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Treaty Monitoring and Compliance in the Field of Transnational Criminal Law

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Treaty Monitoring and Compliance in the Field of Transnational Criminal Law

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I. Introduction

The field of transnational criminal law has grown exponentially since the Second World War on account of extensive treaty making. Through the conclusion of treaty after treaty, states have agreed to criminalize certain conduct at the domestic level and to cooperate internationally. But the conclusion of these treaties has not, for the most part, been accompanied by efforts to monitor compliance with them after their entry into force. Most transnational criminal law treaties do not benefit from any sort of monitoring mechanism that would allow states parties or other actors to assess their domestic implementation and enforcement. There are a few exceptions: treaties and other instruments concerning drug control, corruption, and money laundering are indeed accompanied by monitoring mechanisms. But the general pattern across the field of transnational criminal law is clear, and the paucity of monitoring mechanisms in this field forms a notable contrast with other branches of public international law, such as human rights law and international environmental law. Treaties in these other fields of international law typically depend on treaty bodies to monitor implementation, gather data, and make recommendations for improving domestic implementation and even updating international norms.

This article posits some possible explanations for why transnational criminal law treaties generally lack monitoring mechanisms, and it also explores the significance of their absence from a compliance perspective. There are a number of possible explanations for this absence, which range in their methodological orientation. On a practical level, states may care to avoid the potentially burdensome and duplicative character of monitoring mechanisms. Another more legal explanation may lie in the very character of these treaties, which are inherently less forward-looking than, for example, international environmental law treaties and which do not depend on such bodies for their very operation. In addition, historical factors have also played a role. Like human rights treaties, drug control treaties benefit from monitoring mechanisms due in part to the historical legacy of institutions dating back to the League of Nations. On a sociological level, the sheer diversity and decentralized character of the

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transnational criminal law field may also contribute to this trend. Treaties concerning one form of criminal conduct are arguably unlikely to influence treaty-making efforts regarding other, unrelated forms of criminal behavior, given that the composition of delegations involved in treaty negotiations will often vary across the field. The field also lacks a true geographical or institutional center that might foster the spread of certain trends, such as treaty monitoring bodies. Finally, on a political level, this article does not discount the possibility that states have deliberately refrained from creating monitoring bodies due to a reluctance or disinterest in ensuring compliance with treaties that can have profound implications for domestic criminal justice systems.

This article advocates not for the creation of more treaty monitoring bodies in the field of transnational criminal law, but instead seeks to explain their relative absence and its significance for the field. Monitoring bodies in this field would allow for the collection and analysis of data about treaty implementation, and potentially also domestic enforcement. But without mechanisms to gather such information, states parties to transnational criminal law treaties cannot even begin to meaningfully assess compliance, let alone the effectiveness of these treaty-making efforts. The argument, therefore, is not that monitoring bodies are necessarily desirable and ought to exist in greater numbers in this field. The fact that treaty monitoring bodies can generate heavy reporting requirements for states is enough to make such an argument impractical. Rather, the article seeks to highlight how the absence of these bodies obscures information about compliance and impedes research about what these treaties are actually accomplishing. The current state of treaty monitoring in the field of transnational criminal law is significant because of the extent of what we do not know about the effects of these instruments.

The article begins by elaborating on the contrast between the transnational criminal law field and the field of human rights and environmental law with respect to the existence of monitoring mechanisms (Part II). The article then explores some explanations for this disparity (Part III) before concluding with some observations on how the absence of monitoring mechanisms affects or impedes assessments of the compliance and effectiveness of transnational criminal law treaties (Part IV).

II. The Relative Paucity of Treaty Monitoring in the Transnational Criminal Law Field

Treaty making has been integral to the fields of human rights law and international environmental law, and treaties in these fields have, for the most part, established bodies responsible for monitoring implementation by states parties. In the field of transnational criminal law, by contrast, treaty bodies have been the exception rather than the rule. This section elaborates on the extent of the disparity between the fields of human rights law and environmental law, on the one hand, and the field of transnational criminal law, on the other.

This study covers universal treaties concluded after the Second World War, thus excluding regional treaties, as well as treaties concluded before and during the existence of the League of Nations. Treaty monitoring with respect to regional and universal treaties may not be comparable on account of the fact that treaties negotiated under the auspices of regional organizations, such as the Organization of American States, may lend themselves more readily to follow-up mechanisms within the framework of an existing regional entity. In addition, the challenges involved in monitoring a universal treaty with nearly 200 states parties are likely to be quite different than those involved in monitoring a regional treaty with a much smaller number of relatively like-minded states that are already members of the same regional organization. In comparing treaties from the same era, this study excludes transnational criminal law treaties from the pre-Charter era. These instruments, dating back as early as the 1840s, have few contemporaries in the fields of human rights law and environmental law, as treaty-making in these fields has been a predominantly post WWII phenomena.[1] Part III of this article does, however, trace the historical origins of some contemporary treaty bodies back to the League of Nations era, in an effort to explain why certain fields benefit from monitoring mechanisms while others do not. Finally, this study covers a wide range of major areas in the field of transnational criminal law, namely transnational organized crime; slavery, human trafficking and migrant smuggling; terrorism; drug trafficking; corruption; and money laundering.

[1] Treaty for the Suppression of the African Slave Trade, 20 December 1841, 2 Martens Nouveau Recueil Général des Traités 392.

A. Human Rights and Environmental Law Treaties

Each of the nine core international human rights treaties currently benefits from a treaty body.[2] The 1966 International Covenant on Economic, Social and Cultural Rights was originally an outlier, as the Covenant itself does not provide for a treaty body. In 1985, however, the Economic and Social Council rectified this by creating the Committee on Economic, Social and Cultural Rights.[3] The Committee on the Elimination of Racial Discrimination, established in 1969, is the precedent setter for all of the human rights treaty bodies, which take the same basic form. These bodies consist of independent experts who serve in their personal capacity, rather than as governmental representatives, and they meet twice a year, for three weeks at a time.[4] States must submit an initial report on domestic implementation efforts within a year after becoming parties, and then must report periodically, every 2-5 years.[5] On the basis of states' reports, the Committees issue 'concluding observations' in which they set forth their concerns and make recommendations to states parties.[6] Because there are now 9 different human rights treaty bodies, which monitor instruments that encompass some overlapping rights, the reporting demands for states that are parties to most or all of these treaties have become burdensome and somewhat duplicative.[7] In addition, the treaty bodies themselves have struggled to process reports in a timely manner due in part to resource constraints.[8]

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[2] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 666 UNTS 212 (CERD); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 112; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3; International Covenant for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) A/RES/61/177; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[3] ECOSOC Res 1985/17; ICESCR art 16.

[4] See eg CERD art 8.

[5] ibid art 9.

[6] ibid.

[7] John Morijn, 'Reforming United Nations Human Rights Treaty Monitoring Reform' (2011) 58 Netherlands International Law Review 295, 297.

[8] James Crawford, 'The UN Human Rights Treaty System: A System in Crisis?' in Philip Alston and James Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (CUP 2000) 6-7.

Treaty monitoring bodies are also pervasive in the field of international environmental law, in which most treaties require some sort of reporting by states parties.[9] In fact, reporting is the only specific legal obligation imposed by some environmental law treaties.[10] The type of reporting required by environmental law treaties is somewhat more varied than in the human rights field. Like human rights treaties, some environmental treaties require states parties to report on domestic implementing legislation and regulations. The 1973 Convention on International Trade in Endangered Species (CITES), for instance, requires states parties to submit a biennial report on implementing legislation, regulations and administrative measures to the CITES Secretariat, which, among other things, makes recommendations on implementation.[11] But in contrast to human rights treaties, many environmental treaties also require states parties to submit a range of other information to monitoring bodies, including data on matters such as emissions,[12] permits granted for scientific research,[13] and waste dumped or incinerated at sea.[14] Taken together, monitoring bodies in the field of environmental law can play at least three different functions, namely evaluating implementation by states parties, promoting a process of internal policy reform, and establishing a factual basis for amending the normative requirements set out in these instruments.[15] Treaty monitoring in the environmental field has suffered from some of the same problems that have plagued human rights reporting,

[9] Daniel Bodansky, 'The Role of Reporting in International Environmental Treaties' in Philip Alston and James Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (CUP 2000) 365. International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72 (ICRW); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 138; Convention for the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151; Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 138; Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent (adopted 8 July 1985, entered into force 2 September 1987) 1480 UNTS 215; Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293; Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

[10] Bodansky (n 9), 365. See eg 1979 Convention on Long-Range Transboundary Air Pollution, art 9.

[11] CITES arts VIII, XII.

[12] 1979 Convention on Long-Range Transboundary Air Pollution, arts 8, 10.

[13] ICRW art VIII, Schedule para 30.

[14] 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, art V.

[15] Bodansky (n 9), 365-367.

including a proliferation of reporting requirements as well as inaccurate, incomplete and late reports, and superficial reviews by treaty bodies.[16]

B. Transnational Criminal Law Treaties

In the field of transnational criminal law, by contrast, monitoring mechanisms are a rarity. Most treaties make no provision for any type of monitoring body that would review reports on domestic implementation or other pertinent data. With the exception of drug trafficking treaties, the monitoring bodies that do exist are a relatively recent development.

1. Slave Trading, Human Trafficking, Migrant Smuggling, and Organized Crime

In concluding treaties on a range of related crimes—namely, slave trading, human trafficking, migrant smuggling, and organized crime—states have so far refrained from establishing any monitoring bodies. Treaties concluded in the 1950s concerning human trafficking, prostitution, and slavery simply require states parties to communicate implementing legislation and regulations to the UN Secretary-General.[17] But these treaties do not call on the UN Secretary-General, or any other body, to review these communications and to make recommendations on the basis of them. In addition, the 1957 Abolition of Forced Labour Convention, which states concluded under the auspices of the International Labour Organization (ILO), also does not require the ILO to monitor implementation, and, in fact, the treaty does not even require states parties to communicate their implementation efforts to the ILO.[18]

Two recent protocols concerning human trafficking and migrant smuggling have similarly refrained from establishing treaty bodies, although these protocols left the door open to this possibility, and negotiations on a review mechanism are ongoing. These two protocols, concluded in 2000, supplement the UN Convention against Transnational Organized Crime (UNCTOC), which provides that the Conference of Parties shall agree upon mechanisms for

[16] ibid 361.

[17] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 21 March 1950, entered into force 25 July 1951) 96 UNTS 271, art 21; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3, art 8.

[18] Abolition of Forced Labour Convention (International Labour Organisation Convention No 105) (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291.

promoting and reviewing the implementation of the treaty.[19] But the Conference of Parties has yet to agree on a review mechanism, more than 16 years after the conclusion of the Convention and its protocols, and negotiations in recent years have not been particularly productive. Negotiations among states parties with respect to a review mechanism only began in 2009, and in the years since then, negotiators have failed to agree on basic issues such as what the structure and methodology of the review mechanism should be, and how it should be funded.[20] Negotiators might be expected to take the review mechanism for the UN Convention against Corruption (UNCAC) as a model, as UNCAC's monitoring mechanism was established relatively recently, in 2009, and the treaties are similar (indeed, UNCTOC led to the conclusion of UNCAC).[21] Yet, there appears to be resistance to burdening states parties to UNCTOC with yet more surveys and peer review processes. The United States, for instance, has argued that the creation of a 'costly, burdensome peer review process' for UNCTOC could 'divert resources and personnel away from the practical implementation of the Convention'.[22] Should the states parties to UNCTOC eventually agree on a review mechanism, it is likely to involve a less extensive, and less expensive monitoring system than UNCAC's.

1. Terrorism Suppression Conventions

The absence of review mechanisms in the field of transnational criminal law is arguably most notable with respect to the terrorism suppression conventions on account of the sheer number and range of treaties in this area. None of the 14 universal terrorism suppression conventions, concluded between 1963 and 2010, creates a monitoring body, even though these treaties were concluded under the auspices of existing international organizations that might have played such a role.[23] These conventions fall under the auspices not only of the United

[19] United Nations Convention on Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, art 32(3) (UNCTOC).

[20] Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 'Report of the Chair on the open-ended intergovernmental meeting to explore all options regarding an appropriate and effective review mechanism for the United Nations Convention against Transnational Organized Crime and the Protocols thereto held in Vienna from 28 to 30 September 2015', 14 October 2015, CTOC/COP/WG.8/2015/3, paras 16-41.

[21] Meeting to explore all options regarding an appropriate and effective review mechanism for the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 'Five Years of UNCAC Reviews – What have we learned?', 16 September 2015, CTOC/COP/WG.8/2015/CRP.3.

[22] Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 'Compilation of comments and views received from States on all options regarding an appropriate and effective review mechanism for the United Nations Convention against Transnational Organized Crime and the Protocols thereto', 5 August 2015, CTOC/COP/WG.8/2015/2, para 101.

[23] Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219; Convention for the Suppression of Unlawful Seizure of

Nations, but also the International Civil Aviation Organization (ICAO), the International Atomic Energy Agency (IAEA), and the International Maritime Organization (IMO). In addition, Interpol plays a role with respect to the 1999 International Convention for the Suppression of the Financing of Terrorism, and the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection established an International Explosives Technical Commission.

None of these organizations or entities is engaged in treaty monitoring. Instead, the conventions assign other, more limited roles to them (or no role at all). These bodies act mainly as repositories for information about terrorist incidents and as mechanisms for the exchange of information.[24] The International Explosives Technical Commission plays a somewhat more active role in evaluating technical developments and making recommendations for amendments to the technical annex to the 1991 Convention on the Marking of Plastic Explosives.[25] But the Commission does not monitor implementation of the Convention. Only the 1980 Convention on the Physical Protection of Nuclear Material, as amended in 2005, provides for a one-time review of implementation by the Conference of States Parties, as well as the possibility of future review conferences.[26] The amended Convention does not, however, go so far as to create a review body distinct from the Conference of States Parties, nor does it mandate periodic reviews.

Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205; Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) 1456 UNTS 124; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (adopted 24 February 1988, entered into force 6 August 1989) 1589 UNTS 474; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201; Protocol to the Convention of 10 March 1988 for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201; Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998) 2122 UNTS 359; International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256; International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197; International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (adopted 10 September 2010).

[24] See eg 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, art 11; 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art 15.

[25] 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, arts V-VI.

[26] 1980 Convention on the Physical Protection of Nuclear Material, art 16.

Although the Terrorism Prevention Branch of the Vienna-based United Nations Office on Drugs and Crime (UNODC) plays a range of roles with respect to the terrorism suppression conventions, its responsibilities revolve around technical assistance and capacity building rather than treaty monitoring. The Terrorism Prevention Branch on UNODC supports states parties in drafting and reviewing domestic legislation that implements the terrorism suppression conventions, and it builds the capacity of domestic officials to implement these laws.[27] But the Terrorism Prevention Branch does so only at the request of states, and not as a part of a more formal, systematic effort to monitor implementation across states parties as a whole. Moreover, as a part of the UNODC, the Terrorism Prevention Branch has no formal link to these treaties—the treaties themselves make no reference to the Terrorism Prevention Branch, and the Branch operates independently from ICAO, IAEA, and IMO.

2. Drug Trafficking Conventions

The International Narcotics Control Board (Board or INCB), created by the 1961 Single Convention on Narcotic Drugs, represents the most significant and long-standing exception to the general rule that transnational criminal law treaties do not benefit from treaty monitoring bodies. All three of the drug trafficking treaties concluded post WWII carve out a substantial role for the Board as a body that provides technical assessments and also monitors domestic implementation.[28] The composition of the Board is somewhat different from the human rights treaty bodies due to the inclusion of non-lawyer experts. The UN Economic and Social Council is responsible for electing the Board's 13 members, of whom 3 are technical experts with medical, pharmacological or pharmaceutical experience selected from a list of persons nominated by the World Health Organization.[29] The remaining 10 members are nominated by UN member states and serve in their independent capacity, much like the members of the human rights treaty bodies.[30]

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[27] UNODC, 'Terrorism Prevention, About Us', < https://www.unodc.org/unodc/en/terrorism/about-us.html>. Marta Requena, 'The Role of the United Nations Office on Drugs and Crime's Terrorism Prevention Branch' in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (Edward Elgar 2014).

[28] Single Convention on Narcotic Drugs (adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 151; Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 1976) 1019 UNTS 175; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95).

[29] 1961 Single Convention on Narcotic Drugs, art 9(1)(a).

[30] ibid art 9(1)(b).

The Board, which describes itself as a 'quasi-judicial body'[31] regularly reviews the adequacy of domestic drug control legislation and policies, as well as measures taken by states parties to combat drug trafficking and abuse, the functioning of domestic drug control administrations, and compliance with reporting obligations under the treaties.[32] The Board's review process includes a limited number of 'country missions' each year, which allow it to discuss drug control measures with domestic authorities and to obtain first-hand information about the drug control situation in the given state.[33] On the basis of these country missions and the information reported by states parties to it, the Board makes findings and confidential recommendations for remedial measures.[34]

The Board also plays a limited enforcement role with respect to the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances when the treaties' aims are 'being seriously endangered' by the failure of a state party to comply with its treaty obligations.[35] The Board may request consultations with the state party or request further explanations from it, and may then call upon the state party to adopt remedial measures, as considered necessary. This procedure remains confidential until the Board determines that the state party has failed to provide satisfactory explanations or adopt remedial measures. At this stage, the Board may call the matter to the attention of the states parties, ECOSOC, and the Commission on Narcotic Drugs (which assists ECOSOC in supervising the drug control treaties). The Board may also recommend that states parties stop importing and/or exporting drugs from the state concerned, and it may publish a report on the matter. The Board has apparently invoked these enforcement provisions with respect to a limited number of states parties, and has only pursued public, as opposed to confidential measures, in the case of Afghanistan concerning its widespread illicit poppy cultivation.[36]

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[31] International Narcotics Control Board, 'About', <https://www.incb.org/incb/en/about.html>.

[32] International Narcotics Control Board, 'Treaty Compliance', <https://www.incb.org/incb/en/treaty-compliance/index.html>; International Narcotics Control Board, Report of the International Narcotics Control Board for 2015 (United Nations 2016), para 129.

[33] International Narcotics Control Board, Report of the International Narcotics Control Board for 2015 (United Nations 2016), paras 156-161.

[34] ibid para 160.

[35] 1961 Single Convention on Narcotic Drugs, art 14; 1971 Convention on Psychotropic Substances, art 19.

[36] International Narcotics Control Board, 'Treaty Compliance', <https://www.incb.org/incb/en/treaty-compliance/index.html>; International Narcotics Control Board, Report of the International Narcotics Control Board for 2015 (United Nations 2016), paras 228-230.

3. Corruption and Money Laundering

The other notable exceptions to the general rule may be found in the anti-corruption and anti-money laundering fields, both of which emerged in the 1990s, much more recently than the field of drug control, which dates back to the 1912 Hague International Opium Convention. The 2003 UN Convention against Corruption, which followed close on the heels of UNCTOC and was inspired by it, required the Conference of the States Parties to establish, if necessary, 'any appropriate mechanism or body to assist in the effective implementation of the Convention'.[37] While negotiations concerning a review mechanism stretched on for several years, from 2006 to 2009, they were ultimately successful, and the Implementation Review Group (IRG) began operating in 2010. Since then, the IRG has carried out a relatively large-scale peer review process involving the treaty's nearly 180 states parties. On the basis of an extensive self-assessment checklist, a desk review, and a possible country visit, each state party is reviewed by two other states parties, which produce a country review report with the help of UNODC. This report, however, may only be published with the consent of the state party under review. The review process is phased, meaning that the IRG reviews the implementation of only a couple chapters of UNCAC in each review cycle. Given the length of UNCAC, which contains 71 articles, and its large number of states parties, the review process has unsurprisingly been delayed, and the first cycle is still ongoing as of this writing.

The most noteworthy monitoring of domestic implementation of anti-money laundering norms has taken place in connection with a non-binding instrument as opposed to a treaty. The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was the first international instrument to require the criminalization of money laundering, albeit in the specific context of drug trafficking. But the International Narcotics Control Board does not specifically concern itself with the implementation of the Convention's anti-money laundering provisions.[38] Instead, monitoring of anti-money laundering norms has taken place in relation to the 40 Recommendations of the Financial Action Task Force (FATF), which were first issued in 1990, and focus specifically on money laundering as well as terrorist financing. The FATF 40 Recommendations have benefited from a particularly robust, and at times arguably coercive review mechanism. Despite their non-binding status, the FATF 40 Recommendations have

[37] United Nations Convention against Corruption (adopted31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 (UNCAC), art 63(7).

[38] 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 3(b), (c).

brought about domestic implementation of anti-money laundering provisions in much the same way as treaties like the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and UNCTOC. The review mechanism attached to the 40 Recommendations may therefore be considered comparable to the other treaties discussed in this piece.

FAFT's review mechanism consists of 'mutual evaluations' or peer review among the organization's 37 members, which are substantially the same as the members of the Organisation for Economic Co-operation and Development (OECD). The review process involves country visits, and culminates in the publication of a mutual evaluation report. The first three rounds of mutual evaluations focused on implementation of the Recommendations, while the fourth round, which is currently ongoing, covers implementation as well as the effectiveness of members' anti-money laundering and counter-terrorist financing systems. When states fail to implement effective anti-money laundering and counter-terrorism financing systems, FATF's procedures also provide for enforcement through public peer pressure and even retorsion or 'countermeasures', as FATF calls them.[39] Unlike the other review mechanisms described in this study, FATF's review procedures and enforcement mechanisms extend to non-FATF members. In an effort to ensure world-wide implementation of anti-money laundering and counter-terrorist financing standards, FATF has developed a parallel evaluation procedure for assessing implementation of the Recommendations by non-members through what it terms 'FATF-Style Regional Bodies'. In addition, FATF's enforcement mechanisms have focused almost exclusively on non-FATF members.

III. Possible Explanations for the Relative Absence of Treaty Monitoring in the Field of Transnational Criminal Law

While treaty monitoring bodies are not entirely absent from the field of transnational criminal law, they are relatively scarce, in contrast with other fields of public international law, such as human rights and environmental law. This contrast begs for some explanations of what accounts for this disparity. Why do most transnational criminal law treaties lack accompanying monitoring mechanisms, which have become standard in other international legal fields?

[39] FATF 40 Recommendations, Recommendation 19.

A. Burdensome and Duplicative Reporting Requirements

One of the most obvious explanations may be that states negotiating transnational criminal law treaties have been keen to avoid the burdensome and sometimes duplicative reporting requirements that monitoring mechanisms tend to generate. If all or even just many of the treaties in the field of transnational criminal law were associated with monitoring mechanisms that imposed regular reporting requirements on states parties, the demands on states would be considerable, if not overwhelming, given the sheer number of treaties in this field. The recent negotiations regarding the creation of a monitoring mechanism for UNCTOC show that states parties are indeed aware of the potential for burdensome requirements and are hesitant to impose more intensive reporting requirements on themselves. UNCAC's monitoring mechanism thus appears to have substantially diminished enthusiasm for the creation of other similar treaty bodies.

States' experiences with reporting requirements in the fields of human rights and environmental law may have also dampened enthusiasm for the creation of monitoring mechanisms in the field of transnational criminal law. But this can be no more than a partial explanation for the absence of monitoring bodies due to the fact that a number of transnational criminal law treaties predate the conclusion of human rights and environmental law treaties in the 1960s and 1970s. Moreover, reporting fatigue does not explain why states have, in the first place, generally been willing to take on burdensome reporting obligations with respect to human rights and the environment, but not transnational crime.

States could also conceivably view such mechanisms as duplicative in light of the role of that the United States has adopted in monitoring domestic responses to transnational crimes such as human trafficking. With its country-by-country approach, the annual 'Trafficking in Persons Report' produced by the US State Department resembles the type of report that might be produced by a treaty body engaged in monitoring and evaluating domestic implementation and enforcement of the Protocol to Prevent, Suppress and Punish Trafficking in Persons. But these reports are based not on reporting by states parties, but on information gathered by the State Department, which does not enjoy the sort of independent status that a treaty body would. In addition, the reports' treatment of the relevant international legal instrument is also fairly superficial by comparison to what a treaty body would be expected to produce.[40] Thus, the role played by the United States in monitoring domestic responses to human trafficking is also not

[40] US State Department, 2016 Trafficking in Persons Report, 36.

a particularly persuasive explanation for states' reluctance to create a distinct treaty monitoring body.

B. Character of the Treaties as Prospective or Reactive

A second possible explanation relates to the character of the treaties themselves. Treaties in the field of transnational criminal law could arguably be characterized as less forward looking or prospective than treaties in other fields, such as environmental law. Environmental law treaties often require the collection of data so that accompanying schedules or annexes can be updated periodically after the conclusion of the treaty. These treaties are also geared towards mitigating an ongoing problem with a view towards achieving or maintaining a particular result in the future. In order for these treaties to function properly, states parties often require information about the current state of implementation, as well as the ability to adjust the rules accordingly. Viewed from this perspective, monitoring bodies enable the operation of environmental law treaties.

Transnational criminal law treaties are arguably more retrospective, and do not obviously require treaty bodies capable of monitoring implementation. With the notable exception of drug trafficking treaties, transnational criminal law treaties mainly require the criminalization of a given set of conduct in response to ongoing problems or incidents in the relatively recent past. The terrorism suppression conventions illustrate this point, as states have adopted what is known as a 'sectoral approach' to treaty-making, whereby the negotiation of a treaty responds or reacts to a recent terrorism crisis or string of incidents.[41] The drafters of these treaties appear to have assumed that the agreed upon criminalization provisions represent appropriate solutions to the given conduct, and will not require periodic updating. Future updates are, at least, not contemplated by these treaties, unlike environmental law treaties. As a result, the drafters of terrorism suppression conventions may not have perceived a need to create a treaty body to which states could report both data and domestic implementation measures. The negotiation of terrorism treaties has thus been driven not by the collection of data or information about implementation, but by the ever-evolving methods of terrorists.

The drug trafficking treaties are an important exception to this characterization of transnational criminal law treaties as more retrospective than prospective, as their continued

[41] Kimberly N Trapp, 'The Potentialities and Limitations of Reactive Law Making: A Case Study in International Terrorism Suppression' (2016) 39 University of New South Wales Law Journal 1191.

operation depends on the INCB's collection and analysis of information not only about domestic implementation, but also data on international trade in drug trafficking and required medical usage of certain substances. It must also be acknowledged that transnational criminal law treaties cannot be regarded as entirely retrospective, as criminalization provisions are geared not only towards retribution but also future deterrence and prevention. An entire chapter of UNCAC is, in fact, devoted to provisions concerning the prevention of corrupt conduct.[42]

C. Historical Origins of Monitoring Bodies

A third possible explanation for the existence of certain monitoring bodies, or the lack thereof, may be found in the historical origins of some of the treaties examined in Part II. Treaty bodies in the fields of drug trafficking and human rights, for instance, have links to monitoring bodies that existed during the time of the League of Nations. In the drug trafficking field, monitoring bodies created in the 1920s and 30s have persisted over time, even as one treaty regime has been replaced by another. The existence of the INCB, for instance, may be explained partly by virtue of the fact that it represents the continuation of the Permanent Central Narcotics Board, which was created by the 1925 International Opium Convention and which began operating in 1929. The 1961 Single Convention on Narcotic Drugs ultimately terminated the 1925 International Opium Convention, as well as other drug trafficking treaties,[43] but it also provided for the INCB's adoption of the functions of the Permanent Central Board, and those of the Drug Supervisory Body, which was created by the 1931 Convention for Limiting Manufacture and Regulating Distribution of Narcotic Drugs.[44]

Some of the features of the current INCB are the legacy of inter-war politics and ideals, in particular its semi-independent status and its inclusion of expert members. In negotiating the 1925 International Opium Convention, the drafters' envisioned a central supervisory organ that reflected 'the inclinations of the period's internationalists and American progressives, who favoured expert committees, independent evaluators, and disinterested quasi-judicial bodies'.[45] The Permanent Central Board enjoyed semi-independence from the League of Nations, as it

[42] UNCAC chapter II.

[43] International Opium Convention (adopted 19 February 1925, entered into force 25 September 1928) 81 LNTS 319, arts 19, 44.

[44] 1961 Single Convention on Narcotic Drugs, art 45; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (adopted 13 July 1931, entered into force 1933) 139 LNTS 303, art 5(6). See generally I Bayer and H Ghodse, Evolution of International Drug Control, 1945-1995 (1999) Bulletin on Narcotics; UNODC, A Century of International Drug Control (2008).

[45] William McAllister, *Drug Diplomacy in the Twentieth Century: An International History* (2000) 60.

had ‘full technical independence’ from the Council of the League of Nations. The Secretary-General of the League of Nations did, however, exercise control over staff in administrative matters, and the Council was responsible for appointing members of the Board.[46] The 1925 International Opium Convention also required the Council to invite two non-members of the League, the United States and Germany, to nominate one person each to participate in these appointments.[47] In addition, the treaty ensured that the members of the Board included subject experts, namely persons with ‘technical competence’ and ‘knowledge of the drug situation’.[48]

These provisions on the status and membership of the Permanent Central Board reflect political tensions during the inter-war period. The United States, which remained outside of the League of Nations, participated in these treaty negotiations but had an interest in avoiding direct cooperation with the League or bodies squarely within its organizational structure. Treaty negotiations thus culminated in a Permanent Central Board with semi-independence from the League, and members from two non-members of the League, the United States and Germany. With the conclusion of the 1961 Convention, these design features carried over to the INCB, which describes itself as an ‘independent, quasi-judicial body’ and includes expert members with medical, pharmacological or pharmaceutical experience. Semi-independent might, however, be a more apt description of the INCB, as the United Nations bears the expenses of the INCB, and ECOSOC is responsible for electing its members.[49]

In the human rights field, the existing treaty bodies represent not the continuation of pre WWII monitoring bodies, but the legacy of the League’s mandate system, which may be considered one of the precursors to the modern human rights system. Obvious differences between the mandates system and the present body of human rights law must, of course, be acknowledged. While the mandates system concerned only the ‘well-being and development’ of peoples in certain colonies and territories, human rights law is universal in its application. Yet the reporting system developed for the mandates system may be considered the precursor to the reporting systems developed in the UN era with respect to the Universal Declaration of Human Rights and the subsequent human rights treaties.

[46] 1925 International Opium Convention, art 20.

[47] ibid art 19.

[48] ibid art 19.

[49] 1961 Single Convention on Narcotic Drugs, arts 6, 9.

The Covenant of the League of Nations required all mandatory powers with territories committed to their charge to submit annual reports to the Council of the League.[50] The Covenant also established a Permanent Mandates Commission (PMC) responsible for receiving and examining these annual reports and advising the Council of the League on 'matters relating to the observance of the mandates'.[51] The PMC was composed of nine influential colonial experts who served in their personal capacity and met several times a year to consider reports by the mandatory powers.[52] The PMC viewed itself as a technical body responsible for ensuring that the mandatory powers adhered to the Covenant and their mandate agreements.[53] The PMC had an information-gathering function which it pursued through questionnaires that it designed for the mandatory powers.[54] These questionnaires eventually covered not only the mandatories' obligations as set out in the Covenant and the mandatory agreements, but also more extensive information about the political, administrative, economic, and social conditions in the territories.[55]

While the UN Trusteeship system is the direct successor to the League's mandate system, the PMC's influence can also be detected in the modern human rights system, which relies on reporting by states parties as the basis for treaty monitoring.[56] In 1956 ECOSOC began requiring UN members to report every three years on developments and progress achieved with respect to the rights set out in the Universal Declaration of Human Rights and the right of peoples to self-determination.[57] In the mid-1960s, with the conclusion of the 1965 Convention for the Elimination of All Forms of Racial Discrimination and the two 1966 Covenants, this reporting system developed into a key feature of the contemporary human rights system. Thus, while the progression from the Permanent Mandates Commission to human rights treaty bodies is not linear, the reporting mechanism developed by the PMC arguably left a legacy that continues to this day.

[50] Covenant of the League of Nations, art 22(7).

[51] Covenant of the League of Nations, art 22(9).

[52] Ruth Gordon, 'Mandates', Max Planck Encyclopedia of Public International Law, last updated February 2013, paras 33, 36.

[53] ibid para 33.

[54] ibid para 35.

[55] ibid.

[56] ibid 56.

[57] ECOSOC Res 624B (XXII), para 1.

The existence of a review mechanism for UNCAC may also be explained, in part, by reference to a predecessor, if not a historical legacy going back to the League of Nations. The history of law-making in the anti-corruption field is far shorter than in the fields of drug trafficking and human rights, as it goes back no further than the 1990s, when the subject of corruption began to lose its taboo at international organizations. UNCAC's review mechanism cannot be described as having 'historical origins' in the OECD's Working Group on Bribery, the monitoring mechanism that accompanies the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).[58] But a clear influence may be traced. The mechanism developed by the OECD to monitor implementation of the OECD Anti-Bribery Convention in the late 1990s significantly influenced the creation of UNCAC's review mechanism in the mid to late 2000s. Following the conclusion of the OECD Anti-Bribery Convention in 1997, the parties to this treaty developed a robust peer review monitoring system in the form of the Working Group on Bribery. This body has carried out three different phases of review, which have concerned the implementation of the treaty, and the application and enforcement of domestic legislation. On the basis of questionnaires, desk reviews, and on-site visits, two reviewing states and the OECD Secretariat draft a report which makes recommendations for improved compliance by the state under review. The Working Group then adopts these reports and makes them publicly available.

The Working Group's use of peer review as the cornerstone of its review process is highly unusual among treaty bodies, but it is standard operating procedure for the OECD as an institution.[59] As this piece has shown, treaty bodies (with the exception of UNCAC's and FATF's review mechanisms) rely on assessments by expert bodies rather than peer states. In fact, before UNCAC, peer review had never been used in connection with a treaty drafted under the auspices of the United Nations.[60] Given the related subject matter of the OECD Anti-Bribery Convention and UNCAC, the Conference of States Parties to UNCAC naturally looked to the relatively successful example set by the OECD Working Group on Bribery. Moreover, the expert members of many delegations from developed states were familiar with the peer review

[58] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 17 December 1997, entered into force 15 February 1999) 37 ILM 1.

[59] Fabrizio Pagani, 'Peer Review: A Tool for Co-operation and Change: An Analysis of an OECD Working Method', SG/LEG(2002)1 (2002).

[60] Matti Joutsen and Adam Graycar, 'When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention Against Corruption' (2012) 18 Global Governance 425, 426.

model of the OECD as well as FATF and the Council of Europe.[61] While states in favor of a peer review mechanism for UNCAC initially met with opposition, their position eventually prevailed after a number of developing states, which familiar with peer review in the context of FATF and the 1996 Inter-American Convention against Corruption, came to support its use in the context of UNCAC.[62] But the use of peer review among nearly 180 states parties to UNCAC has, unsurprisingly, proven more cumbersome than among the 41 relatively homogenous states parties to the OECD Anti-Bribery Convention. The reluctance of UNCTOC's Conference of Parties to adopt a similar review mechanism, due in part to concerns about overburdening states parties, suggests that the influence of the OECD Working Group on Bribery may have reached its limits.

D. The Highly Diverse Character of the Transnational Criminal Law Field

A fourth possible explanation for the contrast sketched in Part II may be found in the highly diverse character of the field of transnational criminal law. The field encompasses a remarkably wide range of subjects, from slavery, drug trafficking, and terrorism, to corruption and money laundering. This forms a contrast with the human rights field, for example, in which all treaties concern rights that individuals hold in relation to the state, and there is even some overlap among these treaties. The environmental law field is more varied, with treaties that govern whaling, international trade in endangered species, marine and air pollution, the ozone layer, hazardous wastes, and climate change. Yet, all of these treaties focus on the protection of the environment, broadly defined.

The highly diverse character of the transnational criminal law field is arguably significant because it reduces the likelihood that one treaty will influence other law-making efforts, as diplomats or experts are unlikely to be involved in negotiating treaties across this rather broad field. A given negotiator might, for instance, have in-depth, substantive knowledge of only one or a few related areas of the larger field of transnational criminal law. Transnational criminal law treaties admittedly have not been developed in complete isolation from each other, and they share a number of similar or identical features, such as provisions on extradition and mutual legal assistance. But the exceptionally broad range of subject matters in this field decreases the chances that governments would send the same individuals to negotiations for

[61] ibid 329-430.

[62] ibid 432.

treaties concerning, for example, drug trafficking, terrorism, organized crime, and corruption. This, in turn, reduces the possibility that developments in one area of transnational criminal law will influence law-making in another area. The development of a monitoring mechanism for UNCAC played a role in triggering negotiations for a review mechanism for UNCTOC, a related treaty, but UNCAC's influence is unlikely to be more widespread. Even if the same ministry official were involved in a wide range of treaty negotiations, from drug trafficking to corruption, he or she could very well lack a high level of familiarity with the workings of treaty monitoring bodies in this field. As the negotiations for UNCAC demonstrate, the familiarity of negotiators with other review mechanisms can have a significant impact on the negotiation of other monitoring bodies. The breadth and diversity of the transnational criminal law field does not eliminate the possibility of such cross fertilization, but it does reduce the likelihood that treaties in one area will significantly influence law-making efforts in another.

Finally, transnational criminal law treaties arguably lack a single geographical or institutional base that might facilitate the spread of innovations between different areas of the field. The UN Office on Drugs and Crime was a relatively late entrant into the UN system, and is not in a strong position to mitigate the somewhat fragmented character of the field. UNODC was only established in 1997 through a merger of the UN Drug Control Programme and the Centre for International Crime Prevention.[63] Thus, during the first fifty years of post-WWII treaty making in the broad field of transnational criminal law (as opposed to the narrower area of drug control), states lacked a clear focal point for their activities in the form of the UNODC. During this period, states concluded treaties not only under the auspices of the United Nations, but also the ILO, IMO, IAEA, and ICAO. Even after the creation of UNODC in 1997, the transnational criminal law field has still lacked a clear center due to the continuing roles played by all of these institutions. By contrast, all of the human rights treaty bodies are supported by the Treaties Division of the Office of the High Commissioner for Human Rights, and they all meet in the same place, Geneva. This degree of centralization has arguably facilitated the development of a string of monitoring mechanisms with similar or identical working methods. The UNODC has not, and does not play the same role in the transnational criminal law field, which historically lacked a centralizing institution that could have fostered the development and coordination of treaty monitoring bodies.

E. Deliberate Omission

[63] UNODC, 'About UNODC' <https://www.unodc.org/unodc/about-unodc/index.html?ref=menutop>.

A final, more speculative explanation could be that the relative absence of monitoring mechanisms in relation to transnational criminal law treaties reflects a deliberate choice on the part of negotiating states. States' participation in treaty negotiations may not always represent 'an authentic desire to suppress the particular conduct', but may instead reflect other considerations, such as pressure from other states, the promise of aid, or reputational concerns.[64] Thus, in drafting treaties in this field, states may have opted not to create monitoring bodies that could supervise domestic implementation and enforcement because they had little or no interest in holding themselves accountable in this manner. The negotiation and conclusion of transnational criminal law treaties may not, in other words, be matched by a real interest, among at least some states parties, in rigorous implementation and in having their compliance monitored. This is not to argue that states necessarily act in bad faith in entering into these treaties, but that states may participate in negotiations on account of political rather than legal considerations. Some states may have little enthusiasm for the project in the first place, and are therefore unlikely to pursue the creation of monitoring bodies.

This disinterest or resistance may also reflect the fact that treaties in this field concern matters that go to the core of domestic criminal justice systems. They involve sensitive decisions about what we deem to be criminal behavior worthy of punishment, and about how to allocate the time and resources of police, prosecutors, and judges. Transnational criminal law treaties arguably require states to alter core aspects of their public order, in ways that environmental law treaties, for example, do not. These treaties may also requires states to alter or abandon long-standing procedural or substantive rules of criminal law.[65] States' reluctance to embrace the transnational regulation of criminal law has manifested itself in the inclusion of a provision on the protection of sovereignty in a number of transnational criminal law treaties (whereby states commit to carry out their treaty obligations in a manner consistent with 'sovereign equality' and 'non-interference').[66] In restating these fundamental rules of public international law, states appear to be signaling some resistance to the project at hand.

Given the implications that these treaties can have for domestic legal systems, it is perhaps unsurprising that states have at times entered into some or many transnational criminal law treaties with a degree of trepidation or reluctance. In some cases, omission of monitoring

[64] Neil Boister, *An Introduction to Transnational Criminal Law* (OUP 2012) 262.
[65] Ibid 20.
[66] ibid. See eg 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 2; UNCTOC art 4; UNCAC art 4.

mechanisms could therefore represent a purposeful, strategic decision to avoid any sort of supervision of domestic implementation and enforcement. States may, in other words, have an interest in keeping the lid on whatever gap exists between what states have committed to on paper, and what they do in practice.

IV. Some Concluding Observations on the Implications of Sparse Monitoring of Transnational Criminal Law Treaties

The relative absence of monitoring mechanisms in the transnational criminal law field has some significant implications for our capacity to assess the functioning of these treaties. Without comprehensive, cross-national data about implementation as well as enforcement of treaty obligations in this field, it is very difficult to meaningfully analyze compliance by states with their treaty obligations, as well as the effectiveness of these instruments. The argument is not that there ought to be more monitoring bodies. There are admittedly many reasons not to establish such bodies. They can impose burdensome reporting requirements on states ill-equipped to meet these demands, and they are costly, especially when country-visits are involved. This piece also does not advocate for monitoring bodies as necessarily beneficial mechanisms, though there are many potential benefits. Monitoring bodies can facilitate legislative reform and the exchange of best practices and they can also form the basis for updating the treaty itself. Instead, this section reflects on the broader consequences of failing to monitor, and what this means for the integrity of the field as a whole.

The fields of international law and international relations together boast an array of theories about why states do or do not comply with their international legal obligations. These theories identify various reasons for compliance, including national interest, the inherent fairness or legitimacy of the rules themselves, reputational concerns, and the internalization of international rules in domestic legal systems.[67] All of these theories, however, assume the existence of information about compliance—information which tends to be anecdotal rather than empirical. In the transnational criminal law field, however, this assumption about the existence of information may not be valid on account of the relative absence of monitoring

[67] See eg A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995); Thomas Franck, *Fairness in International Law and Institutions* (Clarendon 1995); A Guzman, A Compliance-Based Theory of International Law' (2002) 90 California Law Review 1823; Harold Koh, 'Why Do Nations Obey International Law' (1997) 106 Yale Law Journal 2599.

bodies that might collect and make such information available. When considered from the perspective of these compliance theories, the relative absence of monitoring mechanisms in the transnational criminal law field reveals a troubling inability to discuss matters of compliance in an accurate and meaningful manner. Reporting by states about implementation and enforcement greatly facilitates assessments of compliance, which would otherwise be difficult if not impossible due to a lack of publicly available information.

At the same time that the field of transnational criminal law does not, for the most part, allow for the application of these compliance theories, the field itself also reveals a weakness in the existing theories, which are generally premised on anecdotal as opposed to empirical information. The existing theories generally concern specific instances of compliance or non-compliance, often in the area of peace and security.[68] In the transnational criminal law field, however, anecdotal information about treaty implementation and enforcement forms an unsatisfactory basis for assessing compliance, and the same may be true in other areas, including peace and security. Meaningful assessments of compliance by states with particular treaty obligations require cross-national information over a substantial period of time. Anecdotal information about non-compliance by one or two states may be exceptional or representative—it is difficult to make this determination without more empirical information.

On account of the challenges involved in acquiring and analyzing cross-national data, international legal fields that are dominated by treaties that require domestic implementation and enforcement may push the limits of these compliance theories. The need to obtain cross-national data in the certain fields, and the problems involved in doing so have not been a focus of compliance theories. These theories have arguably devoted too little attention to this methodological problem, which calls for more consideration of what questions we currently cannot answer because of gaps in available data, why we lack certain information, and how we might resolve these gaps in information.

Without empirical studies of compliance, assessments of the effectiveness of transnational criminal law treaties are difficult, if not impossible. The existence of information about treaty compliance is a necessary first step towards being able to assess whether transnational criminal law treaties are effectively preventing or reducing a particular form of conduct, facilitating international cooperation, etc. In order to make assessments about whether

[68] Andrew T. Guzman, 'A Compliance-Based Theory of International Law' (2002) California Law Review 1823, 1885.

the criminalization of various forms of terrorism, for instance, represents an effective way of combating this phenomenon, it is necessary to establish, as a preliminary matter, whether states have actually enacted and enforced implementing legislation. The experience of FATF demonstrates that even with a great deal of information about compliance, assessing effectiveness is a highly complex endeavor that may require years of further peer reviews. The assessments of effectiveness currently being undertaken by FATF as well as the OECD Working Group on Bribery are, of course, very much the exception in the field of transnational criminal law.

The fact that international organizations and researchers generally lack the capacity to assess the compliance and hence the effectiveness of most transnational criminal law treaties creates a high level of uncertainty about the existing treaty regimes in this field. States have developed a relatively vast body of treaty law that may or may not be adequately designed to combat transnational crimes. The field of transnational criminal law is unusual in that most of the treaties make no provision for follow-up to ensure that domestic implementation and enforcement is not only proceeding as desired, but also having the expected effect. The result is a remarkable gap between the extensive law-making undertaken by states with respect to transnational crimes, and our capacity to establish what this actually accomplishes.