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DOES INTERNATIONAL LAW PROHIBIT THE FACILITATION OF MONEY LAUNDERING?

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Abstract:

There is a broad political consensus that states must not facilitate money laundering, especially as relates to the proceeds of foreign grand corruption. Over the past thirty years, an elaborate regulatory regime has been put in place in most countries to ensure that proceeds of crime are interdicted and confiscated. It rests on the technically non-binding recommendations of the Financial Action Task Force, an influential intergovernmental grouping. Despite this progress and the adoption of international treaties against corruption and organized crime, international law contains no express treaty rule that enjoins states from facilitating money laundering. Furthermore, there are formidable legal and practical obstacle to invoking international legal responsibility of states that do choose to benefit from enabling money laundering. This article explores the disconnect between international law as it stands and the widely accepted political imperative that states must not facilitate money laundering. It argues in favour of recognizing a self-standing customary rule to that effect, and outlines the content and likely impact of such a rule.

Keywords:

Money laundering; economic crime; corruption; Financial Action Task Force; UN Convention against Corruption; UN Convention against Transnational Organized Crime

1. Introduction

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The role that certain states play in facilitating economic crime elsewhere is a fixture of international politics and economic affairs. Some do so by offering financial secrecy one has come to associate with 'tax havens' – or, more politely, 'financial centres'.[1] Others act as hubs for cognate services that can be misused by criminals, such as company incorporation or legal advice. Yet other countries are known as appealing, and arguably all-too-welcoming, locations for investing the proceeds of crime, for instance in high-end real estate.[2] All of these phenomena are instances of 'money laundering', or, simply put, the use of the proceeds of crime – a quintessential form of economic crime.[3]

There is a broad consensus that these are significant policy problems, especially as relates to harbouring the proceeds of large-scale corruption, also known as 'grand corruption'.[4] States routinely vow to clamp down on the proceeds of foreign crime, including corruption, within their respective jurisdictions. Commitments are made at international forums, such as the London Anti-Corruption Summit in 2016,[5] or to domestic audiences, like in President Biden's designation of corruption as a core national security threat to the US in 2021.[6] Those states that perform well in the evaluations by the Financial Action Task Force (FATF), an intergovernmental grouping that sets global anti-money laundering (AML)

[1] N. Mugarura, 'Tax havens, offshore financial centres and the current sanctions regimes', 24(2) *Journal of Financial Crime* (2017) 200; Garcia-Bernardo et al, 'Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network' (2017) 7 *Scientific Reports.*
[2] See, e.g., Transparency International UK, *Faulty Towers: Understanding the Impact of Overseas Corruption on the London Property Market* (2017); Story and Saul, 'Stream of Foreign Wealth Flows to Elite New York Real Estate', *The New York Times*, 7 February 2015.
[3] 'Economic crime' and 'financial crime' are general terms that encompass money laundering, terrorist financing, proliferation financing and, occasionally, other offences such as fraud or insider trading. See, e.g., HM Government and UK Finance, *Economic Crime Plan 2019-22*, July 2019, p. 10, paras. 1.11-1.12.
[4] 'Grand corruption' is not a legal term of art but is often used to describe corruption so widespread and endemic that it distorts decision-making at the highest levels of government. See, e.g., FATF, *Laundering the Proceeds of Corruption*, 2011, at 7.
[5] UK Government, *Anti-Corruption Summit 2016* (2016), https://www.gov.uk/government/topical-events/anti-corruption-summit-london-2016/about.
[6] The White House, *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest*, 3 June 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/.

standards, treat this as a badge of pride.[7] In contrast, those who fall short of the FATF's expectations risk finding themselves on a 'grey' or 'black' list, with their links to the international financial system potentially in peril, as will be explained below. As Jason Sharman argues in his *tour d'horizon* of the international anti-corruption regime, there is a moral and policy norm that 'prohibit[s] countries from hosting money stolen by senior officials of another country'.[8]

This article explores the extent to which this emergent political imperative is reflected in international law. Specifically, it contends that a norm of customary international law has arisen that prohibits states from facilitating the laundering of the proceeds of overseas offences. In doing so, this paper makes a novel contribution to the analysis of an issue that has largely been spared the attention of international lawyers, notwithstanding the useful work on legal avenues for bringing corrupt public officials to account[9] or prodigious literature on restraining the abuse of banking and other regulated sectors.[10]

The article examines two paradoxes. The first of these is that the most effective existing regime for bringing countries in compliance with their economic-crime related obligations is based on the non-binding FATF Recommendations rather than 'hard law' such as the UN

[7] See DG Trésor, *Le GAFI reconnaît l'efficacité de la France dans la lutte contre la criminalité financière*, 17 May 2022, https://www.tresor.economie.gouv.fr/Articles/2022/05/17/le-gafi-reconnait-l-efficacite-de-la-france-dans-la-lutte-contre-la-criminalite-financiere; HM Treasury, *UK takes top spot in fight against dirty money*, 7 December 2018, https://www.gov.uk/government/news/uk-takes-top-spot-in-fight-against-dirty-money.
[8] J.C. Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (2017), at 4.
[9] See, e.g., N. Kofele-Kale, The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment (2nd ed., 2008); N. Kofele-Kale, 'Change or the Illusion of Change: The War against Official Corruption in Africa' (2006) 38 *George Washington International Law Review* 697; S. Starr, 'Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations', 101 *Northwestern University Law Review* (2007) 1257; I. Bantekas, 'Corruption as an International Crime and Crime against Humanity', 4 *Journal of International Criminal Justice* (2006) 466; E. Davidsson, 'Economic Oppression as an International Wrong or as a Crime against Humanity', 23 *Netherlands Quarterly of Human Rights* (2005) 173
[10] See, e.g., K. Benson, *Lawyers and the Proceeds of Crime The Facilitation of Money Laundering and its Control* (2020); S. Platt, *Criminal Capital: How the Finance Industry Facilitates Crime* (2015); K. Hinterseer, *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (2002); Society for Advanced Legal Studies, *Banking on Corruption: The Legal Responsibilities of Those Who Handle the Proceeds of Corruption* (2000).

Convention against Corruption (UNCAC) or UN Convention against Transnational Organized Crime (UNTOC). Secondly, the current international law of economic crime consists of a mosaic of rules, some of them rather detailed, on what countries should do to counteract money laundering. Despite them evidently pursuing a shared purpose, that purpose has not yet manifested itself in a self-standing treaty rule requiring states to avoid facilitating money laundering. Given the perpetual doubts as to whether the existing AML regime is effective in achieving any particular outcome, this is a gap with profound implications.

This paper is particularly timely in the aftermath of *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, the International Court of Justice's (ICJ) first encounter with money laundering and grand corruption.[11] In that case, France took action against the proceeds of overseas corruption by convicting Equatorial Guinea's vice-president of corruption-related money laundering and seizing his ill-gotten property in Paris. This resulted in Equatorial Guinea's unsuccessful lawsuit against France. Imagine a reverse situation where, instead of attempting to thwart foreign judicial proceedings, a state affected by corruption sought to invoke international responsibility on the part of a state that harboured the proceeds of that crime. What would the international law position be?

In addressing these issues, this article merges together international law scholarship with the literature on economic crime, which predominantly focuses on transnational regulation and domestic criminal laws. With some exceptions,[12] there is less cross-pollination across these areas than one would expect, and less coverage of money laundering in international law journals than the profile of the problem deserves. Domestic AML regulations overwhelmingly stem from international standards, and their impact on regulated

[11] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment of 11 December 2020, https://www.icj-cij.org/public/files/case-related/163/163-20201211-JUD-01-00-EN.pdf.
[12] G. Stessens, Money Laundering: A New International Law Enforcement Model (2000); C. Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (2015), at 177-2015.

industries and society at large can hardly be overstated. Various estimates point to significant costs of economic crime compliance, although their precise scale is predictably difficult to ascertain.[13]

For the purposes of our discussion, the nature of the offence that gives rise to criminal proceeds, also known as the 'predicate offence', is of secondary importance. However, I will treat the proceeds of grand corruption as the default point of reference. The reasons for this are threefold. First, corruption is subject to a unique set of rules concerning cross-border asset recovery, which are laid out in Chapter V of the UNCAC. To the extent that international law could be argued to contain *treaty* rules that prohibit the facilitation of money laundering, the asset recovery regime under the UNCAC would be one of the first candidates. Secondly, grand corruption represents a major category of profit-driven criminality, which generates billions in criminal proceeds[14] and often relies on the involvement of a coterie of so-called professional enablers, such as lawyers, financial planners and real estate agents.[15] Thirdly, concerns about grand corruption have long dominated the discussion of states' responsibility to prevent illicit financial flows, as in this statement made by Michael Reisman in 1989:

> Because the spoliations cannot be accomplished without havens abroad, the exercise of the banking jurisdiction of another state in such a way as to conceal

[13] For a methodical attempt to do so at country level, see J. Ferwerda, 'The Effectiveness of Anti-Money Laundering Policy: A Cost-Benefit Perspective' in C. King, C. Walker and J. Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorist Financing Law* (2018), at 317. According to one estimate, the worldwide cost of economic crime compliance reached $213 billion in 2021, LexisNexis, *Global True Cost of Compliance 2020* (2021), https://risk.lexisnexis.com/global/en/insights-resources/research/true-cost-of-financial-crime-compliance-study-global-report. A Thomson Reuters survey lists economic crime among the five biggest risks banks were facing as of 2021: S. Hummond and M. Cowan, *Cost of Compliance 2021: Shaping the Future*, Thomson Reuters, 2021, pp. 16, 35.

[14] For instance, as demonstrated by the repatriation from Switzerland of over US$500 million in the assets misappropriated by Sani Abacha, Nigeria's military dictator: T. Daniel and J. Maton, 'Is the UNCAC an Effective Deterrent to Grand Corruption?' in J. Horder and P. Alldridge (eds.), *Modern Bribery Law: Comparative Perspectives* (2013) 293, at 299.

[15] For example, as is evident from the conviction in the UK of three professional advisors to James Ibori, another corrupt Nigerian official: *R v. Ibori* [2013] EWCA Crim 815, [2014] 1 Cr App Rep (S) 73; *R v. Theresa Ibori* [2011] EWCA Crim 3193 (Ibori's wife); *R v. Onuigbo* [2014] EWCA Crim 6 (Ibori's lover); *R v. Gohil* [2014] EWCA Crim 1393 (Ibori's lawyer); *R v. Preko* [2015] EWCA Crim 42, [2015] All ER (D) 50 (Feb) (Ibori's banker); and *R v. McCann* [2011] EWCA Crim 2038 (another associate).

> funds is effectively part of the delict. It violates the international legal rights of the deprived states and may itself constitute an international legal wrong.[16]

This article is structured in three parts. First, it outlines two *sui generis* regimes that could arguably be said to constitute a corpus of rules that effectively prohibit states from facilitating money laundering. In fact, however, they do no such thing. One of these is the legally non-binding but influential set of FATF Recommendations, whereas the other one is Chapter V of the UNCAC, which deals with asset recovery. Secondly, this article considers the possible existence of a customary international law rule that bars states from facilitating the laundering of the proceeds of overseas offences. It argues it is plausible that such a rule has emerged, and fleshes out its content and likely impact. Thirdly and finally, the article briefly outlines the opportunities for and challenges of invoking state responsibility in this area.

2. Anti-Money Laundering and Asset Recovery Rules

No observer of this field of law will have failed to notice the expansion in international law bearing on money laundering in general, and the proceeds of corruption in particular, that has occurred since Reisman wrote the words cited above. These developments can be thought of as comprising two strands, the first of these being the creation of the criminal and regulatory regime to tackle money laundering per se, and the second being the promulgation of corruption-specific asset recovery rules under the UNCAC. To chart out the arguments in favour of a self-standing customary rule against facilitating money laundering, it is necessary first to consider the import and limitations of these two areas of international law, and then to

[16] W.M. Reisman, 'Harnessing International Law to Restrain and Recapture Indigenous Spoliations', 83 *American Journal of International Law* (1989) 56, at 58.

address the higher-order question of what they tell us about the international law of economic crime.

2.1. Anti-Money Laundering Rules

In the beginning was the legislation criminalising money laundering introduced by the US and the UK in 1986.[17] 'Money laundering' is a term that is at once ubiquitous in popular culture[18] and opaque to the layperson, and so it is worth taking a detour to explain its meaning. In its original sense, the term refers to imparting an appearance of legitimacy to the proceeds of crime. A story is often told of Al Capone's prescient concern that his wealth, absent any plausible account of how it might have been acquired, could lead to his downfall. He therefore, the story goes, set up a chain of launderettes around Chicago. Since quantifying the cash that could have been legitimately brought in by the launderettes was close to impossible, this business gave Al Capone the cover that he sought.[19]

As far as one can tell, the story is apocryphal.[20] It is nonetheless instructive as an explanation of what money laundering might entail. It also adds a practical level to criminals' traditional aesthetic preference for running cash-intensive businesses like casinos, restaurants and strip clubs. However, the modern concept of money laundering is not limited solely to the establishment of a front business or the creation of a cover story to obscure the criminal origin of the funds. The UNCAC and UNTOC both speak of a broad range of acts including the 'conversion', 'transfer', 'concealment' or 'disguise' of the proceeds of crime.[21]

[17] M. Pieth, 'The Wolfsberg Process' in W. Muller et al (eds.), *Anti-Money Laundering: International Law and Practice* (2007) 93, at 95.
[18] M. Ruehsen, 'Professor Fact Checks Money Laundering Scenes, from "Ozark" to "Narcos"', *Vanity Fair,* 24 June 2020 at https://www.youtube.com/watch?v=U0e7OCfAO64.
[19] B. Unger, 'Money laundering regulation: from Al Capone to Al Qaeda' in B. Unger and D. Van der Linde (eds.), *Research Handbook on Money Laundering* (2013) 19, at 19.
[20] R. Pol, 'Effective sentinels or unwitting money launderers? The policy effectiveness of combatting illicit financial flows through professional facilitators' (2017) (PhD thesis at Griffith University, Australia).
[21] Article 23(1)(a) UNCAC and Article 6(1)(a) UNTOC.

The original US and UK legislation was only concerned with the proceeds of drug trafficking. The focus on drug trafficking was transferred to the work of the FATF, an intergovernmental grouping set up by G7 in 1989 to internationalize the US's onslaught on the finances of drug cartels.[22] Over time, the focus of the FATF – and, by extension, that of the global AML rules it promulgates – expanded to other types of predicate offences, beyond drug trafficking. Both the UNTOC and the current iteration of the FATF Recommendations require that states apply AML rules on an all-crimes basis, and at a minimum make sure that they cover the proceeds of all serious crime, defined by reference to applicable penalties.[23]

The FATF Recommendations have been revised multiple times over the past 30 years, such as when counter-terrorist financing rules were added to the FATF's mandate shortly after the 9/11 attacks, but continue to be generally based on several precepts familiar since the FATF's inception. Financial institutions and certain non-financial businesses should be required to conduct customer due diligence and report suspicious transactions to law enforcement agencies.[24] States should, among other things, supervise compliance with these requirements, collect accurate information on beneficial owners of companies incorporated in their territories, and take law enforcement action against money laundering, including the prosecution of perpetrators and confiscation of the proceeds of crime.[25] According to one of the participants at the FATF's inaugural gathering, some of these components were cobbled together in short order and 'no one believed they would survive the next three months', yet they withstood the following three decades.[26]

[22] A. Damais, 'The Financial Action Task Force' in W. Muller et al (eds.), *Anti-Money Laundering: International Law and Practice* (2007) 69.
[23] Article 6(2)(b) UNTOC and FATF Recommendation 3.
[24] FATF Recommendations 10 and 20.
[25] FATF Recommendations 26 and 28 (regulation and supervision), 24 and 25 (beneficial ownership) and 3 and 4 (criminalization, prosecution and confiscation).
[26] M. Pieth, 'Finance and the "Shadow Economy"' in F. Heimann and M. Pieth, *Confronting Corruption: Past Concerns, Present Challenges, and Future Strategies* (2018) 123, at 124–125.

As the name reflects, the FATF Recommendations are not binding in international law. Furthermore, the FATF itself is not an international organisation but an intergovernmental grouping with no legal personality of its own.[27] As an example, FATF employees are in fact employed by the OECD, from whose premises the FATF operates.[28] Until 2019, the FATF functioned based on a time-limited mandate, which was then extended permanently.[29] Despite this lack of formal juridical underpinnings for the FATF's work, its prescriptions command a degree of respect that many an international organisation would envy.[30]

To see that this is indeed so, and to understand why, one needs to consider the FATF's peer review process, or mutual evaluation reviews (MERs). MERs involve the assessment of a country's[31] compliance with the FATF Recommendations and are made publicly available online. The review process originally focused on 'technical compliance', or faithful transposition of FATF requirements into domestic legislation. In 2013, the assessment methodology was modified to evaluate the effectiveness of their implementation, too.[32]

There are no prizes for being top of the class, although some countries that do well in MERs do not shy away from flaunting their success.[33] Those jurisdictions that fare poorly are at a risk of being placed on a list of High-Risk Jurisdictions subject to a Call for Action,[34]

[27] Rose, *supra* note 12, at 202-209.
[28] K. Couvée, 'EXCLUSIVE: FATF Leader Resigns, Raising Questions Over Independence', *moneylaundering.com*, 1 October 2021, https://www.moneylaundering.com/news/exclusive-fatf-leader-resigns-raising-questions-over-independence/.
[29] FATF, *FATF Ministers give FATF an open-ended Mandate*, 12 April 2019, https://www.fatf-gafi.org/publications/fatfgeneral/documents/fatf-mandate.html.
[30] For a detailed analysis of the FATF framework as a form of soft law, see D. Goldbarsht, *Global Counter-Terrorist Financing and Soft Law: Multi-Layered Approaches* (2020). See also D. Chaikin and J.C. Sharman, *Corruption and Money Laundering: A Symbiotic Relationship* (2009) 18.
[31] The MER process engages separately not only with states, but also with discrete jurisdictions such as Hong Kong. Here, 'country' and 'jurisdiction' are used interchangeably.
[32] FATF, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CTF Systems*, 2013.
[33] See note 7, *supra*.
[34] FATF, *High-Risk Jurisdictions subject to a Call for Action - October 2021*, https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/call-for-action-october-2021.html.

known colloquially as the 'blacklist', or that of Jurisdictions Under Increased Monitoring,[35] known as the 'grey list'. As a result of a country's placement on either of the lists, its companies and citizens are likely to face greater scrutiny in their transactions with foreign financial institutions, who need to demonstrate to their regulators that they effectively mitigate economic risks.[36]

Thus, following Turkey's placement on the FATF's grey list in October 2021, the *Financial Times* wrote of this as 'a further blow to the country's ability to attract foreign capital'.[37] A yet more extreme example is the well-documented difficulties that Iranian citizens encounter, through no fault of their own, in obtaining access to banking services in certain countries as a result of Iran finding itself on the FATF's blacklist, alongside North Korea, as well as in consequence of related US sanctions.[38] These practical effects of a FATF censure are compounded by the symbolic element of 'naming and shaming' that countries are loath to endure, as Malta's travails amply demonstrate.[39]

The impact of the FATF's peer review process is therefore unmistakeable. It rests not on any exercise of a legal power – of which the FATF has none – but on the seriousness with which domestic regulatory agencies the world over, especially in major financial centres, take it.[40] The presence of this impact is not to be equated, though, with the effectiveness of the

[35] FATF, *Jurisdictions under Increased Monitoring - October 2021*, https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-october-2021.html.
[36] M. Kida and S. Paetzold, 'The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning', *IMF Working Paper*, May 2021, https://www.imf.org/-/media/Files/Publications/WP/2021/English/wpiea2021153-print-pdf.ashx.
[37] L. Pitel and S. Stubbington, 'Turkish lira tumbles as central bank slashes interest rate', *Financial Times*, 21 October 2021, https://www.ft.com/content/53d3e970-c71e-42d5-b38b-6e8ca2d32c35.
[38] K. Dehghan, 'UK bank accounts of Iranian customers still being closed, says law firm', *The Guardian*, 21 April 2017, https://www.theguardian.com/money/iran-blog/2017/apr/21/law-firm-reports-surge-in-iranians-uk-bank-accounts-being-closed-sanctions-iran-nuclear-deal-trump.
[39] Scicluna, 'Malta faces blow after being greylisted by financial crimes watchdog', *Reuters*, 23 June 2021, https://www.reuters.com/world/europe/malta-says-it-has-been-greylisted-by-financial-crimes-watchdog-2021-06-23/.
[40] This arguably makes the FATF framework emblematic of a broader tendency to use non-binding political commitments in a fashion that is similar to the role of formal treaties: D.B. Hollis and J. Newcomer, '"Political" Commitments and the Constitution' (2009) 49(3) *Virginia Journal of International Law* 507, 540–544.

regime that the FATF requires countries to maintain. Whether the panoply of AML standards that regulated businesses are held to is apt to reduce money laundering, let alone diminish the prevalence or severity of predicate offences, is a source of perennial and profound anxiety.

The consensus in the ever-growing expert commentary is that, at best, we do not know whether the current AML regime is effective,[41] although there are also those who assert with confidence that it is not.[42] To the extent there is disagreement, it revolves not around the conclusion but the path to it. Some argue that the overall objective of the regime must be the reduction of predicate offences,[43] while others say there is value in simply ensuring that regulated businesses are not facilitating crime and are therefore not morally complicit in it.[44] There is virtual unanimity that a better evidence base is needed on the effectiveness of AML regimes, and empirical research is starting to build up.[45] However, even if data pointed to a decrease in predicate offences – the Holy Grail of AML measures, according to some – it would be difficult to ascribe it to the consequences of any particular intervention, such as AML controls.[46] Many adduce evidence of private-sector practices being skewed towards 'tick-box compliance' due to existing regulatory incentives.[47]

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[41] P. Alldridge, *What Went Wrong with Money Laundering Law?* (2016), at 75-76; Redhead, *Deep Impact? Refocusing the Anti-Money Laundering Model on Evidence and Outcomes*, October 2019, https://static.rusi.org/20191011_deep_impact_web.pdf; Ferwerda, 'Criminological perspectives on money laundering' in V. Mitsilegas, S. Hufnagel and A. Moiseienko (eds.), *Research Handbook on Transnational Crime* (2019) 112.

[42] Pol, 'Anti-money laundering: The world's least effective policy experiment? Together, we can fix it', 3 *Policy Design and Practice* (2020) 73.

[43] P.C. Van Duyne, J. Harvie and L. Gelemerova, *The Critical Handbook of Money Laundering: Policy, Analysis and Myths* (2018), at 278-298.

[44] See, e.g., Global Witness, Undue Diligence: How Banks do Business with Corrupt Regimes, 2009, https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/banks/undue-diligence/.

[45] See, e.g., M. Findley, D. Nielson and J.C. Sharman, *Global Shell Games: Experiments in Transnational Relations, Crime, and Terrorism* (2014); V. Zoppei, *Anti-Money Laundering Law: Socio-Legal Perspectives on the Effectiveness of German Practices* (2017).

[46] See M. Levi, P. Reuter and T. Halliday, 'Can the AML system be evaluated without better data?', 69 *Crime, Law & Social Change* (2017) 307, at 325 (referring to grand corruption); Levi and Reuter, 'Money Laundering' in M. Tonry (ed.), *Crime and Justice: A Review of Research* (2006) 289, at 358 (referring to drug trafficking).

[47] See, e.g., R. Pontes et al, 'Anti-money laundering in the United Kingdom: new directions for a more effective regime', advance online publication, *Journal of Money Laundering Control* (2021). The article is noteworthy in part as three out of the four co-authors are practitioners with significant AML experience.

The international law implications of this state of affairs have never been fully articulated. It is not simply the ostensible paradox of states bowing to 'soft law' that is, in terms of its global reach and weight, more 'law' than 'soft' that we should ponder.[48] Nor is it the FATF's clout that has earned it the moniker of 'the most important international organisation you have never heard of'.[49] What deserves our greatest attention is the gap in the international law of economic crime that the FATF standards never filled, namely the absence of a treaty norm, or other codified rule of international law, prohibiting a state from hosting the proceeds of crime from abroad or facilitating their laundering.

At first sight, the FATF Recommendations appear to be nothing less than an instantiation of such a norm that Michael Reisman urged in 1989, and one that Jason Sharman described as a 'political and moral' imperative in 2019. In truth, though, they are both more and less than that. They are more far-reaching, self-evidently, in that they form a comprehensive, multifaceted regime complete with official Interpretive Notes and FATF-issued guidance documents. They are also less ambitious in that their connection to the underlying policy value – or the desired end goal – is uncertain. Viewed against that backdrop, the question of international law's stance vis-à-vis facilitating money laundering can hardly be resolved by simply pointing to the sui generis, quasi-binding regime established under the FATF Recommendations.

2.2. Asset Recovery

The other set of international law rules that are relevant to this inquiry, albeit related to corruption specifically rather than a broad range of predicate offences, are the asset recovery provisions in Chapter V of the UNCAC. They are concerned with the recovery, or return, to

[48] See *supra* note 30.
[49] P. Cochrane, 'Nuclear deal: Iran faces the most powerful organisation you've never heard of', *Middle East Eye*, 8 May 2018, https://www.middleeasteye.net/fr/news/iran-versus-most-powerful-organisation-you-ve-never-heard-52153913. In fairness, more than one organisation has been thus described.

the country of origin of the assets misappropriated through corruption. These rules can too be viewed as a legal embodiment of the new political and moral sensibility that repudiates dealing in the proceeds of overseas crime, but they too fall short of establishing a legal norm that bars states from facilitating money laundering.

The *locus classicus* for analyses of the UNCAC's asset recovery provisions is its Article 51, which states:

> The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.[50]

The magnificence of this statement is tempered by the *travaux préparatoires* to the Convention, which record the understanding of states parties that '[t]he expression "fundamental principle" will not have legal consequences on the other provisions of [Chapter V UNCAC]'.[51] It is, in essence, a political statement, not a legal provision. Furthermore, the content of the other articles in Chapter V paints the picture of a legal regime that requires of states parties little more than what they would have done anyway in the absence of those provisions.[52]

At the core of the UNCAC's asset recovery regime is Article 57, which supplies the answer to the fundamental question: Who keeps the assets? There are two protagonists in the

[50] See, e.g., D. Ziouvas, 'International Asset Recovery and the United Nations Convention Against Corruption' in C. King, C. Walker and J. Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorist Financing Law* (2018), at 591.
[51] Ad Hoc Committee for the Negotiation of a Convention against Corruption, *Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption*, UN Doc A/58/422/Add.1 (7 October 2003), para. 48. Cf. J.-P. Brun, 'Ch.V Asset Recovery, Art.51: General Provision' in C. Rose, M. Kubiciel, O. Landwehr (eds.), *The United Nations Convention Against Corruption: A Commentary* (2019) 517, at 517 ('any doubt concerning the interpretation of provisions related to asset recovery should be resolved in favour of recovery').
[52] A. Moiseienko, 'The Ownership of Confiscated Proceeds of Corruption under the UN Convention against Corruption' 67(3) *International and Comparative Law Quarterly (ICLQ)* (2018) 669. See also P. Webb, 'The United Nations Convention against Corruption: Global Achievement or Missed Opportunity?' 8(1) *Journal of International Economic Law* (2005) 191, at 209.

scenarios envisaged by the UNCAC: the requesting state, whence the stolen assets come, and the requested state, which holds the assets. The 'fundamental principle' language in Article 51 might have led one to expect that the return of assets to the requesting state must be effected in all cases, subject perhaps to limited exceptions. In point of fact, the position under the UNCAC is almost precisely the opposite.

The obligation to 'return the confiscated property to the requesting State Party' is only triggered '[i]n the case of embezzlement of public funds or of laundering of embezzled public funds' and, crucially, if confiscation was executed 'on the basis of a final judgement in the requesting State Party'.[53] The provision borders on the superfluous. If a state recognizes and enforces a foreign judgment or confiscation order that requires the assets to be restored to the state they were diverted from, a stipulation that those assets must be returned to the requesting state is, arguably, redundant.

What the UNCAC does not address is the vital issue of when recognition should be denied to a foreign judgment that may have been obtained in breach of international human rights standards, as is not unheard of in circumstances of regime change that large-scale asset recovery efforts tend to stem from.[54] One of its most recent manifestations is Uzbekistan's vexed attempts to recovery the assets allegedly misappropriated by the daughter of the country's former president and her associates, who claim mistreatment at the hands of Uzbekistan's judicial authorities.[55]

If assets are confiscated on the basis of a final judgement in the requesting state but involve the 'proceeds of any other offence covered by this Convention' (i.e. other than of

[53] Article 57(3)(a) UNCAC.
[54] See R. Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (2014).
[55] R. Messick, 'Will the Swiss Condone Torture in the Rush to Return Assets to Uzbekistan?', *Global Anticorruption Blog*, 20 November 2019, https://globalanticorruptionblog.com/2019/11/20/will-the-swiss-condone-torture-in-the-rush-to-return-assets-to-uzbekistan/.

embezzlement of public funds), then they must be returned to the requesting state 'when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property'.[56] Here, too, the precise import of the provision is open to doubt since, if the requested state enforces a foreign judgment or confiscation order, it is not obvious what scope there will be – or should be – for questioning whether the requesting state is entitled to the assets it claims. On its face, though, the wording of the UNCAC allows greater latitude for the requested state to ask those questions than it does when the embezzlement of public funds is involved.

Finally, in all other cases, the requested state need only 'give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime'.[57] In other words, while the return of the assets is held out as a desirable course of action, there is no legal obligation to follow it. That applies, for instance, to circumstances where the state in which the proceeds of crime were invested undertook its own investigation that led to their seizure and confiscation. Most of the best-known enforcement successes involving the proceeds of grand corruption fall into this category, such as France's action against Equatorial Guinea's vice-president,[58] UK conviction of Nigerian state governor James Ibori and his associates,[59] or US and Swiss money laundering convictions of former Ukrainian prime minister Pavlo Lazarenko.[60]

The UNCAC's asset recovery arrangements are instructive because they do not place any particularly onerous obligations on states that find themselves hosting the proceeds of overseas corruption. To understand why this is noteworthy, recall that, like the UNTOC, the

[56] Article 57(3)(b) UNCAC.
[57] Article 57(3)(c) UNCAC.
[58] *Supra* note 11.
[59] *Supra* note 15.
[60] *US v. Lazarenko*, Case No 00-cr-0284-01 CRB (ND Cal 4 February 2010) Amended Judgment.

UNCAC obliges states parties to criminalize money laundering and '[i]nstitute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions' to prevent money laundering.[61] A situation involving asset recovery is one where, by definition, those controls have failed. One could envisage an approach requiring the state hosting the assets to remedy that failing by restoring the *status quo ante* through the return of assets, regardless of the victim state's request or at least of whether a final court judgment was issued in the victim state. Indeed, this would be in line with what some argue best practice is, irrespective of the letter of the law.[62] This would, of course, still require a final court judgment in the state hosting the assets, for instance on the basis of its criminal prosecution of money laundering or non-conviction based asset forfeiture proceedings.[63]

A particularly strong normative argument could be made in favour of that more expansive conception of asset recovery if one takes major economic or financial centres as the focal point. Since they benefit from facilitating an outsized portion of the world's economic activity, so the argument goes, it behoves them to safeguard their economic infrastructure against criminal misuse, and rectify the consequences of such misuse occasionally happening.

In contrast, the current UNCAC scheme is based on a compromise that was forged during the negotiations between those in favour of unconditional return of stolen assets – generally Latin American and Asian states – and those who would rather leave the fate of the property at the discretion of the state where they were invested, most prominently the US.

[61] Article 7(1)(a) UNTOC; Article 14(1)(a) UNCAC.
[62] Gretta Fenner's remarks at Parliament of Canada, Standing Committee on Foreign Affairs and International Development, Evidence on Monday, 5 December 2016 at 16:15, http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8674987&File=0.
[63] On non-conviction based asset forfeiture, see J. Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (2017) at 67–93 (for a European perspective); S. Cassella, *Asset Forfeiture Law in the United States* (3rd edn, 2021) (for a US perspective).

The solution that emerged from the debate is based on what one might call a 'desert-based model' whereby the disposition of the assets effectively depends on whether the requesting state played *the* decisive role in their confiscation.[64]

The negotiations leading to this outcome were plainly informed by participating governments' sense of whether their country would one day fall within the category of 'requested' or 'requesting' states, but the resulting framework is not without its principled underpinnings.[65] Unlike a legal regime that would have in effect required states to police overseas crime with nothing to gain from their efforts, the current arrangement creates – or, at least, does not remove – an incentive for them to take action against foreign criminal proceeds. The experience in other domains of anti-economic crime policy suggests this can be tangible factor. For example, the US is both the world's most vigorous enforcer of foreign bribery laws and at the same time the country that collects multi-billion dollar fines from companies that fall foul of those laws, including overseas corporations.[66]

There are, in short, good reasons why the UNCAC's asset recovery regime involves the limitations that it does. However, those constraints mean that these rules, like the FATF's AML standards, are not at all equivalent to an international legal norm that forbids states to facilitate money laundering, nor do they give rise to a legal regime where enabling economic crime – including in its most extreme form, namely hosting the proceeds of overseas crime – triggers meaningful consequences. For these reasons, if one is to find in international law an adequate response to the problem eloquently articulated by Michael Reisman in 1989, as well as some before and countless others after him, one must search further.

3. A Customary Rule Against Facilitating Money Laundering

[64] Moiseienko, *supra* note 51, at 15.
[65] Ibid at 19-23.
[66] M. Koehler, *The Foreign Corrupt Practices Act in a New Era* (2014), at 238

With the benefit of the excursus above, we can now broaden our inquiry and consider other possible international law sources of a prohibition on states' facilitation of money laundering that involves criminal proceeds originating elsewhere. The possible existence of a customary international law rule on the matter is an obvious contender for our attention, particularly given the constellation of factors such as high-level governmental rhetoric on money laundering, the action that states take both in pursuance of the FATF Recommendations and in addition to what they require, and the absence of a treaty rule that would directly settle the issue. This section of the article will deal, in turn, with the existence, content and possible impact of such a customary rule.

3.1. The Existence of the Rule

As is well known, the existence of a customary rule of international law requires that states generally and consistently conduct themselves in a certain way as evidence of a perceived legal obligation to do so (*opinio juris*). Establishing this is fraught with methodological difficulty, including in the determination of whether state practice is sufficiently general and consistent[67] or whether it can be ascribed to the tacit acceptance of a legal obligation, as opposed to convenience or some other motivation.[68] There is also a degree of circularity in the formation of a custom since, for a custom to emerge, states must have already believed they were bound by it and acted accordingly.[69]

For all these reasons, ascertaining whether a customary rule exists in international law hardly ever involves mechanistic application of law to a well-defined set of facts. Like

[67] H. Thirlway, *The Sources of International Law* (2nd Edition, 2019), at 62-63; J. Crawford, *Chance, Order, Change: The Course of International Law* (2013) 365 *Recueil des Cours de l'Académie de Droit International* 9, at 56-69.
[68] J. Goldsmith and R. Posner, 'A Theory of Customary International Law', 66(4) *The University of Chicago Law Review* (1999) 1113, at 1116-1118.
[69] Y. Dinstein, *The Interaction Between Customary International Law and Treaties* (2007) 322 *Recueil des Cours de l'Académie de Droit International* 243, at 295. See also Crawford and Miles, 'International Law on a Given Day' in J. *Crawford, International Law as an Open System: Selected Essays* (2002) 69.

partisan journalism, it tends to be an exercise in selective and purposive interpretation of reality, with what is or is not relevant – let alone what is or is not factually true – subject to contestation. The methodology of establishing an international custom is fluid, nowhere more so than in the ICJ, and therefore defies a neat summary.[70] As one influential article suggests, it may be viewed as involving a Dworkinian attempt to identify a rule that both fits state practice and statements of *opinio juris*, and presents them in their best possible light.[71]

Close to nothing has been written to date about the customary international law of economic crime, save for in the contiguous area of unilateral financial sanctions.[72] It is arguable, however, that there is a customary rule prohibiting states from facilitating the laundering of the proceeds of overseas crime. The case in support of this contention is not difficult to make. As regards *opinio juris*, there is a multitude of statements by states to the effect that they must not act as safe harbours for the proceeds of overseas crime, nor enable their exfiltration. For instance, the UN General Assembly's Special Session on Corruption in 2021 culminated in the adoption by consensus of a political declaration that, in pertinent part, reads as follows:

> We will take measures to prevent the financial system from being abused to hide, move and launder assets stemming from corruption, including when vast quantities of assets are involved.[73]

[70] S. Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' 26(2) *EJIL* (2015) 417. Cf. Omri Sender and Michael Wood, 'The International Court of Justice and Customary International Law: A Reply to Stefan Talmon', *EJIL:Talk!*, 30 November 2015, https://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon/.
[71] A. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' 95(4) *American Journal of International Law* (2001) 757.
[72] M. Hakimi, 'Unfriendly unilateralism' 55(1) *Harvard International Law Journal* (2014) 105; E. Criddle, 'Humanitarian financial intervention' 24(2) *EJIL* (2013) 583.
[73] UN Doc. A/RES/S-32/1 (2021).

Prior to that, the UN General Assembly called on states to take action against corruption-related money laundering in 2013.[74] This follows on the heels of similar exhortations in the context of drug trafficking, which saw the General Assembly call on states to 'develop effective mechanisms for the pursuit, freezing, seizure and confiscation of property obtained through or derived from illicit activities'.[75] The relevance of the General Assembly's pronouncements to ascertaining the existence of *opinio juris* is well-established.[76]

Multiple further examples of this sort of multilateral undertakings can be mustered. The G20 has likewise long been vocal on economic crime. In 2010, the G20 adopted its first Anti-Corruption Plan at the summit in Seoul, which contained the following statement:

> To prevent corrupt officials from accessing the global financial system and from laundering their proceeds of corruption, we call upon the G20 to further strengthen its effort to prevent and combat money laundering.[77]

Substantively similar commitments, couched in terms of 'deny[ing] safe haven to corruption offenders and their assets', have been reaffirmed in G20 documents ever since, including in its 2021 Rome Leaders' Declaration.[78] This wording traces its lineage to earlier documents adopted by the Organization of American States and APEC in the mid-2000s.[79]

[74] GA Res. 68/195, 18 December 2013.
[75] UN Office on Drugs and Crime, *Money Laundering and the Financing of Terrorism: The United Nations Response* (2001), at 21, citing the UN General Assembly's 1998 Political Declaration and Action Plan Against Money Laundering.
[76] Thirlway, *supra* note 67, at 92-94.
[77] G20, 'G20 Anti-Corruption Action Plan', 2010, at 1–2, https://www.unodc.org/documents/corruption/G20-Anti-Corruption-Resources/Action-Plans-and-Implementation-Plans/2010_G20_ACWG_Action_Plan_2011-2012.pdf.
[78] G20, 'G20 Rome Leaders' Declaration', 2021, at 17, https://www.unodc.org/documents/corruption/G20-Anti-Corruption-Resources/Leaders-Communiques/2021_G20_Rome_Leaders_Declaration.pdf.
[79] Permanent Council of the Organization of American States, Resolution 875 (1460/05), 11 January 2005; APEC, 'Santiago Commitment to Fight Corruption and Ensure Transparency', 17-18 November 2004.

Meanwhile, the African Union has expressed its commitment 'to end the chronic illicit financial flows from Africa' in 2015 and reaffirmed it in 2018.[80]

Further still, Transparency International documents over 600 corruption- and AML-related promises made by 43 states at the London Anti-Corruption Summit in 2016.[81] As an illustrative example, the following commitment made by Germany is rather typical of the participating governments' statements:

> Germany will work with other countries to strengthen fiscal transparency, to strengthen capacities for fighting illicit financial flows and to return the proceeds of such illicit activities to the legitimate public sources in the country of origin.[82]

As the word 'commitment' in the title of Germany's document suggests, this statement, alongside those made by other participating states, is more than a mere proclamation of existing policy. It evokes the language of obligation. No legal source is identified for any such obligation, and one might therefore deem it an overreach to treat such statements as evidence of *opinio juris*. But to take that view is to overlook the broader context, namely the overwhelming recognition of the central place that tackling corruption-related money laundering, and money laundering more broadly, occupies in achieving vital developmental objectives.

Thus, the Global Declaration Against Corruption, which was adopted at the London Anti-Corruption Summit, states that corruption, and by extension corruption-related money laundering, must be tackled 'if our efforts to end poverty, promote prosperity and defeat

[80] African Union, 'Assembly Special Declaration on Illicit Financial Flows', 2015; African Union, 'Declaration on the African Anti-Corruption Year', 2018.
[81] Transparency International, '43 Countries, 600 Commitments: Was the London Anti-Corruption Summit a Success?', 12 September 2016, https://www.transparency.org/en/news/43-countries-600-commitments-was-the-london-anti-corruption-summit-a-succes. The full commitments database can be downloaded via that page.
[82] 'Germany Country Commitments', London Anti-Corruption Summit 2016, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522833/Germany.pdf.

terrorism and extremism are to succeed'.[83] UN human rights bodies have drawn connections between the prevention of money laundering and corruption on the one hand, and the effective realisation of human rights on the other hand.[84] This linkage augments the normative weight of AML concerns, although it is debatable whether a closer integration of corruption and human rights agendas would produce any benefits beyond that.[85]

It would be far too formalist, against this backdrop, to explain states' avowed commitment to prevent the laundering of the proceeds of overseas offences as a product of shared policy preferences rather than of a legal obligation. The breadth and consistency of governmental rhetoric points unmistakeably to the requisite *opinio juris*. To further lend credence to it, one might weave an ever thicker web of similar statements by governments and international organisations.[86]

To the extent that it is at all possible to plausibly object to this evidence of *opinio juris*, it would likely involve arguing that states' respective pronouncements on the international arena speak to the existence not of a legal obligation, but of some other shared factors that define their stance vis-à-vis money laundering, such as practical convenience or ethical concerns. These objections, while ultimately less than convincing, are explored below following a brief *tour d'horizon* of relevant state practice.

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[83] Cabinet Office and Prime Minister's Office, 'Global Declaration Against Corruption', 9 December 2016, https://www.gov.uk/government/publications/global-declaration-against-corruption/global-declaration-against-corruption.

[84] Office of the UN High Commissioner for Human Rights, *Comprehensive study on the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, in particular economic, social and cultural rights*, A/HRC/19/42, 14 December 2011; UN Human Rights Council, Res. 35/25, 23 June 2017.

[85] See A. Peters, 'Corruption as a Violation of International Human Rights' 29(4) *European Journal of International Law* (*EJIL)* (2018) 1251. Cf. C. Rose, 'The Limitations of a Human Rights Approach to Corruption', 65(2) *ICLQ* (2016) 405; K. Davies, 'Corruption as a Violation of International Human Rights: A Reply to Anne Peters' 29(4) *EJIL* (2018) 1289; F. Peirone, 'Corruption as a Violation of International Human Rights: A Reply to Anne Peters' 29(4) *EJIL* (2018) 1297.

[86] On the relevance of international organisations, see K. Daugirdas, 'International Organizations and the Creation of Customary International Law 31(1) *EJIL* (2020) 201.

There is a plethora of governmental action that constitute relevant state practice, from AML regulatory reforms to participation in cross-border asset recovery arrangements. That this practice is consistent and universal is beyond peradventure.[87] Much of it can be accounted for by reference to specific norms discussed previously, such as the FATF Recommendations or the UNCAC, rather than an overarching, customary rule. This does not explain everything that states do, though. They often go beyond the requirements of either the FATF Recommendations or relevant treaties in an apparent quest for genuine effectiveness in preventing money laundering.

Examples are manifold. They include measures aimed at streamlining forfeiture of the proceeds of crime, such as unexplained wealth orders;[88] public-private information-sharing partnerships that bring together law enforcement agencies, supervisory agencies and regulated sectors;[89] expanded reporting requirements imposed on private sector, such as geographic targeting orders in the US[90] or the reporting of international fund transfers in Australia;[91] the establishment of publicly accessible beneficial ownership registers;[92] and the imposition of targeted financial sanctions on corrupt foreign officials or their enablers.[93] It important to bear in mind that, while these measures may appear diverse to the point of being

[87] See the FATF's table listing the overall state of compliance with its recommendations. While the effectiveness of countries' AML measures varies widely, technical compliance is prevalent. FATF, 'Consolidated assessment ratings', updated 9 June 2022, https://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf.
[88] A. Moiseienko, 'Limitations of Unexplained Wealth Orders' [2022] 3 *Criminal Law Review* 230.
[89] N. Maxwell and D. Artingstall, *The Role of Financial Information-Sharing Partnerships in the Disruption of Crime* (2021), https://rusi.org/explore-our-research/publications/occasional-papers/role-financial-information-sharing-partnerships-disruption-crime.
[90] J. Cassara, *Trade-Based Money Laundering: The Next Frontier in International Money Laundering Enforcement* (2016), at 181-182.
[91] AUSTRAC, 'Money transferred to and from overseas: International funds transfer instruction (IFTI) reports' (undated), at https://www.austrac.gov.au/business/how-comply-guidance-and-resources/reporting/money-sent-overseas-itfi.
[92] A. Knobel, *Transparency of Asset and Beneficial Ownership Information*, FACTI Background Paper 4, 19 July 2020.
[93] A. Moiseienko, *Corruption and Targeted Sanctions: The Law and Policy of Anti-Corruption Entry Bans* (2019).

disparate in their nature, they are united in their objective of preventing money laundering, detecting it or confiscating the proceeds of crime.

None of these measures are mandated by any international requirement, binding or not, yet all of them have been implemented in pursuit of efficacious AML policies. Not only that, but the concept of efficacy itself has become an object of constant soul-searching among law enforcement and regulatory agencies entrusted with fighting money laundering. Both the FATF and certain national authorities, such as those in the US, UK and Australia, have pledged to work further on ascertaining the impact of AML regulation.[94]

These developments, namely the continuous elaboration of novel approaches against money laundering and strategic reflection on the effectiveness of the AML regime, bear ample evidence to the genuine, if tortuous, attempt by multiple states to confront money laundering. In doing so, they go beyond the requirements imposed by the UNCAC or UNTOC, or even those existing under the technically non-binding FATF Recommendations. The duty they seek to fulfil must therefore emanate from a source extraneous to existing treaties or soft law.

With both state practice and *opinio juris* thus in place, both elements that give rise to a customary international rule are satisfied. This is subject to the caveat that, as discussed earlier, none of the two can ever be established with scientific certainty, and there is therefore always room for doubt. Two possible objections have particular force. The first of these is that states simply do what is prudent. Confiscating the proceeds of crime is a more sensible criminal justice policy than allowing criminals to keep them, and therefore a broad suite of

[94] D. Lewis, 'Remarks at the RUSI meeting on the Financial Action Task Force Strategic Review', 19 November 2019, https://www.fatf-gafi.org/publications/fatfgeneral/documents/rusi-fatf-strategic-review.html (FATF); HM Treasury and Home Office, *Economic Crime Plan, 2019 to 2022*, 4 May 2021, paras. 2.14-2.16 (UK); Parliament of Australia, 'The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime' (undated), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC (Australia).

measures is adopted to give effect to that policy. In short, one might argue that the efforts we discussed are motivated by self-interest and pragmatism, not legal obligation. However, this line of reasoning only applies to the proceeds of *domestic* offences, not foreign ones. As Jason Sharman writes:

> [U]nsettling [the sceptical] view, the three states whose commitment is probably most important for the functioning of the [AML] regime thanks to their having the largest international financial centers, the United States, Britain, and Switzerland, have gone to considerable lights to implement their commitments, *despite the lack of compelling national interest*.[95] (Emphasis added)

What is particularly noteworthy about Sharman's selection of states is that all of them, as major international financial centres, can be characterized as specially affected states in the context of giving rise to a rule of customary international law.[96] While neither the doctrine of specially affected states nor how one identifies them is free from controversy,[97] it stands to reason that the acknowledgment by states like Switzerland of their responsibilities to counter money laundering should be afforded some weight in ascertaining the existence of the putative rule.

A second, subtler objection is that states may be enacting not a legal obligation but a moral or political responsibility. It is similar to the previous argument in that it too is predicated on the idea that, while states might express commitment to addressing money laundering, this only shows they consider it the right thing to do, not necessarily that they deem it a legal requirement. The reason this objection is altogether more complex is that,

[95] Sharman, *supra* note 8, at 180.
[96] See *North Sea Continental Shelf Cases (Germany/Denmark, Germany/Netherlands)*, Judgment, 1969 I.C.J. Rep 3, para. 73.
[97] K.J. Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112(2) *American Journal of International Law* 191.

remarkably, international law scholarship supplies little guidance on how to handle it. There is no shortage of examinations of the role of ethics in establishing customary international law, but they focus on whether the ethical implications of a proposed rule should be relevant to deciding if it exists, for instance by obviating the need for state practice.[98] Our question, by contrast, is whether certain statements – such as those we have seen states make about money laundering – should be ruled out as evidence of *opinio juris* because they speak to ethical, not legal commitments.

To answer this, it is helpful to observe, at the risk of stating the obvious, that one cannot establish the inner convictions of a state, a collective entity. The lawyer's objective is thus not to penetrate the depths of a state's psyche to fathom what it really believes but to assign normative significance to its actions and statements.[99] In doing so, one has to embrace a degree of imprecision is inherent in expressions of *opinio juris*. As they are not based on a specific treaty rule, they can only point out an obligation of some description without pinpointing its exact source. To demand that they are, nevertheless, explicit in their assertion of a *legal* duty untainted by other considerations, such as political imperatives, would set a hurdle that is far too high. It would forestall much of the impressionistic, case-by-case practice of establishing customary rules that we are accustomed to. Consequently, while this objection is worth registering, it is not fatal, and should not preclude our further consideration of the potential customary rule prohibiting states from facilitating money laundering.

3.2. The Content of the Rule

[98] See, e.g., Thirlway, *supra* note 67, at 97-100; J. Tasioulas, '*Opinio Juris* and the Genesis of Custom: A Solution to the "Paradox"' 26 *Australian Year Book of International Law* (2005) 199.
[99] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005) 414-427; B. Lepard, *Customary International Law: A New Theory with Practical Applications* (2010) 171.See also D. Lefkowitz, 'Sources in Legal-Positivist Theories: Law as Necessarily Posited and the Challenge of Customary Law Creation' in J. d'Aspremont and S. Besson (eds.), *The Oxford Handbook of the Sources of International Law* (2017) 323, at 333.

So far, I have discussed the nascent rule in broad-brush terms. It is now time to consider its content in greater detail. A convenient starting point is Reisman's and Sharman's statements that articulate the mischief the rule seeks to address. Reisman writes about 'concealing funds' misappropriated from another state forming 'part of the delict [and] an international legal wrong', while Sharman speaks of a prohibition on 'hosting money stolen by senior officials of another country'.[100] It is evident that they refer to the same problem of states acting as safe harbours for the proceeds of foreign corruption.

The paradigmatic manifestation of this is the investment of the proceeds of corruption into the destination state's economy, such as through deposits in its banking system or the purchase of real estate. Beyond this, various dimensions of facilitating money laundering exist. There are jurisdictions known for provisions of services that enable the exfiltration of criminal proceeds from states of their origin and the subsequent obfuscation of their illegal origins. Incorporation services and legal advice are central to the operation of such schemes, but this does not mean that the funds in question end up in the same jurisdiction.

For instance, British Overseas Territories and Crown Dependencies are frequently associated with corporate structures used for economic crime purposes,[101] but the money is far more likely to be used to purchase stately homes in England's home counties.[102] Same goes for South Dakota, whose trusts were the main culprit of the Pandora Paper journalist investigation in 2021, but which is not known as a major destination for inbound investment.[103] Even calling these jurisdictions 'conduits' for criminal proceeds may be

[100] *Supra* notes 8 and 16.
[101] See D. Thomas-James, *Offshore Financial Centres and the Law* (2021).
[102] T. Keatinge and A. Moiseienko, *For Whose Benefit? Reframing Beneficial Ownership Disclosure Around Users' Needs*, November 2020, at 19, https://rusi.org/explore-our-research/publications/occasional-papers/whose-benefit-reframing-beneficial-ownership-disclosure-around-users-needs.
[103] S. Pegg and D. Rushe, 'Pandora papers reveal South Dakota's role as $367bn tax haven', *The Guardian*, 4 October 2021, https://www.theguardian.com/news/2021/oct/04/pandora-papers-reveal-south-dakotas-role-as-367bn-tax-haven.

misleading because the money may not pass through their financial system at all. Instead the companies and trusts that they create would be used to hold funds in overseas bank accounts in their names. But, regardless of where the funds end up, professionals who offer related corporate services are indispensable to economic crime schemes.

To be meaningful, therefore, the rule against facilitating money laundering must run a broad gamut of behaviour that enables the laundering of criminal proceeds, including the provision of financial and non-financial services that fall within the scope of the FATF Recommendations. Since it is private institutions rather than governments that engage in those kinds of conduct, a question arises as to what exactly the proposed rule of international law stipulates, and how it applies to those private, non-state actions.

It is important to clarify, as a preliminary matter, that we are concerned here with establishing a *primary* rule of international law – what is it that states can or cannot do? – rather than with the *secondary* rules of attributing the conduct of private entities, such as regulated financial institutions, to the state. Suppose a state's central bank elected to fling its doors open to all foreigners with money regardless of its provenance, with billions dollars' worth of proceeds of corruption processed as a result. It is not beyond reason that such actions constitute conduct of an organ of a state or conduct directed or controlled by a state.[104] With attribution thus established, we are however none the wiser as to whether there is in fact a primary rule of international law that has been breached.

As indicated above, there is no provision in either the UNTOC or UNCAC that prohibits states from facilitating money laundering, even in the egregious manner of this hypothetical example. This becomes even more apparent if one reaches into the adjacent domain of counter-terrorist financing (CTF), which is likewise governed by the FATF

[104] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Articles 4 and 8 respectively.

Recommendations and rests on a very similar regulatory regime to AML – hence the familiar abbreviation, AML/CTF.[105] In *Ukraine v. Russia*, the ICJ faced Ukrainian claims that Russia had financed terrorism in Ukraine's territory contrary to the International Convention for the Suppression of the Financing of Terrorism (ICSFT). The ICJ ruled in its judgment on preliminary objections that 'the financing by a State of acts of terrorism lies outside the scope of the ICSFT', while reaffirming that 'all States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism' and rejecting Russia's jurisdictional objection on that basis.[106]

Crucially, there is no dispute, in the context of terrorist financing, that states are obliged to suppress it within their territories. Article 18(1) of the ICSFT states:

> States Parties shall cooperate in the prevention of the offences set forth in article 2 [i.e. terrorist financing] by taking all practicable measures, inter alia, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories (…). (Emphasis added)

This provision recognises the threat that sheltering terrorist financiers presents to other states, which parallels the broader problem of terrorists finding succour in certain countries.[107] *Ukraine v. Russia*, which is awaiting the judgment on merits, marks the first time that the ICSFT will subject to the ICJ's interpretation, and further light may be shed on the requirements this particular provision entails. (It is also of interest, in this connection, that according to a leading scholar, the law of CTF has crystallised into 'genuinely new

[105] C. Walker, 'Counter-Terrorism Financing: An Overview' in C. King, C. Walker and J. Gurulé (eds.), *The Palgrave Handbook of Criminal and Terrorist Financing Law* (2018).
[106] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine v. Russian Federation*), Preliminary Objections, Judgment, [2019] ICJ Rep. 558, at 585.
[107] See, e.g., D. Byman, *Deadly Connections: States that Sponsor Terrorism* (2005).

customary international law rules' based on the ICSFT, relevant UN Security Council resolutions and the FATF Recommendations.[108] Given the extent of *opinio juris* and state practice, this would seem all the more true as regards AML.)

Back in the realm of AML, it is precisely a rule of that nature that best encapsulates what states strive to do, namely to prevent and counter money laundering in their territories. It places, in essence, a positive obligation to deter money laundering. A central bank's egregious criminality is less likely compared to the mundane reality of private businesses enacting a 'see no evil' policy, and the customary rule I suggest exist requires states to effectively police those private activities. This might superficially resemble the attribution of private conduct to the state, but in fact that conduct is something the state fails to *prevent or punish* rather than something it *does*.[109]

There are multiple reasons why an obligation of this nature is particularly well-suited to the nature of money laundering. The first of these is the extent of the state's day-to-day control over regulated sectors of the economy that are vulnerable to being used for money laundering purposes. By definition, as these are regulated industries, it is non-negligible. It is up to the government to decide whether a bank obtains a licence, or whether it should be revoked. It is up to the government to decide what record-keeping requirements all regulated businesses must abide by and what arrangements are in place to share the information they possess with law enforcement agencies, consistent with applicable data protection rules – whose design is also a matter of the state's sovereign choices. It is up to the government to

[108] Ben Saul, 'The Emerging International Law of Terrorism' [2010] *Indian Yearbook of International Law and Policy 2009* 163. This view shares some similarities with the argument that terrorism is now a crime under customary international law: see, e.g., Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *JICJ* 933.
[109] See M. Milanovic, 'Special Rules of Attribution of Conduct in International Law' 96 *International Law Studies* (2020) 295, at 299-301.

decide whether information on beneficial owners of property is collected and made available, and if so, how widely and under what conditions.

While we are ultimately talking about the behaviour of private-sector actors, they are shaped and constrained by a web of regulation that states weave. This is, to use Foucault's term, a distinctly 'disciplinary' mode of interaction that is characterized by ongoing engagement, stick-and-carrot incentivisation and risk-management.[110] Widespread money laundering is indicative of a breakdown in this process. Rather than simply a control or surveillance failing, it is arguably a mark of a state that has prioritized profit over crime prevention in how it runs its financial and economic system. At the farthest end of the spectrum are states that deliberately engage in a 'race to the bottom' to attract capital at the expense of regulatory controls – or, in a journalist's vivid metaphor, become 'butlers to the world'.[111]

Seen in that light, the facilitation of money laundering issue acquires an even more troubling complexion, in a certain sense, than the presence of terrorist financiers within a jurisdiction. It is best conceptualized not merely as a law enforcement failing, but as misconfiguration by a state of its regulatory and law enforcement regime. This is not to understate the difficulty of policing economic crime or assert glibly that where there is a will, there is also – magically – the way. It is inevitable that, like other types of crime, money laundering will happen. At what point, though, does its prevalence become inconsistent with a state's international obligations?

In this connection, it is helpful to recall the dichotomy between obligations of conduct and obligations of result, which was first borrowed from civil law systems by Roberto Ago

[110] M. Foucault, *Discipline and Punish: The Birth of the Prison* (1995, transl. Adam Sheridan).
[111] O. Bullough, *Butler to the World: How Britain Became the Servant of Tycoons, Tax Dodgers, Kleptocrats and Criminals* (2022).

and then found some acceptance in the international law doctrine as a useful analytical lens. Despite the complexity of Ago's initial formulation,[112] the best way to understand the distinction is this: if the obligation is ipso facto breached whenever a certain desirable state of affairs does not obtain, it is an obligation of result; if the obligation requires a state to act in a particular way whether or not any result is achieved, it is an obligation of conduct.[113]

One way to frame the obligation to refrain from facilitating money laundering is as one of result. One could argue that if, for whatever reason, a given state is a major money-laundering hub, it finds itself in breach of the obligation at hand. Consider the experience of the UK, which boasts the second-best FATF evaluation results to date[114] and yet, according to its own law enforcement agencies, hosts hundreds of billions of pounds in criminal proceeds from overseas annually.[115] It is plausible to argue, if one accepts the result-focused nature of the obligation, that the UK is a paradigmatic instance of non-compliance, despite the relatively well-developed anti-economic crime framework that it boasts.[116]

The problem with this conceptualization is that states find themselves in drastically different circumstances. The larger a country's economy, the more money laundering there is likely to be, in absolute terms. Or, alternatively, a jurisdiction with a relatively modest financial footprint may nonetheless cater specifically to those who seek secrecy, including

[112] Yearbook of the International Law Commission 1977, Volume 1, at 215-218 and 227-229.
[113] P.-M. Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10(2) *EJIL* 371; C. Economides, 'Content of the Obligation: Obligations of Means and Obligations of Result' in J. Crawford et al. (ed.), *The Law of International Responsibility* (2010) 371.
[114] FATF, 'Consolidated assessment ratings', updated 9 June, https://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf. The UK's results were the best between December 2018 and May 2022, when the FATF published France's MER.
[115] National Crime Agency, *National Strategic Assessment of Serious and Organised Crime 2018*, May 2018, at 38; HM Treasury and Home Office, *National Risk Assessment of Money Laundering and Terrorist Financing 2017*, October 2017, at 23.
[116] For a description of that framework, see FATF, *Anti-money laundering and counter-terrorist financing measures: United Kingdom*, Mutual Evaluation Report, December 2018.

criminals.[117] In short, there is no monetary threshold that would set apart 'acceptable' and 'unacceptable' amounts of money laundering.

An arguably better way to conceptualize the proposed obligation is therefore as a mixed one of conduct and result. Its essence is for a state to take measures against money laundering that are consistent with the magnitude of international money-laundering risks it faces (conduct component) *and* meaningfully reduce the laundering of criminal proceeds that originate overseas (result component).

This framing of the obligation is informed by one of the key tenets of the FATF Recommendations, namely the 'risk-based approach'.[118] According to it, responses to money laundering at all levels, from measures taken by states to individual businesses' policies, should be tailored to the magnitude and nature of existing risks. This means that jurisdictions that benefit from processing an outsized portion of the world's economic activity, such as international financial centres, should also shoulder the burden of ensuring they do not thereby nourish criminality. To acknowledge that obligation is to redress to the paradoxical disparity between AML and CTF regimes, which are frequently mentioned in the same breath and yet only the latter of which requires states to effectively minimise criminal risks emanating from their territories.

Due to the sliding scale of responsibility that this obligation entails depending on a particular state's circumstances, it can be difficult to adjudge whether it has run afoul of this rule. Like in the classical sorites paradox (how many grains of sand make up a heap?), it is

[117] For instance, the latest instalment of the US government's annual review of money-laundering jurisdictions of concern in connection with drug trafficking spans the gamut from Afghanistan, with its limited investigative and regulatory capabilities, to the Netherlands, where despite the high-quality regulatory regime, '[t]he magnitude of money laundering (…) remains a concern'. See US Department of State, *International Narcotics Control Strategy Report: Volume II – Money Laundering*, March 2021, at 144.
[118] FATF Recommendation 1.

impossible to say in the abstract how dramatically a state's AML controls need to break down for the obligation to be violated.

To give an example of what a borderline case might look like, the US is arguably close to one. Its corporate secrecy regime enables significant criminality, albeit it is set to be revamped with the passage of the Corporate Transparency Act and the possible adoption of the Enablers Act.[119] It is, at the same time, one of the world's most vigorous enforcers of AML and other economic crime rules. There are also states that clearly fall on the wrong side of the line. Historical examples include Nauru and Ukraine, both of which were at one point included on the US government's list of jurisdictions of money laundering concern due to their role in financial operations of Russian organized crime groups.[120] Based on think tank and civil society reports, there are countries that exhibit the same problematic behaviour today, but given the subjectivity of such assessments in the absence of comprehensive information,[121] there is little to gain from attempting to identify them here.

3.3. The Impact of the Rule

As with any rule of international law, the impact of a customary rule that states must not facilitate money laundering will depend greatly on its earnest enforcement. It is tempting, therefore, to make the trite point that it is not a silver bullet against money laundering (nothing ever is!). It is, however, valuable from both a practical and normative perspective.

From a practical standpoint, the impact of the rule will depend on whether it is conceived of as a purely result-oriented one or a mixed obligation of the nature proposed above, i.e. requiring states to both act consistent with the magnitude of international money-

[119] See J. Vittori, 'Five Things the United States Can Do to Stop Being a Haven for Dirty Money', *Carnegie Endowment for International Peace*, 7 October 2021, https://carnegieendowment.org/2021/10/07/five-things-united-states-can-do-to-stop-being-haven-for-dirty-money-pub-85530.
[120] J. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (2013), at 153.
[121] See, e.g., M. Riccardi, *Money Laundering Blacklists* (2022).

laundering risks they face *and* meaningfully reduce the laundering of foreign criminal proceeds. In the former case, it would place an obligation on states that goes far beyond what the current, process-driven international regime requires of them. In the latter case, it would form an additional impetus for the ongoing reform of that regime. To see why, a brief discussion of the FATF's evaluation framework is required.

Rather than focusing on the result achieved by a country's AML measures, the FATF approaches the issue in reverse order. Countries are expected to comply with the 40 Recommendations and demonstrate their effectiveness in pursuing 11 immediate outcomes, such as:

> Money laundering and terrorist financing risks are understood and, where appropriate, actions coordinated domestically to combat money laundering and the financing of terrorism and proliferation.[122]

According to the FATF's methodology, the fulfilment of these 11 immediate outcomes inexorably realizes a set of three higher-order, intermediate outcomes. They, in turn, give rise to the achievement of the single high-level objective, which is defined thus:

> Financial systems and the broader economy are protected from the threats of money laundering and the financing of terrorism and proliferation, thereby strengthening financial sector integrity and contributing to safety and security.[123]

The transition from immediate to intermediate outcomes, and then to the high-level objective, is a theoretical construct.[124] It is postulated but not proven. Jurisdictions are only

[122] FATF, *Methodology*, *supra* note 32, at 16.
[123] Ibid.
[124] S. Young, 'Policing and Prosecution of Money Laundering' in V. Mitsilegas, S. Hufnagel and A. Moiseienko (eds.), *Research Handbook on Transnational Crime* (2019) 122, at 138-140; Pol, 'Anti-money laundering effectiveness: assessing outcomes or ticking boxes?' 21(2) *Journal of Money Laundering Control* (2018) 215, at 4.5.3; L. de Koker and M. Turkington, 'Anti-Money Laundering Measures and the Effectiveness Question' in B. Rider (ed.), *Research Handbook on International Financial Crime* (2015) 42.

assessed based on the 11 immediate outcomes, although the intermediate outcomes and high-level objective 'could be relevant when preparing the written MER and summarising the country's overall effectiveness in general terms'.[125] The notion that they are intrinsically connected to a certain higher-level objective involves a leap of faith, and has Fullerian overtones.[126]

The present FATF approach is therefore that of prescribing the details rather than focusing on the whole. It is important to recognize that, far from it being misguided, it is based on a pragmatic effort to assess the (more) assessable features of a country's AML framework that admit of concrete improvements, rather than seek to evaluate a protean, abstract high-level objective. However, as indicated earlier, strong performance in the FATF process is compatible with glaring money laundering vulnerabilities. Nor does the FATF process adjust a country's overall result based on its stature in the global financial system.

It beggars belief, for instance, that the Kingdom of Tonga – one of the FATF's lowest-rated countries – poses a greater money-laundering threat to the world than Russia, which is close to the top of the FATF's league table.[127] (Following Russia's full-scale invasion of Ukraine in February 2022, the FATF announced that it was 'reviewing Russia's role at the FATF and will consider what future steps are necessary to uphold [the FATF's] core values', which has since resulted in banning Russia from 'decision-making on standard-setting, FATF peer review processes, governance and membership matters'.)[128]

[125] FATF, *Methodology*, *supra* note 32, at 16.
[126] In Lon Fuller's *The Morality of Law* (1969), compliance with the eight desiderata of a functional legal system was posited to necessarily realize the moral value of law.
[127] FATF, 'Consolidated assessment ratings', updated 9 June 2022, https://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf.
[128] FATF, 'FATF Public Statement on the Situation in Ukraine', March 2022, https://www.fatf-gafi.org/publications/fatfgeneral/documents/ukraine-2022.html; FATF, 'FATF Statement on the Russian Federation', June 2022, https://www.fatf-gafi.org/publications/fatfgeneral/documents/ukraine-june-2022.html.

Part of the explanation of the status quo may be sought in the FATF's institutional structure. As relates to engagement with the FATF, there are two tiers of countries. 37 member jurisdictions and two international agencies, the European Commission and Gulf Cooperation Council, take part in the FATF proper. Other states participate in, and are evaluated by, regional groupings known as FATF-style regional bodies (FSRBs). FSRBs therefore fulfil 'an essential role in promoting the effective implementation of the FATF Recommendations'.[129] But, crucially, it is the FATF members who decide on the content of the FATF Recommendations and vote on grey-listing and black-listing. Although other jurisdictions can make their views known to the FATF via FSRBs, the democratic deficit of such a set-up is apparent.[130]

The moral hazard it creates manifests itself in the fact that, in 2021, Turkey became the first ever FATF member to be 'grey-listed', or placed among countries with strategic deficiencies.[131] This is so despite the fact that the FATF brings together the world's major financial centres, which are by their nature likely to be the most attractive money-laundering destinations. In fact, the FATF's expansion over the three decades of its existence was openly motivated by bringing major financial centres into the fold and securing their high-level political commitment to AML measures, regardless of existing deficiencies, as was the case with Russia or China.[132] The FATF's exposure to political pressures is further borne out by the resignation in 2021 of its executive director David Lewis, who reportedly urged FATF staff to 'protect the secretariat and its professional status' in his parting letter.[133]

[129] D. Goldbarsht, 'Who's the legislator anyway? How the FATF's global norms reshape Australian counter-terrorist financing laws' (2017) 45(1) *Federal Law Review* 127, 133.
[130] I. de Oliveira, 'The governance of the Financial Action Task Force: an analysis of power and influence throughout the years' 69 *Crime, Law and Social Change* (2018) 153, at 160.
[131] See the list of FATF members at http://www.fatf-gafi.org/countries/; the list of jurisdictions under increased monitoring (grey list) is http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-october-2021.html.
[132] Zarate, *supra* note 120, at 159.
[133] Couvée, *supra* note 28.

The proposed customary rule cannot be expected to remedy these long-standing difficulties, but it can provide further normative support to the FATF's incipient efforts to reorient itself towards effectiveness. Those are evident from a report that the FATF published in April 2022 and that it itself describes as 'landmark'.[134] It records woeful failings of the current system, such as that '[n]early all (97%) of 120 assessed countries have low to moderate effectiveness ratings for preventing money laundering and terrorist financing in the private sector'.[135]

Unless one ascribes to the more ambitious, result-focused version of the proposed rule, its content is in fact not too far removed from that of the FATF's high-level objective. Indeed, the latter may be viewed as yet another indication of *opinio juris*. That said, the FATF's mention of 'financial systems', 'broader economy' and 'financial sector integrity' arguably obscure more than they illuminate.[136] By contrast, the formulation of the customary rule traced in this article is simple yet compatible with the basics of the FATF's process.

This leads on to the normative impact of the proposed rule. The shift from *description* of state practice to *prescription* of required behaviour is central to the instantiation of a customary rule.[137] It expands the governments, experts and civil society groups' normative armoury as they continue advocate with states that shelter proceeds of crime. It can also help maintain momentum in the FATF's own search for 'effectiveness' beyond the forty corners of its Recommendations.

It may be disheartening to accept that one of the primary benefits of acknowledging a novel, and theoretically momentous, rule of international law lies in facilitating advocacy efforts. It would, ideally, be destined for greater things than becoming a bullet point on an

[134] FATF, *Report on the State of Effectiveness and Compliance with the FATF Standards*, April 2022, at 5.
[135] Ibid at 6.
[136] See P. Alldridge, *Money Laundering Law* (2003) at 7-14.
[137] Koskenniemi, *supra* note 99, at 395.

anti-corruption campaigner's slide. Yet this is not unusual. Given the absence of centralized enforcement in international law, the divide between the legally binding 'must' and the hortatory 'should' is attenuated. In light of this, one might recall conceptualisations of law as a 'linguistic register' we use to make normative claims.[138]

This work resonates with a strand of academic thinking on corruption that considers whether symbolic anti-corruption measures are a useful means of changing minds or a distraction that sustains a false sense of achievement. On the one hand, John Noonan, a US law professor and subsequently an appellate judge, wrote in his treatise *Bribes* that '[l]aws do not testify to social fact; they do testify to social consciousness'.[139] The history of bribery in particular, and economic crime more generally, is replete with hypocritical laws but, on that view, it would be short-sighted to disavow their long-term impact.

In contrast, Michael Reisman penned a polemical book about corruption entitled *Folded Lies* in 1979 that coined the concept of *lex simulata* and *lex imperfecta*, laws that are either simply not enforced or drafted with such flaws that they are impossible to enforce.[140] Or, to give a contemporary example, recall the designation of asset recovery as a 'fundamental principle' of the UNCAC in its Article 51. Despite it being clear from *travaux préparatoires* that the expression is devoid of legal significance, its perceived political import was such that the head of the UN Office on Drugs and Crime pointed to this provision as the Convention's main achievement.[141]

One's attitude to declaratory commitments against economic crime is likely to differ depending on which of these schools of thought one sympathizes with. No attempt will be

[138] P. Goodrich, 'Law and Language: An Historical and Critical Introduction', 11 *Journal of Law & Society* (1984) 173, at 174.
[139] J. Noonan, *Bribes* (1987), at 97.
[140] W.M. Reisman, *Folded Lies: Bribery, Crusades, and Reforms* (1979), at 31.
[141] B. Zagaris, 'UN General Assembly Approves UN Convention against Corruption', 20(1) *International Enforcement Law Report* (2004) cited in Sharman, *supra* note 8, at 49.

made here to settle the debate, although it is difficult to deny the lasting impact of symbolism in an area of law where even the world's best-known foreign bribery law, which now routinely leads the US government to net billion-dollar settlements, lay dormant in the first two decades since its adoption before it suddenly came to life and ceased being 'symbolic'.[142]

4. Invocation of State Responsibility

Let us return to the half-hypothetical, half-real scenario introduced at the outset of this article. In the actual case of *Equatorial Guinea v. France*, France convicted of money laundering the vice-president of Equatorial Guinea, albeit with a suspended sentence, and confiscated his French-based assets, all over the vociferous objections of Equatorial Guinea. In a parallel universe I invite us to imagine, it is Equatorial Guinea who takes law enforcement action against its vice-president and seeks to invoke France's international responsibility for having allowed him to launder the proceeds of his crime in the first place. This is indeed the situation that many countries find themselves in, typically following regime change that declares open season on the former officials' ill-gotten wealth.

To date, no attempts have been made in those circumstances to hold states that enabled money laundering responsible for an internationally wrongful act. One can speculate about possible reasons, of which there are at least three. The first, and arguably the most obvious one, is the lack of a rule of international law that could be breached. As discussed earlier, the UNCAC and UNTOC contain generically drafted provisions that call on states parties, for example, to '[i]nstitute a comprehensive domestic regulatory and supervisory regime'.[143] It is not without doubt that even an abject failure of effectiveness on the part of that regime qualifies as a breach of either Convention. The FATF Recommendations, meanwhile, are

[142] M. Koehler, 'The Story of the Foreign Corrupt Practices Act', 73 *Ohio State Law Journal* (2012) 929, 934-935.
[143] Article 7(1)(a) UNTOC; Article 14(1)(a) UNCAC.

non-binding to begin with, and characterized by the same uneasy relationship with effectiveness as the UNCAC and UNTOC provisions.

Secondly, jurisdictional barriers may stand in the way of successful invocation of responsibility. Unless both states have consented to the ICJ's jurisdiction under the optional clause or reached an ad hoc agreement, the only practicable way of bringing a dispute before an international tribunal is to locate an international convention that the dispute could plausibly be said to implicate, or in Sir Christopher Greenwood's famous words, to 'squeeze a rather large, perhaps ungainly force, into the glass slipper of a jurisdictional clause'.[144] This is what Equatorial Guinea attempted. Its argument was that French law enforcement action constituted an unlawful interference with Equatoguinean internal affairs and violated the official immunities of its vice-president. Both the law relating to interference with states' internal affairs and the law of immunities are customary and uncodified. To establish the ICJ's jurisdiction over the dispute, Equatorial Guinea framed it as involving the following article of the UNTOC, which treaty both states were parties to and which contained a compromissory clause:

> Article 4. Protection of sovereignty
>
> 1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

[144] C. Greenwood, Friday Lunchtime Lecture, Lauterpacht Centre for International Law, 'Challenges of International Litigation', 7 October 2011, at 30:31, http://itunes.apple.com/itunes-u/lcilinternational-law-seminar/id472214191.

> 2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.[145]

The ICJ disagreed and ruled, first in the provisional measures order and then in the judgment on preliminary objections, that the provisions in question alluded to self-standing customary rules and principles, such as those of sovereign equality and non-intervention, but did not incorporate them, and thus did not transform a disagreement about these rules into a dispute about the UNTOC.[146] In like vein, the chances of a dispute about the proposed customary rule being convincingly presented as one about the UNCAC, UNTOC or some other international treaty appear to be nugatory.

Thirdly, there may be few practical benefits to draw from invoking another state's international responsibility in connection with its role in facilitating money laundering. In the dispute between Equatorial Guinea and France, Equatorial Guinea's objective was to achieve the cessation of the ongoing law enforcement action in France and forestall the confiscation of its vice-president's assets. In a reverse situation, where it is the state aggrieved by corruption that seeks asset recovery from foreign jurisdictions, it is naturally reliant on those jurisdictions' cooperation. The natural focus of its efforts is therefore to recoup the misappropriated wealth in partnership with jurisdictions that host it, rather than alienate the latter by demanding restitution or compensation.

For all these reasons, international legal responsibility has not been a major tool of compelling states to take effective measures against money laundering. In its place, the

[145] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Application Instituting the Proceedings, 13 June 2016, paras. 35–40.
[146] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures Order, 7 December 2016, ICJ Reports (2016) 1148, at 1160; Preliminary Objections, Judgment, 6 June 2018, ICJ reports (2018) 292, at 321-323.

FATF's mutual evaluation review process has been utilized as the preeminent means of imposing international pressure on states to do so. Yet the FATF scheme, too, is not without its deficits. Its main drawback is plain from earlier discussion, namely that a positive FATF evaluation is no guarantee of effective AML enforcement, nor are the lowest-ranked countries necessarily the greatest enablers of money laundering. Quite apart from the rankings, it is important to note that grey-listing and black-listing does *not* happen automatically to lowest-ranked countries. It is, instead, subject to discussion by FATF members at a plenary meeting. This process has long been subject to criticism as essentially political in nature,[147] not least in view of the institutional architecture of the FATF, as already discussed.

5. Conclusion

The objective of this article has been to reflect on the response that international law provides to one of the most pressing economic and social concerns of our times, namely cross-border laundering of criminal proceeds, especially those of large-scale corruption. Over thirty years ago, faced with an environment where briefcases brimming with cash could be flown across the world and deposited in bank accounts with no questions asked, Michael Reisman called for recognising the complicity of international financial centres in what he called the delict of 'indigenous spoliation'.

Since then, the international legal and regulatory framework has changed beyond recognition, with the adoption of the UNTOC, UNCAC and, above all, the FATF Recommendations, which lay out detailed rules that domestic authorities around the world

[147] T. Keatinge, 'The Financial Action Task Force Should Embrace the Opportunity to Reform', 24 June 2019, https://rusi.org/explore-our-research/publications/commentary/financial-action-task-force-should-embrace-opportunity-reform.

are expected to enforce. There is little doubt, as Jason Sharman writes, in the existence of a moral and political norm that enjoins states from hosting stolen wealth.

For all this progress, there is no binding treaty rule in international law that would reflect this policy imperative. The link between compliance with the FATF Recommendations and effective prevention of money laundering is far from ironclad, so that it is possible to fulfil the FATF's requirements and yet facilitate the laundering of hundreds of billions of dollars' worth of criminal proceeds. Moreover, the FATF Recommendations are not binding in international law, and their enforcement by the FATF is too infused with *Realpolitik* to pose an acceptable informal substitute for the invocation of state responsibility. Binding international treaties, namely the UNCAC and UNTOC, likewise cover much ground but do not contain an unambiguous rule that would prohibit states from facilitating the laundering of overseas criminal proceeds.

Such an obligation can, however, be found in customary international law. There is abundant evidence of relevant state practice and *opinio juris*, including states' ongoing pursuit of palpable improvements in their AML frameworks, multiple declarations and statements made by international organisations and domestic authorities, and indeed states' adherence to the FATF Recommendations.

As is usual with customary international law, the precise parameters of the obligation are not easy to ascertain.[148] To the extent one can do so, the best summary is this. First, a state must take measures against money laundering that are consistent with the magnitude of money-laundering risks it faces. Secondly, these measures must meaningfully reduce the scale of money laundering that would otherwise occur. Thirdly, unlike the FATF's high-level objective, this rule is limited to the proceeds of overseas crime, due to the harm that hosting

[148] 'A persistent anxiety about CIL is that (…) it is too elastic at any given moment to be like a rulebook': M. Hakimi, 'Making Sense of Customary International Law' (2020) 118(8) *Michigan Law Review* 1487, 1501.

them wreaks on other states. This obligation parallels the ICSFT requirement to take ‘all practicable measures’ to ‘prevent and counter’ terrorist financing within states’ respective territories.

The acknowledgement of such a rule can impart further momentum to the ongoing efforts to reframe the FATF’s Recommendations and domestic AML frameworks around effectiveness rather than processes. In an area laden with rules and short on concrete law enforcement outcomes, the significance of this should not be overstated, but nor is it trivial. Time and again since AML laws were pioneered in 1986, policy discourse has defined the evolution of international strategies against money laundering. Now, more than thirty years in, it is time to refocus our attention on states that choose to benefit from money laundering rather than curb it, regardless of their ranking in the FATF’s assessment league table.