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A Criminal Justice Perspective

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Fausto Martin De Sanctis holds a Doctorate in Criminal Law from the University of São Paulo's School of Law (USP) and an advanced degree in Civil Procedure from the Federal University of Brasilia (UnB) in Brazil. He was a Public Defender in São Paulo from 1989 to 1990, and a State Court Judge, also in São Paulo, from 1990 to 1991, until being appointed to the Federal Courts. He is currently a Federal Appellate Judge in Brazil's Federal Court for Region 3, with jurisdiction over the states of São Paulo and Mato Grosso do Sul.

Judge De Sanctis was selected to handle a specialized federal court created in Brazil to exclusively hear complex cases involving financial crimes and money laundering offenses. He is a world known expert on this topic and has been invited to participate in programs and conferences both in Brazil as well as internationally. Judge De Sanctis invites readers to e-mail him at fsanctis@trf3.jus.br.

From April 2 to September 28, 2012, Judge De Sanctis was a fellow at Federal Judicial Center in Washington, DC.

His recent publications include, among others:

"Popular Action: Using Habeas Corpus in the Context of Financial Crimes" in *Popular Action* ("Ação popular: A utilização do habeas corpus na dinâmica dos crimes financeiros" in *Ação Popular*. São Paulo: Saraiva, 2013).

"Coherent and Functional Criminal Law" ("Direito Penal Coerente e Funcional" in *Revista dosTribunais. Edição especial dos 100 anos.* Vol. 919. São Paulo: Revista dos Tribunais, May 2012).

"Telephone Tapping and Fundamental Rights," in *A Tribute to Afrânio Silva Jardim* ("Interceptações Telefônicas e Direitos Fundamentais" in *Tributo a Afrânio Silva Jardim*: *escritos e estudos*. Rio de Janeiro: Lúmen Júris, 2011).

Money Laundering through Gambling and Soccer. Analysis and Proposals (*Lavagem deDinheiro. Jogos de Azar e Futebol. Análise e proposições*. Curitiba: Editora Juruá, 2010).

Criminal Liability of Corporations and Modern Criminal Methods (*Responsabilidade Penal dasCorporações e Criminalidade Moderna*. São Paulo: Saraiva, 2009).

Organized Crime and the Disposal of Seized Assets: *Money Laundering, Plea Bargains*, *and Social Responsibility* (*Crime Organizado e Destinação de Bens Apreendidos. Lavagem de Dinheiro, Delação Premiada e Responsabilidade Social*. São Paulo: Saraiva, 2009).

"The Constitution and Freedoms" in *Constitutional Limitations on Investigations* ("Constituição e Regime das Liberdades" in *Limites Constitucionais da Investigação.* Rogério Sanches Cunha, Pedro Taques and Luiz Flávio Gomes. São Paulo: Revista dos Tribunais, 2009).

Judge De Sanctis has also written a number of articles published in newspapers and magazines specializing in law and economics.

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Contents

Chapter 1
Introduction

Art[1] is one of the many sectors attractive to criminals as a means of laundering the proceeds of all types of illegal activity. For centuries, artworks have been known targets of theft, robbery, and all sorts of forgery. Unfortunately, as Leonard DuBoff, Michael Murray and Christy King reveal, art theft has increased considerably in recent years, apparently generating billions of dollars on the illegal market.[2]

For example, one of the world's most important paintings—symbolizing the transition from the Middle Ages to the Renaissance—is the work by Jan Van Eyck titled *Adoration of the Mystic Lamb*.[3] Since its conception between 1426 and 1432, this artwork—comprising twelve panels painted in oil—was taken in three different wars, burned, dismembered, forged, smuggled, illegally sold, censored, hidden, made a pawn in diplomatic wrangling, recovered, hunted for first by Napoleon and later by the Nazis, recovered by Austrian agents, and actually stolen thirteen times. This masterpiece, with its puzzle-box appearance, is now an altarpiece in the cathedral in the heart of Ghent, Belgium.

At its center, it unfolds into an idealized field in which various figures, including saints, martyrs, priests, hermits, judges, Knights of Christ and a choir of angels are all in a pilgrimage to pay homage to the central figure, a lamb standing proud upon the sacrificial altar, bleeding into a golden chalice.

The level of detail that went into this grandiose work of art is unprecedented. Prior to its completion, only portrait miniatures and illuminated manuscripts

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[1] It is important to distinguish between art and handicrafts. According to Leonard DuBoff, Michael Murray and Christy King, an artisan does work that is essentially more manual than mental, working mechanically more than by inspiration. An artisan's work is essentially automatic; the success of his trade depends not on creation, but rather on dexterity and skillful application of preestablished rules. See *The Deskbook of Art Law*, Booklet A, *Art: The Customs Definition,* New York: Oceana, Second Edition, Release 2010–2012, issued Dec 2010, p. A-21.

[2] Cf. *The Deskbook of Art Law.* Booklet C (*Theft*). New York: Oceana, Second Edition, Release 2010–2012, issued Dec 2010, p. C1.

[3] The painting is known by various names. Many of the titles in use today were given by art historians for ease of identification. In Flemish (the language of Belgium), it is called *The Lamb of God*. It is also referred to as *The Mystic Lamb*, or simply, *The Lamb*.

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contained such rich detail. Thus its widespread fame is due to its beauty and artistic rendering,[4] as well as its importance to the history of art.[5]

There are several other known cases of extraordinary art theft. Confiscation of works of art belonging to Jewish families was one of the policies of the Nazi regime during World War II. Such works ultimately found their way to museums or the hands of collectors. Many of them were received as donations, or paid for in good faith at a fair price.[6]

Art theft is certainly no secret. However, money laundering through works of art is a recent phenomenon dating to the close of the twentieth century.

It was not by accident that this type of crime took such an unusual turn. Controls enacted pursuant to recommendations by the Financial Action Task Force (FATF), aimed at cracking down on money laundering, made it necessary to seek out new mechanisms for the laundering of ill-gotten gains. Furthermore, the globalization of financial markets and the rapid development of information technology have gradually steered the underworld economy toward new possibilities for the commission of financial crimes.

Like so many other businesses, art has been used by criminals to launder money and derive illegal income. As in the world of sports (gambling and ball games), the connections forged between criminals and the art world are not always motivated by monetary gain. Social prestige, rubbing elbows with celebrities and the prospect of dealing with authority figures may also attract private investors bent on skirting the law. Its high degree of specialization—inasmuch as few are really familiar with this market so historically dominated by unlawful practices (or perhaps honor among thieves?[7])—could also contribute toward attracting illegal activity.

In Geoffrey Lewis's view, following the 2004 declaration by nineteen of the world's leading museum directors, "the importance and value of universal museums deserves our detailed attention." The declaration argues that "the universal admiration for ancient civilizations would not be so deeply established today were it not for the influence exercised by the artifacts of these cultures, widely available to an international public in major museums."[8] This concept of a "universal

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[4] It pleases the eye and awakens the mind.

[5] Cf. Noah Charney. *Stealing The Mystic Lamb: The True Story of the World's Most Coveted Masterpiece*, p. 04.

[6] See Ralph Lerner. The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes Over Title. 31 *N.Y.U. J. Int'l L & Pol*. 15, 1998.

[7] Prof. Diane Apostolos-Cappadona of Georgetown University in Washington, DC, in her *Art and Ethics* course, discusses the relationship between political, social and cultural realities identified as ethically relevant to the world of art, including theft and restitution, cultural heritage, public financing of art and museum holdings with an eye to engaging in the acquisition and alienation of art, especially religious art, as well as the role of museums as cultural and educational institutions. Statements obtained directly from the professor herself at a 4 PM meeting at Georgetown University on 04/19/2012, or www.georgetown.edu, Accessed May 8, 2012.

[8] Cf. "The 'Universal Museum': A Case of Special Pleading?" in *Art and Cultural Heritage: Law, Policy, and Practice*, p. 379.

museum" gives rise to a need to pay closer attention to crime that involves cultural heritage.

Art is an attractive sector for the practice of money laundering because of the large monetary transactions involved, the general unfamiliarity and confidentiality surrounding the art world, and the unlawful activity endemic to it (theft, robbery and forgery).

Our purpose here is to inquire into the scale of the problem and to look into legislative and institutional loopholes that might give power and mobility to organized crime, thereby making it a more deeply entrenched source of unprecedented illicit wealth. The carefree attitude that has characterized the industry must be confronted with a realistic understanding of the problem and must go beyond the adoption of measures taken in isolation or in an uncoordinated manner, lest conflict and instability continue to undermine its credibility and possibly even jeopardize its continued existence.

Indeed, repeated tolerance of illegal activity in the art world, which is known to be widespread, undermines the market and its credibility to the extent that authorities have been unable to properly enforce the good practices required by both the law and the will of society.

This analysis seeks to provide a basis for a number of important public decisions, to prompt specialists to speak up in order to keep art from being used or manipulated for illegal purposes, and to expound on the situational vulnerabilities confronting this market that are not clearly understood by authorities or society-at-large.

Inasmuch as art is a subject of universal interest, it must not be exempted from criminological scrutiny because of its great social, educational and cultural importance.

We must constantly reflect on how authorities are defied on a daily basis in their efforts to take steps to prevent money laundering and the financing of terrorism and organized crime. Closer scrutiny is necessary if we are to understand the new global situation that has encouraged the commission of serious crimes and the illegal enrichment of criminals. In other words, we must seek solutions that will make effective criminal enforcement possible.

We must be mindful that one of the essential criminological features inherent in money laundering, as Pedro Caeiro, citing Jorge Fernandes Godinho and Luís Goes Pinheiro, reminds us,[9] is its necessary links to organized crime, which in turn add considerable diversity to the types of conduct that its prosecution and enforcement may prevent.

Therefore, strong criminal enforcement on the part of government is required from the outset, including investigations into the assets of suspects, so that—by confirming their propriety and legitimate ownership—we may do away with the idea that crime pays, albeit despite occasional convictions and sentencing.

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[9] Cf. Pedro Caeiro, in *Branqueamento de capitais*. Manual distributed in a course sponsored by the OAS and the Brazilian Ministry of Justice and presented to Brazilian judges and prosecutors on October 17–21, 2005, p. 4.

The author's purpose is to go beyond a mere introduction to this captivating subject. Considerations will be presented in an effort to further the study of methods likely to add transparency to business dealings and thereby inhibit or curtail unlawful activity. This book seeks to dispel the many mysteries surrounding the business of art.

The idea is to connect a number of important dots in the world of art, where its business practices are concerned, so as to bring about improvements in crime prevention systems. Our hope is to provide a useful foundation for conducting a critical analysis that is both realistic and practical, and to include an overview of studies already conducted worldwide that touch upon this important and current topic.

Our aim is to provide a reading on this sector, a snapshot of the market that will provide the groundwork and guidance necessary to give it transparency and a backdrop sufficient for a particularized analysis. Some rigor in procedures for cataloging and investigation are in order, for we should remember that the resurgence of organized crime is often the result of a systemic atmosphere of inattention, mutual tolerance, and ethical codes which, however lofty, are in practice applied only selectively. Matters are worsened by the arrogance and permissiveness, if not covert complicity, of portions of civil society (the elite, the press, etc.) that insist on pointing out only the defects that do not suit their purposes.

This effort began with the author's reflections on many points. Some of the main questions to take into account when studying this phenomenon, and which will be answered in Chapter 8 of this book, are:

- Are there any restrictions on the transportation of masterpieces out of the country?
- Do international auction houses (IAHs) or art galleries only ask sellers where the proceeds should be deposited? And what is done if the reply is a tax haven? Does anyone ever inquire into the source of the money the buyer deposits?
- Should buyers make deposits directly to the account of the IAH or gallery, or to the seller's account? How does one verify the source of funds, especially if supplied by a third party?
- Should an IAH or gallery ever turn in a Suspicious Activity Report to a financial crimes enforcement agency, such as FinCEN in the United States or COAF in Brazil?
- What is the role of insurance companies?
- Are auctions or artworks ever used to launder money? For example, might an individual hire someone to buy his own art at an inflated price?
- What can be said about flea markets for works of art?
- How are nondisclosure agreements between buyers and sellers handled when there is a need for proper monitoring by government authorities?
- Can artwork be purchased from an IAH with stored value instruments or prepaid access cards? Can payments be made through remittance companies or foreign exchange brokers?

Questions such as these come up on a daily basis during my time in court. When I was given the opportunity to conduct research with support from the Federal Judicial Center (FJC) in Washington, DC, from April 2 to September 28, 2012,

I visited U.S. Federal Courts, the Library of Congress and the FJC's own library, attended several seminars and talks, and researched online (especially on *LexisNexis* and *Westlaw*). I have also been in contact with U.S. authorities, including federal prosecutors, professors, museum and auction house representatives, judges and FBI and INTERPOL agents, all of whom provided me with valuable information.

The difficulties in obtaining specific information on money laundering—even amid such a wealth of sources—were underscored, in my eyes, by the expressions of perplexity, reflection and deep thought on the faces of persons I contacted. Coupled with this were expressions conveying sober acknowledgment of the complexity, difficulty and scope of a problem that defies every effort toward a solution. Small wonder, then, that it propagates so masterfully throughout the underworld.

This book is divided into nine chapters. Chapter 2 deals with overarching topics of money laundering, and civil and criminal legislation affecting the protection of artwork. Chapter 3 addresses the difficult task of catching financial criminals. Chapter 4 is about the world of art and the roles of the people in it. Here, important cases from U.S. and Brazilian courts that were covered by the media will be discussed. Chapter 5 seeks to organize all of this into a scholarly context. Chapter 6 addresses forms of payment and the use of NGOs, trusts, associations and foundations, and their potential for the movement of ill-gotten gains. International legal cooperation, repatriation and asset forfeiture are analyzed in Chap. 7. Chapter 8 deals specifically with responses to the questions raised at the outset, among others, which may go a long way towards clarifying how the prevention of money laundering applies to the art industry. Conclusions are also covered here. The ninth and final chapter covers national and international proposals for improving the industry so as to prevent money laundering and the financing of terrorism.

Although this work may, at a glance, appear to cover the entire subject, this is actually far from the case. It has, however, aimed at achieving a logical and practical "completeness" in describing an unexplored and virtually unknown world in which art is used in the commission of serious crimes. The purpose here is to see to it that the use of artistic media in the commission of crimes will seldom, if ever, be carried to fruition.

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Chapter 2
Civil and Criminal Legislation Regarding Money Laundering and the Protection of Cultural Heritage

2.1 Money Laundering: The Crime Defined

A great deal of attention has focused on money laundering due to the highly sophisticated nature of its criminal practices—practices that have been internationally organized and professionally executed for a considerable amount of time.

Organized crime has had a relatively free hand in its efforts to make criminal assets legal. This is made possible by the total ineffectiveness of current national and international laws, which have not kept pace with the changing situation.

Gilson Dipp points out that organized crime takes advantage of the "inertia of States, and their closely-regulated executive, legislative and judicial branches, which are bound by the principle of territoriality—the idea that the law holds only within its boundaries. This is a hopelessly dated notion. Each State must, without giving up its sovereignty, achieve broad international cooperation. To insist on a 19th-century conception of sovereignty is to allow organized crime to exercise its will to the detriment of formal sovereignty."[1]

On the other hand, the understanding that organized crime greatly affects our economic and social fabric led to the realization that a new class of felony had to be clearly established. Such is also the case in the category of financial crimes, which is principally characterized by the absence of social scrutiny.

Francisco de Assis Betti views financial crimes as crimes that are generally "marked by the absence of social scrutiny, due to several factors including an excessive attachment to material things such as profit and egotistical zeal among the owners of capital, who are scornful of the lower classes and confident in their own impunity. Most of these crimes are covered up by collusive public officials. When the crimes do come to light, evidence is poorly produced and the facts are difficult to ascertain, given the specialized assessment required, culminating almost always in impunity."[2]

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[1] Interview published 11/03/2004 on the *Consultor Jurídico* website. www.conjur.com.br. Accessed June 18, 2012.

[2] In BETTI, Francisco de Assis. *op. cit*., p. 20.

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Money laundering was at first linked to drug trafficking. Recognition of the crime of money laundering traces its origins, in Europe, to a 1980 recommendation by the Council of Europe. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention of 1988) is considered the international milestone that paved the way for worldwide political and criminal analysis of the subject.

All efforts to categorize money laundering as a crime on its own were closely associated with the international traffic in narcotics. Two separate aspects appear to have been decisive in bringing about an international mobilization to punish the conversion of the proceeds of criminal drug trafficking into apparently legal wealth.

The first is the predictable inefficacy of the methods used in the war on drugs. The second factor stems from the economic impact that the movement of so-called "narcodollars" has on the economies of many countries—enough to interfere greatly with the normal course of production, competition and consumption.

Thus, there was a strong international push for the adoption of a means to combat money laundering. The United Nations Vienna Convention of 1988 provided an international legal framework, although it was specifically organized to battle the traffic of narcotic drugs and psychotropic substances.

The failure of traditional legislation to deal with these new issues was well known. It was a constant concern in many countries in their struggle against serious crime because permitting the flow of illegal capital poses a threat to everyone and undermines the confidence in law enforcement institutions.

Mireille Delmas-Marty and Geneviève Giudicelli-Delage assert that "beginning in the late 1980s, the international community became aware of the shortcomings—if not futility—of national rights when faced with increasingly effective international crime prospering precisely because of the disparities between, and lack of harmony among, national legislative bodies…. The UN Convention signed at Vienna on December 20, 1988, was the first response to bring harmony to enforcement."[3]

It is important to take into account that criminalizing money laundering emerged as a measure to inhibit the use and benefit of illegally acquired assets. Thus, it is a crime derived from another, and could not exist without the antecedent crime having been previously committed. It is, in the words of Jean Larguier and Philippe Conte, a "consequential crime," as opposed to behavior preceding or concurrent with the primary act or attempt.[4]

To confidently benefit from its illegal income, organized crime has protected itself well, much like the Government, causing the latter to turn to the most modern mechanisms for combating crime.

Francisco de Assis Betti adds that it is not always "easy for a criminal to use the proceeds of crime." Profligate spending and the eccentricities that always accompany the easy acquisition of money, and immediate purchases way above one's standard of living, are outward signs of wealth which give rise to suspicion,

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[3] Cf. DELMAS-MARTY, Mireille; GIUDICELLI-DELAGE, Geneviève. *Droit pénal des affaires*. 4th ed. Paris: Presses Universitaire de France, 2000. pp. 309–310.

[4] In CONTE, Philippe; LARGUIER, Jean, *op. cit*., p. 238.

and are conducive to investigations by either police or internal revenue authorities. Experienced criminals therefore try to come up with arrangements for investing their criminal proceeds and work with others inclined to conceal these assets and obliterate the money trails in order to avoid enforcement efforts.[5]

To the extent that society has realized that serious crime can encompass more than just violent crime, more and more States have ratified international regulatory instruments without restrictions, demonstrating that they are no longer willing to tolerate open-ended criminality within their borders.

The links between money laundering and organized crime necessitated immediate and aggressive intervention by governments, not least to ensure their very survival.

Article 3 of the Vienna Convention of 1988 requires that each signatory take all necessary steps to fight drug trafficking and to establish as criminal offenses under domestic law all of the practices enumerated therein. The practices in question are divided into three groups within Section 1 of Article 3. The first group (item "a" of Article 3, Section 1) refers to the drug trafficking itself as it describes production, manufacture, extraction, preparation or sale [3(1)(a)(i)], cultivation [3(1)(a)(ii)], possession or purchase for any of the above purposes [3(1)(a)(iii)], transportation and distribution [3(1)(a)(iv)], and the organization, management or financing of any of the offenses enumerated above [3(1)(a)(v)]. The second group (item "b" of Article 3, Section 1) deals with money laundering whereby all signatory States agree to outlaw the conversion or transfer of property that is derived from offenses provided in item "a" [3(1)(b)(i)] and the concealment or disguise of the true nature, location, disposition or ownership of said property [3(1)(b)(ii)]. Finally, the third group (item "c" of Article 3, Section 1) addresses other types of contact in connection with narcotics trafficking or money laundering, such as the acquisition, possession or use of the proceeds of narcotics trafficking [3(1)(c)(i)], possession of materials or equipment related to narcotics trafficking [3(1)(c)(ii)], inciting or inducing others to commit the offenses therein enumerated [3(1)(c)(iii)], and aiding or abetting the commission of any of the offenses therein enumerated [3(1)(c)(iv)].

Observe that money laundering is in essence a derivative crime because the offense is contingent upon an antecedent crime.

In 1992, in the Bahamas, the OAS General Assembly passed and adopted Model Regulations on money laundering offenses related to drug trafficking, which define, in Article 2, behavior considered unlawful. This led to the drafting of numerous laws in Latin America, including Colombia (Law No. 333 of 1996), Chile (Law No. 9366/1995), Paraguay (Law No. 1015/1997) and Venezuela. Money-laundering legislation was already in place in Argentina, Ecuador, Mexico and Peru before the Model Regulations were adopted in the Bahamas, but after the Vienna Convention.

When the Money-Laundering Law was promulgated in Brazil, the crime in question had already lost its characterization as a crime derived solely from

[5] In BETTI, Francisco de Assis. *op. cit*., p. 39.

drug-trafficking crimes, as was the case in many of the countries that make the offense illegal. For example, Spain, Switzerland, Austria, the United States, Canada, Australia and Mexico no longer classify money laundering as a mere appendage of drug trafficking. Given the evidence that the money-laundering problem is not exclusively a drug trafficking issue, and faced with the deleterious consequences of the entry of the proceeds from certain types of crime into a nation's economy, many legislative bodies began to extend the concept of money laundering by associating it with other types of antecedent crimes.

The crime of money laundering had to be separated from drug trafficking because there was no justification for legislating against only that particular form of illicit enrichment. However, this presented serious questions of legal doctrine, such as the question of what legal interest is actually being protected.

Indeed, when money laundering was a crime exclusively in connection with drugs, it could be argued that the legal justification—albeit in an indirect and reflexive manner—was the same as that for drug trafficking. This is clearly the case in the Vienna Convention, which makes no formal distinction between drug trafficking per se and enrichment therefrom.

Argentine legislation, originally under Article 25 of Law No. 23737/1989 and currently under Article 3 of Law No. 25246/2000, provides a penalty of two to ten years for all who engage in money laundering even without having participated or cooperated in the predicate crime from which the money was obtained. Thus, if a prerequisite for liability for money laundering is the absence of some antecedent narcotics violation, we may infer that this is a case of violation of one and the same criminal legal interest, so as to avoid *bis in idem*.

With the shedding of this exclusive link with the originating crime, many questions emerged as to the legal justification for criminalizing money laundering. Today there is no question that the crime of money laundering falls within the category of financial crimes because of the great effect it has on socio-economic order. There is no doubt that introducing large sums of money that originated in crime into the market interferes with the normal course of production, consumption and competition.

Another difficulty with money laundering is that it is not simple to accomplish, nor does it follow any preset rule. The commission of the crime involves processes that are often complex and sophisticated, with actions taken in a concatenated or scattered manner, all in an effort to make dirty money look legal. One could indeed simply define money laundering as a procedure whereby one transforms goods acquired through unlawful acts into apparently legal goods. However, overriding considerations of legality and legal security do not permit us to make use of such a simple definition.

The crime of money laundering, classically speaking, involves three stages of conduct, namely: concealment or placement, in which goods acquired by unlawful means are made less visible; monitoring, dissimulation or layering, in which the money is severed from its origins, removing all clues as to how it was obtained; and integration, in which the illegal money is reincorporated into the economy after acquiring a semblance of legality. Added to this is the recycling stage, which consists of wiping out all records of those previous steps completed.

Faced with the complexity of the various forms of conduct and processes comprising money laundering, one is struck by the almost complete impossibility of imposing legal restraints other than through combined means, by proscribing more than one form of conduct, and open-ended means, since the large number of activities described in the Vienna Convention and adopted by most countries calls for intervention for full classification within the limits therein imposed. Additionally, money laundering is always a derivative crime, so that it must necessarily be connected, to a greater or lesser extent, to its antecedent crime. All of these issues give innumerable peculiarities to the crime of money laundering, peculiarities that must be gradually sorted out by jurisprudence or case law.

In Brazil's case, money laundering was not typified in the main body of the Criminal Code, as was done, for instance, in the United States (in 18 U.S.C. § 1956). This poses an undeniable difficulty, for if the crime in question were codified, it would have to be promptly adapted to the principles and rules of the Criminal Code. Because this system is integrated and hierarchical, there would be no margin for unjustifiable exceptions. Such is the case in France, Italy, Switzerland and Colombia.

Created in December of 1989 by the seven richest countries in the world (G-7[6]), the Financial Action Task Force (FATF, or *Groupe d'Action Financière sur le blanchiment des capitaux*—GAFI), organized under the aegis of the Organization for Economic Cooperation and Development (OECD), has a mandate to examine, develop and promote policies for the war on money laundering. It initially included twelve European countries along with the United States, Canada, Australia, and Japan. Other countries joined afterward (including China in 2007), as well as international organizations (the European Commission and the Gulf Cooperation Council). Brazil joined, initially as an observer and later as a full member, at the XI Plenary Meeting, held in September of 1999.

The OECD is an intergovernmental agency organized to promote measures for the fight against money laundering. Its list of Forty Recommendations, drafted in 1990, was revised in 1996. Another eight recommendations were drawn up in 2003 (on financing of terrorism) and a ninth in 2004 (also about financing of terrorism). On February 16, 2012, all forty-nine recommendations were revised, improved and condensed into forty.

These recommendations are not binding, but they do exert strong international influence on many countries (including nonmembers) to avoid losing credibility, because they are recognized by the International Monetary Fund and the World Bank as international standards for combating money laundering and the financing of terrorism. In the 1996 version, they were adopted by 130 countries. In the 2003–2004 version, they were adopted by over 180 countries.

It is important to mention that the idea of improving and condensing the Recommendations to avoid distortion and duplication, and to also incorporate the nine Special Recommendations on the financing of terrorism into the basic text

[6] United States, Japan, Germany, France, United Kingdom, Italy and Canada, which has since been joined by Russia (G8).

(Forty Recommendations), originated in Brazil when it presided over the FATF between 2008 and 2009.

Some initial resistance to altering wording that had already become assimilated was overcome. No substantial changes were offered, and all focus was on fine-tuning the Recommendations to make them clearer and more objective, and as a result more easily enforceable. All of this changed and facilitated matters, including the member nations' methods of evaluation.

The following are relevant provisions contained in the 2012 version of the Recommendations:

Countries should identify, assess, and understand the money laundering and terrorism financing risks of the country, and take action to mitigate them (*Risk-Based Approach—RBA*, Recommendation No. 1). Countries should ensure cooperation among policy-makers, the Financial Intelligence Units (FIUs) and law enforcement authorities, and domestic coordination of prevention and enforcement policies (Recommendation No. 2). The current text of Recommendation No. 2 (this was in Recommendation No. 31 before) adds legitimacy to Brazil's National Strategy for the Fight against Corruption and Money Laundering (ENCCLA).[7] The crime of

[7] According to a study conducted by the Brazilian Federal Justice Council's Judiciary Studies Center on the effectiveness of Law No. 9613/1998, through September of 2001 the Brazilian Federal Police had conducted only 260 police investigations, and most (87%) of the federal judges polled in that study answered that there were no active proceedings in their courts relating to money laundering through 12/31/2000, the date on the survey form (FEDERAL JUSTICE COUNCIL, *A critical analysis of the money laundering law*). In 2002 and 2003, with Minister Gilson Dipp of the Appellate Court presiding, and participation from representatives of the Federal Courts, the Office of the Federal Prosecutor, the Federal Police and the Brazilian Federation of Bank Associations (FEBRABAN), the Council drew up substantive recommendations to improve investigation and prosecution of criminal money laundering by engaging the cooperation of various government departments responsible for implementing the law. It was embryonic to the ENCLA (National Strategy for the Fight against Money Laundering and Recovery of Assets), later renamed the National Strategy for the Fight against Corruption and Money Laundering (ENCCLA). The ENCCLA is made up of the primary agencies involved in the matter, which are the Office of the Attorney General, the Council for Financial Activities Control (COAF), the Justice Ministry's Asset Recovery and International Legal Cooperation Council Department (DRCI), the Federal Justice Council (CJF), the Office of the Federal Prosecutor (MPF), the Office of the Comptroller-General (CGU) and the Brazilian Intelligence Agency (ABin), annually setting policy for all actions to be carried out in the execution of Law No. 9613/1998, on account of private and uncoordinated—if not conflicting—agendas having been observed among government agencies responsible for said enforcement. A meeting was held on December 5–7, 2003, in Pirenópolis in the State of Goiás, to develop a joint strategy for the fight against money laundering. To monitor progress toward the goals set forth in the objectives of access to data, asset recovery, institutional coordination, qualification and training and international efforts and cooperation, an Integrated Management Office for the Prevention of and Fight against Money Laundering (GGI-LD), was created in compliance with Target 01 of ENCLA/2004. This Office is composed of the primary government agencies, as well as the Judicial Branch and Attorney General's Office, conducting both breakout sessions and plenary meetings on various occasions. Every year they define new Actions (formerly Targets), in hopes that the conclusions arrived at during their work sessions will be transformed into substantive outcomes.

money laundering should apply to predicate offenses, which may include all serious offenses, any of a long list, or any offenses punishable by a maximum penalty of more than one year, and criminal liability should apply to all legal persons, irrespective of any civil or administrative liabilities (Recommendation No. 3). No criminal convictions should be necessary for asset forfeiture. Furthermore, with reference to the Vienna Convention (1988), the Terrorist Financing Convention (1999), and the Palermo Convention (transnational organized crime, 2000), the burden of proof on confiscated goods should be reversed (Recommendation No. 4). Countries should criminalize the financing of terrorism (Recommendation No. 5). Countries should implement financial sanction regimes to comply with UN Security Council resolutions on terrorism and its financing (Recommendation No. 6), and on the proliferation of weapons of mass destruction and its financing (Recommendation No. 7). Countries should establish policies to supervise and monitor non-profit organizations, so as to obtain real-time information on their activities, size and other important features, such as transparency, integrity and best practices (Recommendation No. 8). Financial institution secrecy laws, or professional privilege, should not inhibit the implementation of the FATF Recommendations (Recommendation No. 9). Financial institutions should be required to undertake customer due diligence and to verify the identity of the beneficial owner, and be prohibited from keeping anonymous accounts or those bearing fictitious names (Recommendation No. 10). Financial institutions should also be required to maintain records for at least five years (Recommendation No. 11) and closely monitor politically exposed persons (PEPs), that is, persons who have greater facility to launder money, such as politicians (in high posts) and their relatives (Recommendation No. 12). The 2012 version expanded the definition of PEPs to include both nationals and foreigners, and even international organizations.

Other provisions worth mentioning include:

Financial institutions should monitor wire transfers, ensure that detailed information is obtained on the sender as well as on the beneficiary, and prohibit transactions by certain people pursuant to UN Security Council resolutions, such as resolution 1267 of 1999 and resolution 1373 of 2001, for the prevention and suppression of terrorism and its financing (Recommendation No. 16). Designated non-financial businesses and professions (DNFBPs), such as casinos, real estate offices, dealers in precious metals or stones, and even attorneys, notaries and accountants, must report suspicious operations, and those who report suspicious activity must be protected from civil and criminal liability (Recommendation No. 22, in combination with Nos. 18 through 21). Countries should take measures to ensure transparency and obtain reliable and timely information on the beneficial ownership and control of legal persons (Recommendation No. 24), including information on trusts—settlors, trustees and beneficiaries (Recommendation No. 25). Financial Intelligence Units (FIUs) must have timely access to financial and administrative information, either directly or indirectly, as well as information from law enforcement authorities in order to fully perform their functions, which include analysis of suspicious statements on operations (Recommendations Nos. 26, 27, 29 and 31). Casinos must be subject to effective supervision and rules to prevent money laundering (Recommendation No. 28). Countries should establish the means for

conducting freezing and seizure operations, even when the commission of the predicate crime may have occurred in another jurisdiction (country), and implement specialized multidisciplinary groups or task forces (Recommendation No. 30). Authorities should adopt investigative techniques such as undercover operations, electronic surveillance, access to computer systems, and controlled delivery (Recommendation No. 31). The physical transportation of currency should be restricted or banned (Recommendation No. 32). Proportionate and dissuasive sanctions should be available for natural and legal persons (Recommendation No. 35). There should be international legal cooperation, pursuant to the Vienna Convention (international traffic, 1988), Palermo Convention (transnational organized crime, 2000) and Mérida (corruption, 2003) (Recommendation No. 36). Countries should provide mutual assistance to facilitate a quick, constructive and effective solution (Recommendation No. 37), including the freezing and seizure of accounts, even with no prior conviction (Recommendation No. 38). Countries should quickly execute extradition requests (Recommendation No. 39), and spontaneously take action to combat predicate crimes, money laundering, and terrorism financing (Recommendation No. 40).

Thus, as of the 2012 revision, the Recommendations set forth general guidelines, with details given in Interpretative Notes. The glossary has made it easy to place the standards adopted in proper perspective and also provides important clarifications.

The Interpretative Notes are best described as a sort of common ground made to fit both common law and civil law countries.

One important innovation, albeit not the purpose of the February 2012 review, was pointing out the need for countries to adopt the Risk-Based Approach (RBA). In other words, before applying certain measures, standards must be established to guide public policies for preventing and combating money laundering, terrorism financing and (this is new) the proliferation of weapons of mass destruction.

With regard to politically exposed persons (PEPs), what was once a simple requirement to monitor certain foreign nationals or authority figures now refers to domestic entities, understood to include international organizations.

The FATF pressed for the creation of similar agencies known as FATF-Style Regional Bodies (FSRBs), intended to integrate the global network for the war on money laundering, including:

(a) *Asia–Pacific Group on Money Laundering* (APG, which includes Australia, Bangladesh, Brunei, Cambodia, Taiwan, Cook Islands, Fiji, Hong Kong, India, Indonesia, Japan, South Korea, Malaysia, Marshall Islands, Mongolia, Nepal, New Zealand, Niue, Pakistan, Palau, the Philippine Islands, Samoa, Singapore, Sri Lanka, Thailand, Tonga, the United States and Vanuatu);
(b) *Eurasian Group* (EAG, including Belarus, Kazakhstan, Russia, Kyrgyzstan, the People's Republic of China and Tajikistan);
(c) *Middle East and North Africa Financial Action Task Force* (MENAFATF, made up of Algiers, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, Yemen and the United Arab Emirates);
(d) *Caribbean Financial Action Task Force* (CFATF or GAFI CARAÏBE, for Central America and the Caribbean, namely Antigua and Barbuda, Anguilla,

Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman, Costa Rica, Dominica, the Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, the Dutch Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, the Turks and Caicos Islands, Trinidad and Tobago, and Venezuela);

(e) *Moneyval* (Council of Europe, composed of Albania, Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lichtenstein, Lithuania, Moldavia, Malta, Monaco, Poland, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Macedonia and the Ukraine);

(f) *Eastern and Southern Africa Anti-Money Laundering Group* (ESAAMLG: Botswana, Kenya, Lesotho, Malawi, Mozambique, Mauritius, Namibia, South Africa, Swaziland, Seychelles, Uganda, Tanzania, Zambia and Zimbabwe);

(g) *Financial Action Task Force on Money Laundering in South America* (GAFISUD, composed of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Mexico);

(h) *Intergovernmental Action Group against Money Laundering in West Africa* (GIABA);

(i) Central African Action Group against Money Laundering (GABAC).[8]

A group resembling an FSRB is the Offshore Group of Banking Supervisors—OGBS (composed of Aruba, Bahamas, Bahrain, Barbados, Bermuda, Cayman Islands, Cyprus, Brault, Guernsey, Hong Kong, the Isle of Man, Jersey, Labuan, Malaysia, Macau, Mauritius, Netherlands Antilles, Panama, Singapore and Vanuatu).

The purpose of these groups is to promote the adoption and effective implementation of the Forty Recommendations, requiring member nations to accept multilateral oversight and mutual evaluations.

The FATF does not appear particularly concerned with art, for in recommending the compulsory reporting of suspicious operations on the part of designated non-financial businesses and professions (DNFBPs), at no time did it mention that sector. It went no further than to include casinos, real estate offices, dealers in precious metals or stones, attorneys, and notaries and accountants, suggesting that they be subject to internal controls, and recommending protection of whistleblowers from civil and criminal liability (Recommendation No. 22, together with Nos. 18–21).

Despite estimates running into the billions for the underworld dealing in works of art,[9] the Financial Action Task Force has not addressed the problem.

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[8] See 2010–2011 Annual Report for the Financial Action Task Force/Groupe d'Action Financière. www.fatf-gafi.org. Accessed May 20, 2012.

[9] Cf. Robert Spiel Jr. places the annual amount involved in global theft of artworks at $1.3 billion (in *Art Theft and Forgery Investigation*, pp. 31 and 237–238). The FBI estimates that the international traffic in artworks amounts to some $6 billion annually, while UNESCO reportedly claims the amount is in excess of $1 billion a year (Cf. Tailson Pires Costa and Joceli Scremin da Rocha, *A incidência da Receptação e do Tráfico Ilícito de Obras de Arte no Brasil*. https://www.metodista.br/revistas/revistas-ims/index.php/…/523, pp. 264–265).