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Transnational Influences on Financial Crime

Jeremy Kuester

ABSTRACT

Transnational Crime¹ can loosely be defined as a crime that occurs across borders and is differentiated from domestic and international crime by the absence of a single sovereign or supranational power that has absolute jurisdiction over the crime. The dynamics of actors in transnational spaces, as well as the lack of a clear enforcing authority in such spaces, creates significant challenges to efforts to disrupt and deter transnational crime. Addressing these types of crimes requires a holistic approach from state and non-state actors using a variety of tools, many of which are not traditionally law enforcement in nature. Focusing on the financial aspects of transnational crime, this paper seeks to outline some of the current tools available for addressing transnational crime, as well as advocating for an integrated approach to enforcement.

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¹ See G.A. Res 55/25, ¶ 6, U.N. Doc. A/RES/55/25 (Nov. 15, 2000). The U.N. Convention against Transnational Organized Crime, signed December 2000, characterizes an offence as transnational in nature if:

- a) It is committed in more than one State;
- b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- d) It is committed in one State but has substantial effects in another state.

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I. TRANSNATIONAL SPACES AND SOVEREIGNTY

In the academic community there has been considerable debate as to whether the international system of nation-states has collapsed in the face of globalism and retreated to a transnational structure where nation-states face declining influence.² The rise of transnationalism is not necessarily mutually exclusive with the international system. Rather, the international system—and the exclusive interactions between nation-states—may have been subsumed into a larger transnational construct that incorporates the activities of nation-states and those of non-state actors on a relatively even plane of influence.

When speaking of the differences of internationalism and transnationalism, it often devolves into perspectives on sovereignty. In the traditional, modern, international system of nations, sovereignty often refers to the state's exclusive control over the territory bounded by its borders.³ Sovereignty enables the state to dictate the norms of the society inhabiting the state's borders.⁴ Under the transnational system, the concept of territory

² See John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 *REVIEW OF INT'L POLITICAL ECON.*, no. 1, 1994, at 53-80; David O. Friedrichs, *Transnational Crime and Global Criminology: Definitional, Typological, and Contextual Conundrums*, 34 *SOCIAL JUSTICE*, no. 2, 2007, at 4-18; Willem van Schendel, *Spaces of Engagement: How borderlands, illicit flows, and territorial states interlock*, in *ILLICIT FLOWS AND CRIMINAL THINGS: STATES, BORDERS AND THE OTHER SIDE OF GLOBALIZATION*, 38-68, (Ind. Univ. Press, 2005); Peter Shields, *Borders as information flows and transnational networks*, *Global Media and Communication*, *SAGE JOURNALS*, (Jan. 22, 2014), <http://gmc.sagepub.com/content/10/1/3>. See, e.g., SASKIA SASSEN, *LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (Columbia University Press, 1996).

³ Friedrichs, *supra* note 2, at 4-18.

⁴ Agnew, *supra* note 2, at 53-80.

becomes blurred and therefore understandings of sovereignty become increasingly complex.

Enabled by economic globalization and integrated global telecommunication networks, social structures have been allowed to form outside the scope of the traditional state model.⁵ Virtual cyber networks and the international financial system have become transnational spaces, which must ensure the rights and privileges of participants outside the scope of sovereign powers, while still bound by the processes and infrastructures that are national in nature.⁶ Norm-setting, typically a sovereign responsibility, becomes a balancing act between state and non-state participants in a transnational space. Both have tremendous influence over the other, though neither can absolutely dictate to the other. Given this dynamic, efforts to address crime in transnational spaces must also be a balancing act between state and non-state action.

II. NATURE OF TRANSNATIONAL OFFENSES

Transnational crimes, like the trafficking offenses that are the subject of this symposium, can generally fall into two categories: crimes of borders and crimes of transnational spaces. Crimes of borders are those that involve activity that physically crosses borders. Trafficking offenses are the most common examples of this type of transnational crime, as nearly all trafficking offenses involve the movement of something tangible from one jurisdiction to another. National authorities have been cooperating on addressing these crimes for decades.

Crimes of transnational spaces, however, are more difficult to address. Crimes of transnational spaces, involving virtual communities or ungoverned spaces,⁷ may involve activities or components that never fall under the jurisdiction of any nation or authority. Cyber-crime, money laundering, and even international terrorism are representative examples of this type of transnational crime. National authorities have stepped up efforts to cooperate on addressing these crimes, but are also coming to the conclusion that traditional enforcement tools may not be as effective.

⁵ Shields, *supra*, note 2.

⁶ Sassen, *supra*, note 2.

⁷ For example, places where a government cannot exercise control, like the border between Afghanistan and Pakistan or the region between Saudi Arabia and Yemen.

III. THREAT FINANCE

Because of the profit motive of most criminal networks/conspiracies, financial network analysis has long been an important element in the investigation of organized crime and its subsidiary activities.⁸ It is only relatively recently that these same techniques have been applied to broader transnational issues, including terrorist networks, proliferators of weapons of mass destruction, international drug trafficking organizations, and transnational organized crime, as transnational criminal networks are considered a credible threat to national security.

Transnational criminal threats and illicit trafficking networks continue to expand dramatically in size, scope, and influence—posing significant national security challenges for the United States and our partner countries. These threats cross borders and continents and undermine the stability of nations, subverting government institutions through corruption and harming citizens worldwide. Transnational criminal organizations have accumulated unprecedented wealth and power through trafficking and other illicit activities, penetrating legitimate financial systems and destabilizing commercial markets. They extend their reach by forming alliances with government officials and some state security services.⁹

What had once been almost exclusively the province of law enforcement communities is now increasingly coming under the purview of the national security community – and is being addressed through its suite of tools. From a financial perspective, two significant developments in the national security community are being leveraged against transnational criminal organizations.

First, financial sanctions under the authorities of the International Emergency Economic Powers Act (IEEPA) are now being leveraged against the problem set.¹⁰ These powerful tools are designed “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy

⁸ *A Brief History of the FBI*, FEDERAL BUREAU OF INVESTIGATION, last visited April 7, 2014, available at <http://www.fbi.gov/about-us/history/brief-history>. Interestingly, during one of the “golden eras” of organized crime under Prohibition, it was the Department of the Treasury that had jurisdiction over those offenses and not the Department of Justice.

⁹ *National Security Strategy*, WHITE HOUSE, 49, May 2010, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

¹⁰ See Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities, 50 U.S.C. §§ 1701 – 1707 (2013); Blocking the Property of Transnational Criminal Organizations, Exec. Order No. 13581 (July 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/07/25/executive-order-blocking-property-transnational-criminal-organizations>.

of the United States.”¹¹ Consider some of the other sanctions programs under IEEPA authorities¹² and judge the level of importance the government is placing on the issue of transnational crime.

Second, a new perspective on threat network intelligence analysis has arisen. In the wake of the attacks on September 11, 2001, organizations across the intelligence, defense, and law enforcement communities developed or augmented their existing threat finance intelligence units. Many of these efforts focused on terrorism finance, but the U.S. also faces challenges in proliferation, narco-trafficking and illicit finance. Threat finance intelligence elements have grown as agencies have come to understand that the common denominator of these threats is money - how it moves and how it supports these endeavors.

While competing definitions may abound, “threat finance” may most aptly be defined as any financial activity associated with actors, operations, or systems that threaten the security or stability of the U.S. Financial activity typically refers to raising, storing, moving, and transferring money or other items of value. Actors threatening the U.S. include an array of transnational networks that have a direct or indirect impact upon U.S. national security or its infrastructure. Some examples include terrorist groups; proliferators of weapons of mass destruction; hostile, corrupt, or ostracized foreign regimes; transnational criminal organizations – including, cyber criminals, drug traffickers, and third-party money launderers. Less interested in the profit motive, practitioners of threat finance are more interested in uncovering what can be learned about a transnational threat network by understanding how it interacts with the transnational space of the international financial sector. Threat finance intelligence has come to serve as the foundation for many of the government’s efforts to address transnational networks and illicit finance.

¹¹ 50 U.S.C. § 1701.

¹² See Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism, Exec. Order 13224 (Sep. 24, 2001); Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters, Exec. Order 13382 (June 29, 2005), *available at* <http://www.state.gov/t/isn/c22080.htm>; Blocking Property of the Government of Iran and Iranian Financial Institutions, Exec. Order 13599 (Feb. 6, 2012). For a complete list of the sanctions programs administered by the Office of Foreign Assets Control, please see <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.

IV. SOVEREIGN MECHANISMS FOR ENFORCING FINANCIAL ASPECTS OF CRIMES

The Asset Forfeiture and Money Laundering Section of the Department of Justice's Criminal Division investigates and prosecutes complex, multi-district, and international criminal cases involving financial institutions and individuals who violate the money laundering statutes, the Bank Secrecy Act, and other related statutes. The Money Laundering Control Act, for example, makes it illegal to conduct certain financial transactions with proceeds generated through specified unlawful activities.¹³ The Currency and Foreign Transactions Reporting Act requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering.¹⁴ Specifically, the act requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding \$10,000 (daily aggregate amount), and to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities.¹⁵

International efforts to address financial crimes are primarily directed at preventing criminals from making use of the proceeds of their crime, as well as combatting the influence of transnational criminal actors on the legal economy. In addition to the anti-money laundering and counter-terrorist financing recommendations of the Financial Action Task Force,¹⁶ there are four UN conventions that primarily make up the international regime on illicit financing (UNODC). The 1988 Convention against the Illicit Traffic in Narcotics Drugs and Psychotropic Substances is the first international convention to have criminalized money laundering.¹⁷ The 2003 Convention against Transnational Organized Crime¹⁸ and the 2005 Convention against Corruption¹⁹ extend the predicate offense for money laundering beyond drug trafficking to all serious

¹³ See Money Laundering Control Act, 18 U.S.C. §§ 1956-57 (1986).

¹⁴ See Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311-5330 (2012); Financial Crimes Enforcement Network, Department Of The Treasury, 31 C.F.R. ch.X (commonly referred to as the "Bank Secrecy Act" or "BSA")

¹⁵ *FinCEN's Mandate from Congress*, DEP'T OF TREASURY, last visited Apr. 7, 2014, http://www.fincen.gov/statutes_regs/bsa/.

¹⁶ The Financial Action Task Force (FATF) Recommendations are internationally endorsed global standards against money laundering and terrorist financing and are designed to increase transparency and enable countries to successfully take action against illicit use of their financial system. Please see <http://www.fatf-gafi.org/topics/fatfrecommendations/>.

¹⁷ See Convention against the Illicit Traffic in Narcotics Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/14 (1990).

¹⁸ See United Nations Convention Against Transnational Organized Crime, No. 39574, as adopted by G.A. Res 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

¹⁹ See U.N. Convention against Corruption, as adopted by G.A. Res. 58/4, U.N.Doc. A/RES/58/4 (Oct. 31, 2003).

crimes, while urging states to create comprehensive regulatory and supervisory regimes to combat money laundering. The 2002 International Convention for the Suppression of the Financing of Terrorism required member states to protect financial systems from abuse by terrorist actors.²⁰

With the exception of the authorities and agreements directed at countering the financing of terrorism, almost all of the formal authorities described above are directed at disrupting the beneficial use of proceeds of crime. This is an important tactic in combating the threat posed by transnational criminal organizations, but it only addresses one aspect of the underlying financial network that may underpin the criminal organization. In combining threat finance intelligence with the financial sanctions under IEEPA, as discussed above, the U.S. Government has another powerful tool for directly targeting the criminal network itself.

V. FINANCIAL INSTITUTIONS AND THE EXCHANGE OF INFLUENCE

Clearly, the role of law enforcement authorities are critically important in the enforcement of money laundering and transnational financial crime, but the tools of the national security community are important to worldwide efforts to combat these crimes. This doesn't imply military action should be used to address this issue, but that in transnational spaces, the information-sharing and outreach conducted by the national security community can be extremely effective.

We've already discussed the international financial system as being a transnational space. Within that system, large international financial institutions are influential actors that can and often do have significant impact on the financial system. Large international financial institutions are both participants in a transnational space and transnational networks themselves. They have branch offices and subsidiaries all over the world; share information, expertise, and resources throughout the institution; and must comply with the regulatory regimes in every jurisdiction in which they operate. Even with the efforts of organizations like the U.S. Department of the Treasury, the Financial Action Task Force, and the United Nations to establish minimum standards for the regulation and oversight of financial institutions on illicit finance, there is still quite a bit of differentiation between jurisdictions. While many jurisdictions adhere to the minimum standards, they are still free to add other measures on top of those standards, which add complexity to a financial institution's compliance function. With penalties for non-compliance passing

²⁰ See International Convention for the Suppression of the Financing of Terrorism, No. 38349, *as adopted by* G.A. Res 54/109, U.N. Doc A/RES/54/109 (Dec. 9, 1999).

the billion dollar mark, the consequences for financial institutions continue to escalate.²¹

One response of the financial industry has been to come together independently and respond to local and international efforts to establish standards for financial crime compliance. One such organization is known as the Wolfsberg Group. The Wolfsberg Group is an association of eleven global banks, which aims to develop financial services industry standards, and related products, for Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing Policies. The Wolfsberg Anti-Money Laundering Principles for Private Banking were published in October 2000, and most recently revised in June of 2012.²²

While financial institutions have always been responsible for their own decisions regarding risk, those decisions are influenced by the regulatory environment. Given the increasingly high penalties for non-compliance and the fast-moving pace of change in world-wide financial crime regulations, individual international financial institutions, in some situations, have gotten out in front of their regulators. For example, in November 2013, HSBC implemented a policy to ask customers to show evidence of what they planned to do with some large cash withdrawals.²³ Enhanced due diligence is an appropriate response to potentially risky circumstances, and is commonly found in guidance from regulators. In this situation, however, the determination to request this information from customers was wholly internal, perhaps influenced by HSBC's past penalty, but certainly not dictated by its regulator. This type of self-policing may be happening more. In response to recent sanctions against certain Russian officials, JP Morgan made the news for blocking a transaction between a Russian embassy and an insurer, effectively "self-sanctioning."²⁴ In an industry with a reputation for pushing the boundaries of the letter of the law, this perceived shift towards stricter tolerances for financial crime risk have significant implications for the transnational enforcement of transnational crime.

Forums created by the Wolfsberg Group, as well as by forward leaning financial institutions, create opportunities by governments to influence and

²¹ Chad Bray, *HSBC Apologizes After Cash Withdrawal Issue in Britain*, N.Y. TIMES, Jan. 26, 2014, available at <http://dealbook.nytimes.com/2014/01/26/hsbc-apologizes-after-cash-withdrawal-issue-in-britain/>.

²² The Wolfsberg Group, <http://www.wolfsberg-principles.com/index.html>, last visited April 7, 2014.

²³ Bray, *supra* note 21.

²⁴ Thomas Grove & Megan Davies, Megan, *Russia says JP Morgan 'illegally' blocked embassy money transfer*, REUTERS, Apr. 1, 2014, available at <http://www.reuters.com/article/2014/04/01/us-ukraine-crisis-russia-usa-idUSBREA3010820140401>.

inform key actors in the international financial system. Governments already influence, successfully it appears, financial institutions through their regulatory and oversight authorities. Moreover, discussions between governments and financial institutions on financial crime risk occur on a regular basis.²⁵ But many of these discussions occur in the construct of the overseer/overseen relationship, which can have a chilling effect on more robust collaboration. Financial institutions, however, have a great deal of legitimacy in the international financial system, and have considerable ability to set the norms of that system. Within the transnational space of the financial system, those qualities place financial institutions on a similar plane of influence as governments. It is important to engage these institutions from that perspective and respect their ability to act outside the exclusive scope of sovereign authority.

VI. IMPLICATIONS

So what are the implications for the practitioner? In short, the legal environment is increasingly complex. In addition to the array of national and international laws, regulations, and other authorities that govern transnational criminal law enforcement, one must consider the independent activities of influential transnational actors. Legal advice is not complete unless it considers the norms of the society in which the client acts. Typically, those norms are reflected in the laws of the land, but this is not always true in transnational spaces. Rather, influential actors in transnational spaces may act independently or set norms for the society of that transnational space. This is particularly true in the financial arena, as the risk-based decisions of major international banks exceed the scope of the national regulations under which they operate. Failure to understand the risk appetite of these banks may result in substantial financial loss.



²⁵ For example through the Bank Secrecy Act Advisory Group that is overseen by the Financial Crimes Enforcement Network.