-money laundering regime appears to offer some avenues for reform toward a more effective international anti-human trafficking regime. However, before such a proposition would garner adherents, some challenges must be identified and acknowledged or addressed. These challenges include issues such as conceptualization of money as opposed to conceptualization of people, the political will of members of the international community, and the practical question of whether the human trafficking industry's link to legitimate economies can be as clearly identified and targeted as has been the link between money laundering and banking and financial sectors.

B. Conceptual Challenges

Two layers of conceptual distinctions are at issue here. The first issue is whether money and its laundering are or can be analogous to the traffic in persons. The second is the reaction among policymakers, participants, and the public to the two distinct activities—money laundering and human trafficking.

1. Money Versus People

Money is perceived as a neutral or positive commodity which is owned and which may move in and out of legality. That is, the mechanism through which money is earned and/or attained may "stain" it so that it becomes "dirty money" or "blood money." However, that stain is not readily apparent to recipients of or traders in that money, so that, whatever its origins, the "dirty" or "blood" money may be exchanged for goods and services, and/or held against future needs.

Secondly, money is purely the creation of state issuance and perceived creditworthiness and acceptance by the state's inhabitants, bolstered and supported (vis-à-vis other currencies) by the strength of the issuer state's economy and reputation. Money would and could not exist in the absence of legal sanction of the state. In the absence of state issuance (or of private bank issuance sanctioned by the laws of the governing political entity),[317] other types of less efficient value exchange mechanisms, such as barter systems, would need to be used.

316. Contrast, for example, the extreme interference and monitoring of nation-states' economies by international financial institutions such as the International Monetary Fund and the World Bank (IMF conditionality is a very pertinent example) versus interference to protect the human rights of a jurisdiction's nationals.

317. Bank notes issued by individual private banks may be used as units of exchange.

The ideal conception of human beings, however, differs. Human beings, in contrast to money, may no longer legally be owned.[318] Human beings have an intrinsic nonmonetary value that is independent of the state in which they are inhabitants or nationals. Biological beings, their production or creation is not dependent on the state's support or status, and a human being cannot be "dirty" because of his/her origins.

A deeper analysis of the foregoing statements reveals that, while these statements are philosophically, idealistically, and morally true, in reality they are not true. A human being may come into being without the legal sanction of the state, but that sanction or power does determine the human's value. For example, citizens of Western states are more "valuable" than are citizens of less-developed countries. Citizenship largely determines status—whether or not the individual human is accepted as belonging to an economically powerful or economically weak state.[319]

Further, a human can be "dirty"—that is, illegal. A human may be marked as suspicious by virtue of national origin, race or ethnicity, and/or the state's official approval or disapproval of that human's presence within its territory. The unsanctioned presence of an individual human, like the presence of money in some cases, evidences the perpetration of illegal activity. And, like money, the human being can weave in and out of illegal status based on the application of the differing domestic laws of individual states as well as amendments to those laws.

However, the predominant conceptualization of money as a creature of the state and of the human as an independent free-standing being creates other barriers. The reaction to the loss of financial privacy represented by anti-money laundering laws and activities has received only muted response.[320] On the other hand, it is certain that regulation of or targeting, for anti-trafficking purposes, a wider array of industries that may play a role in sexual and other privacy issues may rouse greater reaction and concern about civil and human rights.

2. *Money Laundering Versus Human Trafficking*

The conceptual challenge and question that must be addressed with respect to adapting the international anti-money laundering model to the

318. Since the abolition of slavery, chattel slavery has been legally forbidden by most, if not all, states.

319. The ratio of values can be determined through a review of actuarial tables and/or values and premiums of and for life insurance policies in different countries. Values will vary as well *within* countries according to the skills and occupations of individuals. Media reports bear out this claim. In the United States, for example, stories involving crimes against white females and minors garner much more media coverage and societal angst than does the victimization of minorities.

320. *See, e.g.*, HINTERSEER, *supra* note 263, at 234–35 (discussing the impact of the Forty Recommendations on "both civil liberties and property rights"); *see also* Wessel, *supra* note 107, at 189–90.

international human trafficking regime is whether the conceptual differences give rise to civil society and governmental reactions that are so divergent that the political will to combat trafficking in a similarly coordinated manner would not emerge.

Conceptual deference is given to the state's evaluation and legal treatment of money laundering as a result of money's perceived dependence on the state, the nature of state control, and money's capacity to appear legal when it is in fact illegal. Money laundering is viewed as relatively more sophisticated and technical than human trafficking, and as highly dependent on the legislative and regulatory pronouncements and determinations of the state. An increase in money laundering or a crackdown on money laundering therefore is unlikely to create an upsurge of civil society interest or pressure on the state to eradicate it. The average person is unlikely to be able to perceive the link between money laundering and consequent social ills—it is seen as a thing apart, which requires expertise as a precondition for involvement and understanding. Even when there is a perceived rise in the indicators of social ills tied to money laundering, the public may not perceive a causal link or other connection.

Human trafficking, on the other hand, evokes a visceral reaction in individuals and civil society. It is an activity which an average person might believe him/herself to be capable of detecting. The human-to-human exploitation of trafficking is readily perceived as undesirable and a violation in modern societies where slavery has been de-normalized. As a result, civil society organizations and activists are more likely to react to the trafficking in humans and to push for legislative and other remedies and to initiate bottom-up movements against it. However, the effectiveness of these reactions may be undermined by the implicit acceptance of prostitution and of many forms of labor exploitation within individual societies.

From these distinct ways of perceiving money and money laundering in contrast to views of human beings and trafficking in humans, it appears inevitable that anti-money laundering initiatives and strategies should spring from above, that is, from the governments of states. It also seems inevitable that economically powerful states with a greater stake in the functioning of the existing international financial and monetary networks and institutions should be most concerned about addressing this issue. Finally, then, it is probable that the top-down approach from the powerful economies should produce a cohesive and overtly effective anti-money laundering regime.

This insight is further bolstered if domestic immigration laws are viewed as the efforts of individual states to regulate the exit and entry of individual humans (potentially dirty/illicit) into their territory. The interrelationship among immigration laws, migrant smuggling, and human traffick-

ing is well documented.[321] An overlay of international law lays out the prerequisites of state hospitality to refugees and state treatment of migrant workers.[322] However, the domestic immigration laws of individual states regulate and attempt to bar the entry of undesirable humans. According to that viewpoint, the framework for the criminalization, confiscation, detention, reporting, and information gathering with respect to illicit people (including trafficked and otherwise exploited persons) already exists on the domestic level of individual states. However, these domestic human interception laws, unlike anti-money laundering laws, are not coordinated within an international legal framework. Further, they are not aimed at the prevention of human trafficking, but at the protection of the state against the unsanctioned entry of individual humans, including trafficked persons.

A further conceptual complication emerges in light of the FATF anti-money laundering efforts' apparent insults to sovereignty and nation-state regulatory autonomy.[323] The international anti-money laundering regime, in addition to pressures on nation-state sovereignty, also raises issues of potential conflict with civil and human rights.[324] The right to economic privacy is affected by the broad scope of the information gathering that is mandated by the international anti-money laundering standards. The human rights of opponents of authoritarian regimes may be negatively affected by the information sharing among jurisdictions facilitated by the FATF-inspired coordination.[325] Even more, might internationally coordinated targeting of specific industries and modes of communication negatively affect the civil and human rights of individual humans? Some obvious examples include information gathering and monitoring of sexual activities and communications. Might the attempt to combat the egregious scourge of human trafficking create greater violations of other types of rights by the state?[326]

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321. *See, e.g.*, Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006).

322. *See, e.g.*, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/Res/45/158 (Dec. 18, 1990); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267, 6 I.L.M. 78.

323. *See, e.g.*, Hartman, *supra* note 207; *see also* Doyle, *supra* note 301, at 298–305.

324. For example, the activity of the UN Security Council with respect to counterterrorist anti-money laundering activities creates potentially alarming consequences with respect to human rights. For a discussion of some consequences of the Security Council's post-September 11, 2001, anti-terrorism/money laundering sanctions, see José E. Alvarez, *The UN's 'War' on Terrorism*, 31 INT'L J. LEGAL INFO. 238, 246 (2003). Professor Alvarez discusses how the new UN antiterrorism regime is "presenting opportunistic states with a ready formula for trampling upon the rights of political or other opponents in the name of the war on terrorism." He further notes that "[h]uman rights groups are recording with alarm the number of perennial human rights violators—from Egypt to China—now lining up to justify new or old repressive criminal laws and procedures" in the name of the sanctions regime.

325. For example, dissidents' attempts to hide resources abroad may be undermined by trans-border information sharing. *See* Wessel, *supra* note 107, at 189–90.

326. The example of the civil and human rights violations resulting from the United States' international anti-terrorism efforts is a daunting and deterrent one.

C. Priorities

The intersection and interdependence of world financial and monetary systems may lead to a conclusion that the fight against human trafficking and the fight against money laundering logically deserve different political and international reactions. It may be argued that the threat of money laundering does merit a more coordinated, concrete, and enforceable reaction than does the crime of human trafficking, whether because of the potential damage to the legitimate financial and monetary networks, because the availability of this service encourages commission of more crimes, or because the risk of financing terrorist activities is such a threat to nation-state existence.

There are two fallacies to this argument. First, the efforts against money laundering and human trafficking do not conflict with each other. It is possible for the international community to simultaneously pursue campaigns against both. Second, the potential damage from money laundering may appear to be clearer and more imminent, but this perception may stem from a failure to understand and tabulate the full scope of the damage wrought by the traffic in humans.

The comparatively less urgent political will to create a stand-alone international organization to combat human trafficking may also stem from a perception that the involvement of nationals of a state or territory with human trafficking makes the issue a domestic one, the international regulation of which would interfere with state sovereignty more than does the international regulation of money laundering. Or, perhaps, money laundering may appear to represent a greater threat to individual state sovereignty than does the trafficking in humans, even if some of the trafficked individuals are citizens of that state.

However, it would not be necessary to persuade all members of the United Nations to adopt and deploy a tighter set of standards and sanctioning mechanisms against human trafficking. The members of the G-7 formed the FATF in response to the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Through the Trafficking Protocol, the members of the United Nations have similarly spoken against human trafficking. By the same token, the G-7 or an analogous intergovernmental institution could take action in this regard. However, the (lack of) political will of members of the G-7 is a barrier to the creation of a similar single purpose intergovernmental organization to spearhead and guide the international fight against human trafficking.

D. Practical Challenges to Implementation

Which mechanisms and elements are crucial to the apparent success of the anti-money laundering regime and should be transposed into the anti-human trafficking regime? Which should be prioritized? The crucial mecha-

nisms that appear suitable for transfer are self-assessments, mutual evaluations, regional monitoring and oversight, and effective institutional reaction to noncompliance.

In thinking of adapting anti-trafficking efforts to use anti-money laundering measures, are the differences between trafficking and money laundering insuperable? Banks and financial institutions, among others,[327] are essential links between the criminal or the corrupt leaders and/or officials attempting to hide the evidence of their crimes and to enjoy the laundered money in the legitimate economy. It is this link, this parasitism endemic to money laundering, that makes the targeting and monitoring of banks and other financial institutions an essential element of anti-money laundering efforts. Are there comparable legitimate institutions which are essential to and/or integrally linked to human trafficking?

Humans who are trafficked are exploited within a diverse array of legitimate enterprises. The varied industries in which human trafficking has been implicated include construction, agriculture, restaurants, and domestic service, among others. There may be no *one*, or even no *central*, industry or sector, the information gathering from which and the monitoring and regulation of which would increase the trafficker's costs and serve as a disincentive to human trafficking. In addition, some may contend that, since human trafficking is one of the predicate crimes the proceeds of which the criminal may seek to launder, the regulation and monitoring of the financial industry already serves to combat trafficking as effectively as it creates barriers to other predicate crimes.

The potential targets of anti-human trafficking monitoring and regulation by states may be so widely dispersed—they include the sex industry and industries that consume cheap labor, such as domestic service, construction, restaurants, agriculture, employment agencies, landlords, hospitals, Internet and mobile phone service providers, and immigration agents—that the identification of a suitable target or proxy may be impossible and the regulation and monitoring of too many points of contact may be administratively challenging and self-defeating. However, the sex and hospitality industries, and the mechanisms used to communicate with prospective clients, such as newspapers, magazines, and the Internet, may be appropriate targets for heightened monitoring and information gathering obligations. Further, general workplace safety regulation enforcement would also provide an effective tool for monitoring and information gathering targeted at trafficking for labor exploitation.

Once the question of the identification of targets has been settled, other challenges for implementation include determination of how to regulate and gather information from these contact points (newspapers, hotels, travel agencies, etc.). One problem is that the contact points will differ in each

327. Other targeted points of contacts include accountants, real estate agents, and lawyers.

region, country, and jurisdiction. Further, it is unclear whether, unlike the financial industry, there is sufficient existing expertise in the intersection of human trafficking and the legitimate economy to allow the creation or framing of standards and targeting mechanisms aimed at thwarting the traffickers and/or disrupting their criminal activity.

Another challenge is presented by the necessity of framing a sanctioning mechanism that is closely related to the underlying noncompliance. In money laundering, the "take appropriate measures" language of Recommendation 21 authorizes a series of measures that can result in *financial* shunning of the noncompliant country. Is it possible to identify an analogously aligned target of sanctioning as part of a more concrete and enforceable set of anti-human trafficking standards? The links between human trafficking and the legitimate economy are so widespread that it is difficult to identify a particular link, the targeting of which would lead to more effective anti-trafficking measures.

Perhaps, however, it is only a matter of time. The anti-money laundering regime is characterized by influential standard setting, followed by buy-in by parties (countries and transnational financial organizations). The name-and-shame device is applied *after* suspected NCCTs are provided an opportunity to comply with existing standards. In contrast, the anti-human trafficking regime is characterized by weak international standard setting and unilateral U.S. standards backed by a name-and-shame device that is enforced by unilateral U.S. sanctions. If anti-human trafficking efforts are still in the standard-setting phase,[328] norm dissemination and acceptance by additional actors may lead inevitably to more effective measures.

V. Conclusion

In-depth analysis leads to the disappointing possibility that the FATF's anti-money laundering regime as epitomized by the NCCT initiative and list is no more "successful" in eradicating the targeted activity than is the international fight against human trafficking. Instead, the apparently greater compliance may evidence no more than the greater political will and coordination of powerful countries on a matter that is vastly more important to those states and central to their continued dominance, that is, the health and control of the transnational monetary, financial, and banking networks—than is the trafficking of humans—merely a more severe form of already widespread exploitation of individual humans.

Although no definitive answer is yet possible regarding the relative effectiveness and success of the two regimes, it does appear that the

328. Note, however, that the long-standing prohibition against slavery and the *ius cogens* status of that prohibition indicate that the dissemination of the norm is already widespread.

FATF's anti-money laundering mission and campaign is more effective.[329] Some of these mechanisms and methodologies have been identified in this article, and there is little doubt that, if there is political will, some aspects of the anti-money laundering model could be adopted and adapted to the international fight against human trafficking.

An obstacle to implementing such measures is the true importance to the international community of the efforts against human trafficking. What is the nature and strength of the political will to combat and attempt to end human trafficking? Identifying and adapting the mechanisms and methodologies of the anti-money laundering fight that could be effectively deployed in the global campaign against the trafficking of human beings is but the second, less difficult step.

329. That is, if success means effective norm creation, dissemination, and penetration; credible enforcement mechanisms; and global coordination and cooperation through a single-purpose, powerful international body with limited membership and broad participation.