

Legitimizing the fight against Terrorist Financing

Scholars have argued that the 9/11 attack exposed the presence of a previously unknown global menace and their funding structure.¹ However, the reality is that national and international terrorists have caused casualties over the years, through access to various conduits of financial or asset transfers. The bombing of three sites in a five week period in Nairobi, Kenya in 1975, the Egypt archaeology site bombing in 1997 and the 1998 United States Embassy bombing in Tanzania were all acts of terrorism that could not have been implemented without access to funding channels.²

Given the reality of globalization of terror, it seemed logical that all countries, particularly those with unprecedented rates of terrorism, would be consulted in framing regulatory responses to curtail the use of financial and non-financial institutions by terrorists. Yet, International responses were restricted to input from members of the Financial Action Task Force (FATF), who make up the Group of Seven (G7), the Organization for Economic Co-operation and Development (OECD) and the emerging economies, including Brazil, India, China, Russia and South Africa.³ The FATF argued that the inclusion of countries not classed as 'strategically important' would result in expensive and bureaucratic decision making processes.⁴ This foreclosed the participation of all countries in a process that would have permitted dissenting viewpoints. Hence raising concerns as to whether the FATF acknowledged that the unsuitability of some of its rules may be uncovered if subject to intense scrutiny – a potential catalyst for refutation or delayed transplantation by developing countries. Irrespective of this opposing perspective, the FATF has maintained its stance, revealing its projection of efficiency over democracy and inclusion, a decision that no doubt had an impact on the resulting counter terrorist financing (CFT) standards. These include the recommendations to criminalize terror funding and implement standards to curb the proliferation of finances through financial institutions or value transfer services, by freezing and/or confiscating funds discovered from suspicious transactions.⁵

The ensuing CFT standards have proved unsuitable for a majority of countries, particularly African states, leading to misguided compliance.⁶ This can be attributed to two intertwined factors: the absence of sturdy pre-conditions for compliance in African states and the lack of

¹ John Roth, Douglas Greenburg and Serena Wille, 'National Commission on Terrorist Activities Upon the United States: Monograph on Terrorist Financing – Staff Report to the Commission' <https://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf> Accessed 7 August 2017; Jimmy Gurule, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (Edward Elgar, 2008)

² Njonjo Kihuria, 'Kenya: Political and Terror Attacks in Kenya Since 1975' (All Africa, 7 August 2014) <<http://allafrica.com/stories/201408071202.html>> accessed 7 August 2017; The Economist, 'Bloodbath at Luxor' (The Economist, 20 November 1997) <<http://www.economist.com/node/106278>> accessed 7 August 2017; Peter Panzeri, *Killing Bin Laden: Operation Neptune Spear 2011* (Bloomsbury Publishing, 2014) – Panzeri argued that Bin Laden funded the attack in Egypt and Tanzania

³ FATF, 'FATF Members and Observers: The 37 Members of the FATF' (FATF) <<http://www.fatf-gafi.org/about/membersandobservers/>> accessed 7 August 2017

⁴ See FATF, 'Financial Action Task Force On Money Laundering Report 1990 -1991' (FATF, 13 May 1991) <<http://www.fatf-gafi.org/media/fatf/documents/reports/1990%201991%20ENG.pdf>> accessed 10 May 2017; This has raised concerns as to whether the FATF acknowledges that its rules are unfavorable and may become subject to intense scrutiny, prompting refutation or delayed transplantation by developing countries.

⁵ FATF, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations' [2012] <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf> accessed 7 August 2012

⁶ Nicholas Ryder, *The Financial War on Terrorism: A Review of Counter-Terrorist Strategies Since 2001* (Routledge, 2015)

legitimacy in the formulation of standards. Political will, well-made legislation, robust legal systems and confidence in the regulatory and financial systems are crucial pre-conditions for a country's compliance.⁷ These factors are lacking in within African states. However, to avert sanctions such as financial or economic exclusion due to non-adherence to the CFT standards, these countries engage in formal or creative compliance.⁸ Whilst the former refers to adherence to the letter of the law, the latter refers to tactical compliance simply to evade sanctions. Consequently, although the FATF's mutual evaluation reports indicate improved technical compliance in certain African countries – these countries have consistently fallen short on the effectiveness ratings. This is reinforced by empirical evidence which indicates that no correlation exists between the technical compliance levels of African countries to CFT standards and their terror levels.⁹ Thus indicating the possibility of sham compliance levels to CFT standards.

Additionally, a perusal of the CFT standards indicates two presumptions; first that terror funding is usually transferred through financial institutions, and secondly that the informal transfer systems such as cash couriers and value transfer services can be regulated in the same way as formal institutions.¹⁰ Consequently, the FATF empowers regulatory and financial institutions to freeze and confiscate terror funding or employ other sanctions, where there is financial intelligence indicating that funds are to be utilized for terror activities.¹¹ However, this is not always possible in African states, where 76% of the population is unbanked and 25% do not have the necessary documentation to open an account.¹² Furthermore, the existing underground banking structure cannot be easily regulated, given its historical development on the basis of communal 'trust'.¹³ Terrorists exploit these unregulated avenues for transfer of funds because like financial institutions they offer speed and convenience, whilst providing the additional cloak of anonymity. This indicates that the CFT standards may be misguided and therefore unattainable in a cash based economy, where funds are rarely transferred through financial institutions. Africa is still moving away from the barter and cash based system, which although considered largely unfitting to the modern capitalist environment – is still prevalent. Consequently, the standards aimed at unveiling suspicious transactions may at best be inefficient to trace or freeze terror funds that fly under its radar.

⁷ Concepcion Verdugo Yepes, 'Compliance with the AML/CFT International Standards: Lessons from a Cross-Country Analysis' [2011] WP/11/177 IMF Working Paper

⁸ Doreen McBarnet, *Enforcing Ethics: New Strategies for Tackling Creative Compliance* [2007] Australian National University, Canberra

⁹ Azinge Nkechikwu, 'A Regulatory Misfit? A Closer Look at the Counter Terrorist Strategies in African States' (Awaiting Publication)

¹⁰ Nicholas Ryder, *The Financial War on Terrorism: A Review of Counter-Terrorist Financing Strategies since 2001* (Routledge, 2015)

¹¹ FATF, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations' [2012] < http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf > accessed 7 August 2012

¹² See, Freezing Terrorist Assets in West Africa (Security Council Counter-Terrorism Committee, December 2012) < http://www.un.org/en/sc/ctc/news/2012-12-24_dakar.html > accessed 12 July 2016

¹³ The Economist, 'New Rivers of Gold: Remittances from Unlikely Places are Helping Poor Countries in the Downturn' (The Economist, 28 April 2012) < <http://www.economist.com/node/21553458> > accessed 10 July 2017; The Economist, 'How Hawala Money Transfer Schemes are Changing' (The Economist, 16 October 2015) < <https://www.economist.com/blogs/economist-explains/2015/10/economist-explains-12> > accessed 1 August 2017

The narrow focus on banks, coupled with the compliance deficiency of regulatory and financial institutions – have brought into question the problem-solving capacity of the FATF to effectively address CFT.

Invariably, there would be pressure on the international community to revisit its non-inclusive decision-making process - a proposed solution to ensuring proactive and guided compliance. Vibert discounts this solution, arguing that the problem-solving abilities of trans-governmental networks (TGNs) such as the FATF, lie not in increased membership but in informed knowledge and expertise.¹⁴ He believes that amending power relationships in TGNs through inclusivity would be inadequate to ensure the effectiveness of the FATF standards or cure the existing democratic deficit.¹⁵ This position is predicated on the fact that although a select number of bodies, such as the International Organisation of Securities Commission (IOSCO) and the Financial Stability Board (FSB) widened their membership, such changes did not result in improved effectiveness or democracy. Consequently, there is the argument that focus should be on the ability of these institutions to build their epistemic authority through the amalgamation of information and knowledge to help frame regulatory responses.¹⁶ Supporting this, Kerwer and Hulsee argue that TGNs are objectively technocratic.¹⁷ These arguments are however limited to the extent that they fail to recognise that improved membership representation may indeed be crucial for a more robust knowledge bank at TGNs.

Consequently, Shaffer argues that the effectiveness of TGNs is dependent on their legitimacy. For heuristic purposes, legitimacy is a fluid concept that is not restricted to meaning ‘conformity to legal rules’.¹⁸ Rather, it extends to cover ‘*the perception of holding normative right to govern by those on whose behalf it seeks to govern*’.¹⁹ Simply put, an institution is legitimate if so perceived. Shaffer argues that the concept inculcates input, throughput and output legitimacy. This implies that where, within an institution - all countries have a say in formulating standards, are included in the process of decision making and expertise of the finalized standards are achieved through deliberations that involve these countries – then it can be argued that such an institution is legitimate.

Legitimacy, which goes beyond ‘membership’ is fundamental in catalyzing proactive behavioral responses, a key feature of TGN effectiveness. Proactive compliance transcends adherence to the letter of the law, or tactical adherence. Rather, it focuses on pre-empting and effectively addressing possible avenues of terror funding. For instance, the response of the emerging economies to cryptocurrencies as a conduit for laundering and funding terrorism can be classed as proactive – as their stance was taken irrespective of the gap in international standards.²⁰ Their responses were predicated on their perception of the FATF and their membership involvement in contributing to its epistemic community. African countries

¹⁴ Frank Vibert, ‘Reforming International Rule Making’ [2012] 3.3 Global Policy Volume

¹⁵ *ibid*

¹⁶ *ibid*

¹⁷ Dieter Kerwer and Rainer Hulsee, ‘How International Organisations Rule the World: The Case of the Financial Action Task Force’ [2011] 2.1 Journal of International Organisation Studies

¹⁸ C Schmitt, *Law and Legitimacy* Transl. J. Seitzer (Durham: Duke University Press, 2004); C.A Thomas, The Concept of Legitimacy and International Law [2013] 12 LSE Law, Society and Economy Working Papers; Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ [2008] 2 LSE Law, Society and Economy Working Papers

¹⁹ *ibid*

²⁰ Bitcoin, ‘Russian Government to Introduce KYC Guidelines for Cryptocurrency Purchases’ (Bitcoin.info) < <https://bitcoin.info/russian-government-to-introduce-kyc-guidelines-for-cryptocurrency-purchases/> > accessed 7 August 2017; Wu Yujian and Han Wei, ‘China Drafts Bitcoin Regulations to Block Money Laundering’ (Caixin, 11 May 2017) <<http://www.caixinglobal.com/2017-05-12/101089358.html>> accessed 7 August 2017

however fell short of this, with certain countries responding arbitrarily only after pyramid schemes built on cryptocurrencies threatened the official financial sector in certain West African countries. This can be attributable to their perceived lack of legitimacy within the FATF.

The FATF's argument that it has secured legitimacy through its interrelationship with the International Monetary Fund (IMF) and the World Bank ("Bank") fails to acknowledge the power asymmetries existent in the quota of these institutions, that restrict developing countries from having an equal input in decision making processes. Furthermore, the FATF has attempted to cure the 'illegitimacy' through the creation of autonomous FATF Styled Regional Bodies (FSRB) which granted associate membership to non-members.²¹ Refuting the viability of FSRBs, the Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA) stated that although presumably autonomous, it was formed in response to the pressure from the blacklisting of Nigeria.²² It only operated based on standards set by the FATF, and makes minimal input to these standards.²³ This has been reiterated by the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMG), who indicated that its CFT laws were only extended in response to the FATF's CFT standards set after 9/11.²⁴ This is despite prior terror attacks in Tanzania and Kenya and ongoing attacks in West Africa. No doubt, such responses will elicit creative as opposed to proactive compliance occasioned by lack of legitimacy. Furthermore, whilst it is postulated that the FSRB granted non-member countries associate membership, this is not necessarily the case as it is only the organization (FSRB) that gains associate members and not the countries; as countries have no independent claim to this position.

CFT requires that effective regulations match with proactive compliance. Whilst it may be argued that the addition of other countries in the deliberation processes of regulatory standards may not ensure this, there is no doubt that broadening inclusion would ensure that standards deliberate on and inculcate factors previously unconsidered. Such addition would no doubt aid the regulation of CFT in the informal sector whilst improving compliance within the formal sector. More so, this would confer legitimacy on the FATF – a tool which is indispensable in combatting terror funding and propelling proactive compliance.

²¹ The Caribbean Financial Action Task Force (CFATF) established in 1990, the Middle East and North Africa (MENAFATF) Eurasia (EAG), South America (GAFISUD) and West Africa (GIABA)

²² The Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA) 'Overview of GIABA Operations from 2004 to 2013; A Chronicle of the Evolution of a Promising African Institution from the Beginnings' < http://www.giaba.org/media/f/693_599_GIABA-Overview-2004-2013-English.pdf > accessed 10 August 2017

²³ *ibid*

²⁴ This has been reiterated by the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMG), 'From Arusha to ESAAMLG at 10 1999-2009' < http://www.esaamlg.org/userfiles/ESAAMLG_10_Year_Report.pdf > accessed 10 August 2017