17

Monitoring Compliance in International Criminal Law

LEONARDO BORLINI

17.1 Introduction

The present chapter has a twofold aim. First, it maps the current state of international supervision in the area of international criminal law,[1] by looking particularly at the competence of treaty bodies and other non-compliance mechanisms (NCMs),[2] their institutional and operative differences, progressive sophistication and other developments in recent practice. Secondly, the chapter investigates the features of, and circumstances under which, NCMs established by certain international criminal law instruments are more effective than others to address situations of non-compliance and orient future actions of States.

In order to address these matters in a viable way, I plan to make four related points. First, the chapter argues that the lamented paucity of monitoring mechanisms in contemporary international criminal law does not accurately reflect the recent evolution of international

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[1] Antonio Cassese was the first scholar to investigate international supervision (or oversight) systemically as an organizational function of the international legal system, and to illustrate the basic structural and functional differences between monitoring and judicial proceedings in international law. According to Cassese, international supervision is intended to result in "an objective evaluation of uncertain situations that has all of the moral authority of an impartial judgement." A Cassese, *Il Controllo Internazionale* (Giuffrè 1971) 310, translated into English by me.

[2] As explained in other chapters of this volume, the functions of non-compliance bodies are based on a composite notion of compliance comprising monitoring, verification and including national reporting. The term "monitoring" for the purposes of this chapter means the assessment of States' compliance with the standards or obligations implicit in adherence to international criminal law conventions.

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supervision in the field.[3] Second, an important issue related to the nature of the interest to be pursued by such mechanisms is the increasing complexity of international criminal law treaties and standards. Compared to past agreements, modern international conventions aimed at the suppression of crime (*rectius:* holding criminal activities at acceptable levels), have a more prospective nature.[4] Far from being essentially reactive instruments, they are also geared towards mitigating an ongoing criminal problem, shared by different States, with a view towards achieving specific results over time. These results include the development of the rule of law, deterrence and prevention of crime, and ongoing international cooperation. Thirdly, and related, much as in the case of international human rights and environmental treaties, the mechanisms at issue are designed not to allocate legal liability, but rather to encourage States, by influence and soft power, to adopt behaviors and practices that comply with international obligations and standards. Finally, the relative effectiveness of different monitoring procedures and NCMs in the area of international criminal law depends on a variety of factors that may be identified through a comparative assessment of such instruments.

17.2 Mapping Treaty Monitoring and Non-Compliance Mechanisms in International Criminal Law

Figure 17.1 maps the range of existing mechanisms, focussing on the main treaties that oblige States Parties to criminalize specified conduct at the domestic level and cooperate internationally to prevent and prosecute those offences.

Since World War II, international criminal law has developed in a piecemeal, incremental fashion, as one, then another crime has been added to specific regimes on account of extensive treaty-making.[5]

[3] In mapping and comparing treaty monitoring and NCMs from the same era, this chapter excludes international criminal law conventions from the pre-UN Charter era and focusses on international criminal conventions that oblige State Parties to criminalize specified conduct as a matter of their domestic law without providing for individual criminal responsibility for such conduct under international law.

[4] C Rose, "Treaty Monitoring and Compliance in the Field of Transnational Criminal Law" in MJ Christensen and N Boister (eds) *New Perspectives on the Structure of Transnational Criminal Justice, Brill Research Perspectives on Transnational Crime* (Brill 2018) 40.

[5] There are various ways to define international criminal law. These include those aspects of international law involving the allocation of jurisdiction, or international cooperation in criminal matters. But the notion of international criminal law that has become widely popular among international lawyers and the public at large deals specifically with those

Through the conclusion of treaties, States have agreed to criminalize various conduct at the domestic level and to cooperate internationally to prevent and prosecute those crimes.[6] But the adoption of these treaties has not been consistently accompanied by efforts to monitor compliance with them after their entry into force. Thus, there has been a tendency by the few international lawyers who have dealt with the issue systematically to stress the scarcity of compliance monitoring mechanisms in the field.[7] My own view is slightly different. It is undeniable that the current state of

crimes that are directly criminalized by international law, which also provides for individual criminal responsibility for such conduct. Such crimes, conventionally referred to as "core crimes," are genocide, crimes against humanity, war crimes and aggression, and, along with terrorism and torture, constitute the main or exclusive ambit of investigation of well-known textbooks. See, e.g., WA Schabas and N Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) Part II; A Cassese and P Gaeta (eds), *Cassese's International Criminal Law* (3rd ed., Oxford University Press 2013) Part II. On his part, R O'Keefe, *International Criminal Law* (Oxford University Press 2015) para 2.20, posits, following a conception advocated by Cherif Bassiouni, that an international crime is merely "a crime defined by international law, whether customary or conventional." This is, he adds, "the sole characteristic shared by every offence with a claim to the denomination 'international crime'." (Ibid.) On the grounds of such an inclusive approach to the notion of international crime, the scope *ratione materiae* of international criminal law includes, *inter alia*, crimes that in the taxonomy proposed by other scholars are defined as "transnational crimes." This is a problematic label for several reasons (Ibid., paras 2.47 and 2.48) starting from the very fact that the conduct to which it refers does not necessarily straddle state frontiers – such as drug trafficking, money laundering, trafficking in human beings and the like. More precisely, international criminal law includes offences defined by customary international law; "crimes under treaty," namely "offences, defined by international law, which give rise to the individual criminal responsibility of the perpetrator as a matter of international law itself" (specifically, by virtue of a secondary rule of customary international law); and "crimes pursuant to treaty," by which it is meant that treaties oblige States Parties "to criminalize specified conduct as a matter of their municipal law without providing for individual criminal responsibility for such conduct under international law." (Ibid. para 7.3). Interestingly, the sub-area of international criminal law under discussion has lately caught the attention of both the media and legal scholars for the cases of allegations of misappropriation of public funds by heads of States, ministers and members of their families in their country of origin (mainly African or Eastern European States), the proceeds of which had allegedly been invested in Western jurisdictions, as well as, on occasion, for the resulting application of the international rules on immunities in the context of the criminal proceedings against these persons. For a recent and remarkable example, see ICJ, *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Judgment, ICJ Reports 2020, 300.

[6] Rose (n 4) 40–1; O'Keefe (n 5) chapters 4 and 7; and N Boister, *An Introduction to Transnational Criminal Law* (2nd ed., Oxford University Press, 2018) Part B, "Crimes."

[7] This opinion is voiced by Rose (n 4) 41: "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." From a different perspective, see also Boister (n 6) 407–11.

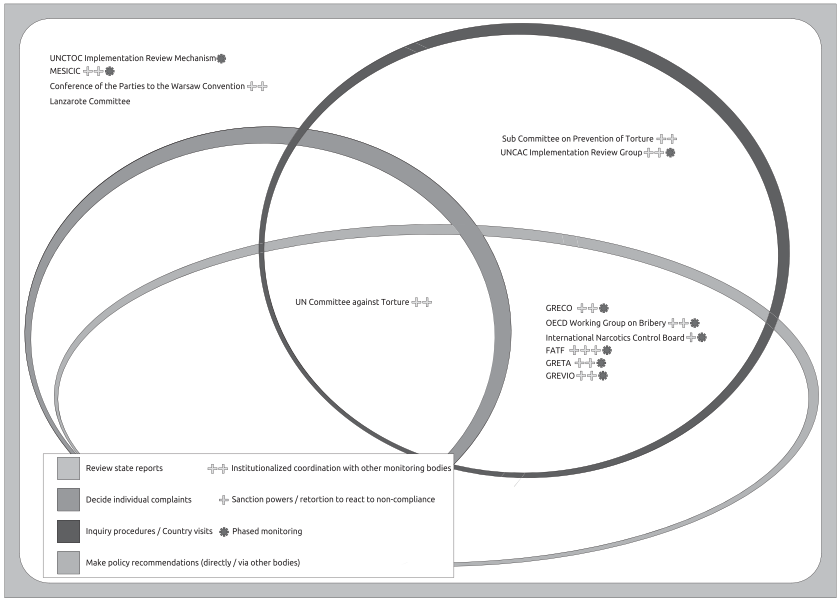

Figure 17.1 Treaty Monitoring and Non-Compliance Mechanisms - International Criminal Law

treaty monitoring in international criminal law is not as developed as in other areas of international law, such as international environmental law and human rights law.[8] However, the scarcity of sectoral international supervision seems overstated. In fact, international monitoring in international criminal law is evolving in different ways.[9] These range from the progressive development of NCMs for multilateral treaties negotiated under the auspices of the United Nations (UN), such as the review mechanisms for the UN Convention against Corruption (UNCAC)[10] and the United Nations Convention on Transnational Organized

[8] See Chapters 2, 3, 5, 6, 11, 13, 14, 15 and 16 in this book and the wide literature referred to therein.

[9] L Borlini, "Il controllo internazionale tra standardizzazione, coordinamento e 'contaminazione'" in A Annoni, S Forlati and F Salerno (eds), *La codificazione nell'ordinamento internazionale ed europeo* (ES 2019) 591, 595–8.

[10] United Nations Convention against Corruption, adopted 31 October 2003, entered into force 14 December 2005, 2349 UNTS 41 (UNCAC).

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Crime (UNCTOC)[11] and its Protocols;[12] to the proliferation and sophistication of monitoring procedures established in the context of regional organizations; and the operation of fairly complex, wide-ranging and rigorous NCMs to ensure that international standards on the prevention and repression of specified international crimes such as money laundering, terrorist financing and financing of the proliferation of weapons of mass destruction (WMD) are put into effect, despite the fact that such codes are not legally binding.[13] I will now elaborate on each of these distinct developments.

17.2.1 Universal Suppression Conventions and Treaty Monitoring

UN criminal law conventions concerning torture, drug control, corruption, money laundering and different forms of organized crime – including trafficking in persons, smuggling of migrants and illicit manufacturing and trafficking in firearms – are accompanied by NCMs. There are too many instances by now for these to be discounted as constituting merely a "few exceptions" to a general absence of treaty

[11] United Nations Convention against Transnational Organized Crime and the Protocols Thereto, adopted 15 November 2000, entered into force 29 September 2003, 2225 UNTS 209 (UNCTOC).

[12] Protocol to Prevent, Suppress, Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, adopted 15 November, 2000, entered into force 25 December 2003, 2237 UNTS 319 (Trafficking Protocol); Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, adopted 15 November 2000, entered into force January 28 2004, 2241 UNTS 507 (Smuggling Protocol); Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime, adopted 31 May 2001, entered into force June 3 2005, 2326 UNTS 208 (Firearms Protocol). Analyses of the legal framework established by these protocols are offered, by, among others, T Obokata, "Human Trafficking" in N Boister and RJ Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 171; AT Gallagher and F David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014); A Schloenhardt, "The UN Protocol against the Smuggling of Migrants by Land, Sea and Air 2000" in P Hauck and S Peterke (eds), *International Law and Transnational Organized Crime* (Oxford University Press 2016) 169; DL Rothe and JI Ross, "The State and Transnational Organized Crime: The Case of Small Arms Trafficking" in F Allum and S Gilmour (eds), *Routledge Handbook of Transnational Organized Crime* (Routledge 2012) 391.

[13] Borrowing from D Thürer, "Soft Law: Norms in the Twilight between Law and Politics" in D Thürer (ed.), *International Law as Progress and Prospect* (Nomos 2009) 159, at 166: "in other words: soft law is sometimes coupled with hard procedures."

monitoring in international criminal law.[14] Quite the contrary. In surveying the catalogue of international criminal treaties that aspire to attract universal participation,[15] the lack of treaty compliance monitoring mechanisms is notable only with respect to the terrorism suppression conventions. This can be ascribed to the sheer number and range of treaties in this area.[16] None of the fourteen universal terrorism suppression conventions, concluded between 1963 and 2010, creates a monitoring body, even though these agreements "were concluded under the auspices of existing international organizations that might have played such a role."[17]

[14] Rose (n 4) 40.

[15] This subset of crimes defined by international conventional law includes torture; drug trafficking; the different forms of terrorism that are defined by UN treaties; slavery, human trafficking and migrant smuggling; firearms trafficking; other forms of transnational organized crime; corruption and money laundering.

[16] 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 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, entered into force 1 July 2018, ICAO Doc 9960, DCAS Doc No 21. See MC Bassiouni, "Enslavement as an International Crime?" (1991) 23 *New York University Journal of International Law and Politics* 445.

[17] Rose (n 4) 48.

The situation of other universal suppression conventions is markedly different. Granted, in adopting early treaties on crimes such as human trafficking, prostitution and slavery in the post–World War II era, States refrained from establishing monitoring bodies.[18] In fact, those conventions require States Parties to communicate implementing legislation and regulations to the UN Secretary General, but do not call for the Secretary General, or any other body, to independently monitor and review these communications. Yet, over the past twelve years, two important mechanisms have been created. The first, UNCAC's monitoring system, was established relatively recently, in 2009.[19] Specifically, UNCAC 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."[20] Although the negotiations concerning a review mechanism for the UNCAC stretched from 2006 to 2009, they were ultimately successful. The Implementation Review Group (IRG), a subsidiary body of the Conference of the States Parties to the UNCAC, responsible for maintaining an overview of the review process and considering technical assistance requirements for the effective implementation of the Convention, began operating in 2010. Since then, the UNCAC IRG has carried out a relatively large-scale peer review process involving the treaty's nearly 180 States Parties.[21] 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 State Parties, which produce a country review report with the help of the United Nations

[18] 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, Article 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, Article 8. Moreover, 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. Abolition of Forced Labour Convention (International Labour Organisation Convention No 105), adopted 25 June 1957, entered into force 17 January 1959, 320 UNTS 291.

[19] For a critical assessment of this mechanism, see M Arnone and L Borlini, *Corruption: Economic Analysis and International Law* (Edward Elgar 2014) chapter 16.

[20] UNCAC (n 10) Article 63(7).

[21] P Webb and O Landwehr, "Article 63: Conference of the States Parties to the Convention" in C Rose, M Kubiciel and O Landwehr (eds), *The United Nations Convention against Corruption: A Commentary* (Oxford University Press 2019) 627, at 636–37.

Office on Drugs and Crime (UNODC). This report, however, may only be published with the consent of the Party under review.[22] The review process is phased, meaning that the IRG reviews the implementation of only a couple of chapters of UNCAC in each review cycle.[23]

Secondly, after quite a prolonged limbo, in October 2018, State Parties to the UN Convention against Transnational Organized Crime and its Protocols eventually agreed on the creation of a review mechanism (IRG) for organized crime, human trafficking, smuggling of migrants and trafficking in firearms.[24] This mechanism, established after nearly ten years of negotiation,[25] took the review mechanism for the 2003 Convention against corruption as a model: UNCTOC IRG is similar to UNCAC IRG in nearly every respect.[26] This is also because the two

[22] Arnone and Borlini (n 19) 475.

[23] Webb and Landwehr (n 21) at 636–37.

[24] Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Resolution 9/1, Establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 15–19 October 2018, available at www.unodc.org/unodc/en/organized-crime/intro/review-mechanism-untoc/home.html, accessed 6 October 2021.

[25] In theory, Article 32 of UNCTOC allows for the possibility that the Conference of the Parties could gather and analyze information about implementation itself, without the help of a supplementary review mechanism. For an informed explanation of why the creation of a Review Mechanism for UNCTOC proved to be controversial, see C Rose, "The Creation of a Review Mechanism for the UN Convention against Organized Crime and Its Protocols" (2020) 114(1) *American Journal of International Law* 51.

[26] The Conference of the Parties to the UNCTOC and its Protocols ultimately settled on a twelve-year programme of reviews for all States Parties, which covers UNCTOC and the three protocols over the course of four phases. Each phase covers a particular set of provisions on topics such as criminalization, international cooperation, and so on. The phases begin with a self-assessment questionnaire to be completed by the State Party under review. States provide answers to the questionnaire via a knowledge management portal hosted by UNODC, known as SHERLOC (Sharing Electronic Resources on Laws and Crime). On the basis of this questionnaire, two peer-reviewing countries conduct a "desk-based" review of the State Party, without the benefit of a country visit. Following this desk-based review, the review team produces a country review report, which it submits to the Conference of the Parties' thematic working groups (which cover trafficking in persons, smuggling of migrants and firearms). All documents produced during this review process (i.e., the self-assessment questionnaire, the country review report and the executive summary) remain confidential unless the State under review opts to make them public. See Procedures and Rules for the Functioning of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (UNCTOC Procedures and Rules for the Review Mechanism), esp. paras 20, 25 and 41.

treaties are comparable in terms of structure and main provisions (UNCAC was negotiated by the UN on the heels of the UNCTOC).

All this being said, the International Narcotics Control Board (Board or INCB),[27] created by the 1961 Single Convention on Narcotic Drugs, arguably represents the most significant and long-standing treaty monitoring body created by universal criminal law treaties. All three of the drug trafficking treaties concluded after World War II carve out a significant role for the Board as a body that provides technical assessments and monitors domestic implementation.[28] The Board, which describes itself as a "quasi-judicial body,"[29] periodically reviews the adequacy of domestic drug control legislation and policies, as well as measures taken by States Parties to tackle drug trafficking and abuse, the functioning of domestic drug control administrations and compliance with reporting obligations under the treaties.[30] The Board's review process comprises a limited number of "country missions" each year, which permit it to discuss drug control measures with domestic authorities and to obtain first-hand information about the drug control situation in the given State.[31] On the basis of these country missions and the information reported by States Parties, the Board makes findings and confidential

[27] International Narcotics Control Board, "About", available at www.incb.org/incb/en/about.html, accessed 10 August 2021.

[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. The latter treaty has come quite close to achieving universal participation: in January 2022, it had 191 Parties.

[29] International Narcotics Control Board (n 27). The composition of the Board is somewhat peculiar as it includes non-lawyer experts. The UN Economic and Social Council is responsible for electing the Board's thirteen members, of whom three are technical experts with medical, pharmacological or pharmaceutical experience selected from a list of persons nominated by the World Health Organization (1961 Single Convention on Narcotic Drugs, Article 9(1)(a)). The remaining ten members are nominated by UN member States and serve in their independent capacity, much like the members of the human rights treaty bodies (Ibid. Article 9(1)(b)). See B Leroy, "Drug Trafficking" in Boister and Currie (n 12) 229, 233-34.

[30] International Narcotics Control Board, "Treaty Compliance", available at www.incb.org/incb/en/treaty-compliance/index.html, accessed 26 August 2021; International Narcotics Control Board, *Report of the International Narcotics Control Board for 2015* (United Nations 2016) para 129.

[31] International Narcotics Control Board (n 30) paras 156–61.

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recommendations for remedial measures.[32] Besides, it is also worth recalling that 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;[33] the same approach being then followed in the UNCTOC[34] and UNCAC.[35] And the implementation of the respective mandatory provisions on criminalization of money laundering is obviously subject to the monitoring mechanisms established under those treaties respectively.

Slightly more complicated are the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[36] and its peculiar monitoring system. The Committee Against Torture (CAT) (the body of ten independent experts that monitors implementation of the Convention against Torture) and the Subcommittee on Prevention of Torture (which was created by the Optional Protocol to the Convention[37] with the mandate to visit places where persons are deprived of their liberty in the States Parties) are conventionally grouped among human rights treaty bodies. They supervise the implementation of one of "the nine core international human rights treaties,"[38] and operate much like

[32] Ibid. para 160. See also D Barrett, "Unique in International Relations? A Comparison of the International Narcotics Control Board and the UN Human Rights Treaty Bodies" (1 February 2008). Available at https://ssrn.com/abstract=1473198, accessed 12 September 2021; and Rose (n 4) 51–52.

[33] 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 3(b) and (c).

[34] UNCTOC (n 11) Article 6. See also JD McClean, *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols* (Oxford University Press 2007) 76–83.

[35] UNCAC (n 10) Article 23.

[36] UN 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.

[37] UN General Assembly, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199, entered into force 22 June 2006, available at www.refworld.org/docid/3de6490b9.html, accessed 2 February 2022.

[38] Rose (n 4) 44. The same qualification is maintained, among many, by T Kelly, "The UN Committee against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty" (2009) 31(3) *Human Rights Quarterly* 777; R McQuigg, "How Effective is the United Nations Committee against Torture?" (2011) 22(3) *European Journal of International Law* 813; and G Molina, "Article 17: Committee Against Torture" in M Nowak, M Birk and G Monina (eds), *The United Nations Convention against Torture and Its Optional Protocol: A Commentary* (2nd rev. ed., Oxford University Press 2019) 475.

other well-known human rights treaty bodies, particularly the CAT.[39] Still, there is no obvious reason to exclude the same Convention from the array of multilateral treaties that oblige States Parties to criminalize specified conduct as a matter of their domestic law and to cooperate internationally to prevent and prosecute those offences.[40]

To recap, the implementation of, and compliance with, the main universal suppression conventions are now monitored by ad hoc treaty bodies and through specific review processes, the only significant exception remaining the criminal law conventions against terrorism. The composition and functions of these bodies vary, but they can be broadly grouped into three categories: subsidiary bodies of the Conference of the States Parties to the UNCTOC and UNCAC, which are responsible for the overview of the whole monitoring process; quasi-judicial bodies that periodically review the adequacy of relevant domestic legislation and policies, as well as compliance with reporting obligations under the universal treaties against drug trafficking; and in one instance a body comprising independent experts with the mandate to visit places where persons are deprived of their liberty, in States Parties to the CAT.

17.2.2 The Development of Treaty Monitoring and Non-Compliance Mechanisms in Regional Criminal Law Conventions

Non-compliance mechanisms with respect to regional and universal treaties are hardly comparable.[41] Treaties negotiated under the auspices of regional organizations, like the Council of Europe (CoE), the Organization of American States (OAS) and the African Union (AU), may lend themselves "more readily to follow-up mechanisms within the

[39] All States Parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every four years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations." In addition to the reporting procedure, the Convention establishes three other mechanisms through which the Committee performs its monitoring functions: the Committee may also, under certain circumstances, consider communications from individuals claiming that their rights under the Convention have been violated, undertake inquiries and consider inter-State complaints. The Committee also publishes its interpretation of the content of the provisions of the Convention, known as general comments on thematic issues.

[40] See also O'Keefe (n 5) para 7.13.

[41] Arnone and Borlini (n 19) 474–75.

framework of an existing regional entity."[42] The problems involved in monitoring a universal treaty with nearly 200 States Parties are clearly different to those involved in monitoring conventions "with a much smaller number of relatively like-minded states that are already members of the same regional organization."[43] With that said, some meaningful developments of treaty monitoring in international criminal law have taken place in the context of regional organizations, which make the exploration of such instruments essential for the purposes of the present study. Over the last forty years criminal conventions concluded under the auspices of regional organizations, as well as sectoral intergovernmental institutions grouping like-minded States like the Organization for Economic Co-operation and Development (OECD), have proliferated.[44]

These instruments range from conventions on combating migration and exploitation crimes (human trafficking, migrant smuggling and child sex tourism); to treaties against commodity crimes (e.g., drug trafficking, weapons smuggling and cultural property trafficking); and so-called "facilitative" and organizational crime (money laundering, corruption, terrorism, cybercrimes). It is not possible, within the confines of the present chapter, to investigate this dense and complex network of rules in detail.[45] The same holds true with the panoply of monitoring mechanisms designed to elicit compliance with such rules. Without claiming to be exhaustive, one may refer to (a) the two instruments, other than the Trafficking Protocol, that encouragingly recognize the importance of victim protection in countering trafficking in human beings:[46] the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse;[47] and the Convention on Preventing and Combating

[42] Rose (n 4) 42.
[43] Ibid. 42. See also Borlini (n 9) 499.
[44] See, *ex multis*, Boister and Currie (n 12).
[45] When relevant for the purposes of this chapter, readers are referred to recent scholarly works that offer full analysis of the legal frameworks under discussion.
[46] These are the Inter-American Convention on Traffic in Minors 1994, adopted 18 March 1994, entered into force 15 August 1997, OAS Treaty Series No. 79; and, with greater force, the Council of Europe Convention on Action against Trafficking of Human Beings, adopted 16 May 2005, entered into force 1 February 2008, ETS No 197. The latter treaty aims to prevent and combat human trafficking, to protect and assist victims and witnesses of trafficking, to ensure effective investigation and prosecution and to promote international cooperation against trafficking. See Obokata (n 12) 178–79.
[47] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25 October 2007, entered into force 1 July 2010, ETS No 201 (Lanzarote Convention). The Lanzarote Convention requires its Parties to establish specific legislation and take measures to prevent sexual exploitation and sexual abuse of

Violence against Women and Domestic Violence;[48] (b) the array of regional conventions against illicit manufacturing and trafficking in firearms, ammunitions, explosives and the like;[49] (c) the recent Convention on Offences relating to Cultural Property;[50] (d) the influential 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime,[51] and its successor, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism;[52] (e) the development in the

children, to protect children and to prosecute perpetrators. The Committee of the Parties to the Convention, also known as the "Lanzarote Committee," is in charge of monitoring the implementation of the Convention. It is also in charge of facilitating the collection, analysis and exchange of information, experience and good practices to enhance the capacity of Parties to prevent and combat sexual exploitation and sexual abuse of children. For a comment see K Fredette, "International Legislative Efforts to Combat Child Sex Tourism: Evaluating the Council of Europe Convention on Commercial Child Sexual Exploitation" (2009) 32(1) *Boston College International and Comparative Law Review* 8.

[48] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted 11 May 2011, entered into force 1 August 2014, ETS No 210 (Istanbul Convention). The Istanbul Convention places an obligation on the Parties to effectively address violence against women and domestic violence in all its forms and to take action to prevent it, protect its victims, prosecute the perpetrators and to ensure that such actions form part of a set of integrated policies.

[49] Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials, adopted 14 November 1997, entered into force 1 July 1998, 37 ILM 143 (1998), (CIFTA); Protocol on Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region, 2001; Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, 2004; and ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, 2006. See www.poa-iss.org/RegionalOrganizations/, accessed 17 July 2021.

[50] Council of Europe Convention on Offences relating to Cultural Property, 3 May 2017, ETS No 221, not yet in force (Nicosia Convention). For a contextualization of this convention in the broader international legal framework for the protection of cultural heritage, see T Scovazzi, "International Legal Instruments as a Means for the Protection of Cultural Heritage" in O Niglio and EYJ Lee (eds), *Transcultural Diplomacy and International Law in Heritage Conservation* (Springer 2021), available at https://doi.org/10.1007/978-981-16-0309-9_11, and the literature referred to therein.

[51] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, 8 November 1990, ETS No 141, entered into force 1 September 1993.

[52] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted 16 May 2005, entered into force 1 May 2008, ETS 198 (Warsaw Convention). See WC Gilmore, *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (4th ed., Council of Europe Publishing 2011) 175–95; and for the accommodation of such international instruments in the EU, L Borlini, "Regulating Criminal

late 1990s of four regional and sectoral treaties on combating bribery and corruption[53] almost in unison with the negotiations and drafting of UNCAC and the AU Convention on Preventing and Combating Corruption;[54] (f) the CoE Convention on Cybercrime;[55] (g) the so-called, "Medicrime Convention";[56] and (h) the many regional treaties on terrorism that either (1) follow the limited approach of sectoral universal treaties by proscribing certain acts or protecting certain targets[57] or declare that terrorism offences should not be regarded as political offences in extradition law, or that States must cooperate, but do not explicitly require States to criminalize the offences;[58] or (2) define

Finance in the EU in the Light of the International Instruments" (2017) 36(1) *Yearbook of European Law* 553.

[53] Inter-American Convention against Corruption, adopted 29 March 1996, in force 6 March 1997, 35 ILM 724 (1996) (IACAC); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted 21 November 1997, entered into force 15 February 1999, 37 ILM 1(1997) (OECD Anti-Bribery Convention); Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, Council Act 97/C OJ 1997 C 195/01; and Council of Europe Criminal Law Convention on Corruption, adopted 27 January 1999, entered into force 1 July 2002, ETS No 173 (CoECLCC).

[54] African Union Convention on Preventing and Combating Corruption, adopted 1 July 2003, entered into force 5 August 2006, 45 ILM 5 (2003) (AUCPCC). Finally, the Arab Anti-Corruption Convention concluded under the auspices of the League of Arab States is the latest addition to the regional instruments on combating corruption. It was signed by twenty-one Arab countries on 21 December 2010 and has been ratified by more than fifteen countries to date. See www.acta.gov.qa/en/arab-anti-corruption-convention/, accessed 8 June 2021.

[55] Council of Europe Convention on Cybercrime, adopted 8 November 2001, entered into force 1 July 2004, ETS No 185 (Budapest Convention).

[56] Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health, adopted 28 November 2011, entered into force 1 January 2016, ETS No 211. This is the first international criminal law instrument to oblige States Parties to criminalize the manufacturing of counterfeit medical products; supplying, offering to supply and trafficking in counterfeit medical products; the falsification of documents; the unauthorized manufacturing or supplying of medicinal products and the placing on the market of medical devices which do not comply with conformity requirements.

[57] Organisation of American States (OAS) Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, adopted 2 February 1971, entered into force 16 October 1973, 1438 UNTS 194; OAS, Inter-American Convention Against Terrorism, adopted 6 March 2002, entered into force 7 October 2003, available at www.refworld.org, accessed 5 June 2021.

[58] Council of Europe Convention on the Suppression of Terrorism, adopted 27 January 1977, entered into force 4 August 1978, ETS No 90; Protocol amending the European

terrorism by reference to other treaties and then create preparatory or inchoate offences which States are required to criminalize;[59] or, more controversially, (3) define terrorism generally and require States to criminalize terrorist offences in domestic law.[60]

Non-compliance mechanisms established by regional criminal law conventions show great variety in structure, competence and procedures. The constellation of monitoring systems here is even more diverse than with universal treaties. Diverse monitoring systems oversee States' implementation of specific obligations under regional criminal law conventions, leaving aside those treaties that do not benefit from any such dedicated system.[61] These bodies may be intergovernmental and political (led by States),[62] or supervisory bodies made of independent experts (documenting and assessing implementation and enforcement of the supervised treaties).[63] Each of these entities was established either

Convention on the Suppression of Terrorism, adopted 15 May 2003, ETS No 190; South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism, adopted 4 November 1987, entered into force 22 August 1998; Treaty on Cooperation among the States Members of the Commonwealth of Independent States (CIS) in Combating Terrorism, adopted 4 June 1999, entered into force 4 June 1999; African Union Protocol of 2004 to the Organisation of African Unity Convention on the Prevention and Combating of Terrorism 1999, 8 July 2004.

[59] Council of Europe Convention on the Prevention of Terrorism 2005, adopted 16 May 2005, entered into force 1 July 2006, ETS No 196; SAARC Additional Protocol of 2004, 6 January 2004.

[60] Examples include the Arab Convention on the Suppression of Terrorism, adopted 22 April 1998, entered into force 7 May 1999; the Organisation of Islamic Cooperation (OIC) Convention on Combating International Terrorism of 1999; and the Shanghai Cooperation Organization Convention on Combating Terrorism, Separatism and Extremism, adopted 15 June 2001, entered into force 29 March 2003. On the problems of defining terrorism in international law see generally B Saul, *Defining Terrorism in International Law* (Oxford University Press 2006).

[61] This is the case, for instance, of the Inter-American Convention on Traffic in Minors; most of the regional conventions against terrorism; the EU Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States, OJ C 195, 25 June 1997, 2–11.

[62] CIFTA, for example, established a Consultative Committee gathering a representative for each State Party in order to guarantee its implementation, to promote the exchange of information, to facilitate cooperation and foster training between States. See www.oas.org/dsp/espanol/cpo_cifta_armas.asp, accessed on 20 September 2021. Another case in point is the Conference of the Parties to the Warsaw Convention, established as the Council of Europe monitoring mechanism for such treaty.

[63] Probably the most notable case of independent expert monitoring bodies, especially for the quality of its reports is the Group of Experts on Action against Trafficking in Human Beings (GRETA), which, together with the Committee of the Parties to the Council of

directly by individual States or by groups of States, as members of intergovernmental organizations.[64] Some NCMs tasked with the

Europe Convention on Action against Trafficking in Human Beings is responsible for monitoring the implementation of the Convention. The Group meets in plenary sessions three times a year, carries out on-site visits and draws up and publishes country reports evaluating legislative and other measures taken by Parties to give effect to the provisions of the Convention. In addition, GRETA regularly publishes general reports on its activities. Article 36 of the Convention stipulates that GRETA shall have a minimum of ten and a maximum of fifteen members and stresses the need to ensure geographical and gender balance, as well as multidisciplinary expertise, when electing GRETA members. They are selected from among nationals of States Parties to the Convention on the basis of their competence in the areas covered by the Convention. Members sit in their individual capacity and must be independent and impartial in the exercise of their functions. See generally S Forlati, "Monitoring Compliance with International Obligations in the Field of Human Trafficking; Towards a 'Systemic Integration' of Control Mechanisms?" in S Marchisio, C Curti Gialdino, R Cadin and L Manca (eds), *Scritti in memoria di Maria Rita Saulle* (ES 2014). Other such organs are the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), the independent expert body responsible for monitoring the implementation of the Istanbul Convention, whose first ten members were elected on 4 May 2015. The Group of Experts on Action against Trafficking in Human Beings works in conjunction with a body composed of representatives of the Parties to the Convention, the Committee of the Parties and with the African Union Advisory Board on Corruption, which is an autonomous organ established within the African Union (AU), in terms of Article 22 of the African Union Convention on Preventing and Combating Corruption. The Advisory Board, modelled on the African Commission on Human and Peoples' Rights, is the AU's only formal monitoring measure at the international level and at the level of the AU Commission. The follow-up mechanism provided for in Article 22 of the AUCPCC calls for an Advisory Board of eleven members, elected by the AU Executive Council and serving for a period of two years, renewable once, from among a list of experts of the highest integrity and recognized competence in matters relating to preventing and combating corruption and related offences. Board members are to "serve in their personal capacity," but the fact that they are proposed by States Parties does not help to guarantee their independence and impartiality.

[64] For instance, the Lanzarote Committee (i.e., the Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse) is the body established within the Council of Europe and composed of both present and potential representatives of the Parties to the Convention, to monitor whether Parties effectively implement the Lanzarote Convention. The Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption (MESICIC), the Anticorruption Mechanism of the OAS, brings together thirty-three of the thirty-four member States to review their legal frameworks and institutions in the light of the IACAC. Similarly, the OECD Working Group on Bribery in International Business Transactions (WGB), established in 1994, is a peer-review monitoring system conducted in successive phases, which is responsible for monitoring the implementation and enforcement of the OECD Anti-Bribery Convention, the 2009 Recommendation on Further Combating Foreign Bribery in International Business Transactions and related instruments. The Group of States against Corruption

oversight of regional criminal law conventions perform on-site visits; others do not.[65] Monitoring may be either "vertical," that is, a single State's performance may be evaluated across a range of obligations (also known as "country-by-country" monitoring), or "horizontal," in which States' performance of a single obligation or of a group of related obligations may be compared.[66] While some procedures are based solely on periodic consultations among the Parties,[67] or the attribution of a general supervising role to the secretariat of the regional organization

(GRECO), the anti-corruption body of the Council of Europe, is peculiar in that its membership is open on an equal footing to all forty-seven member States of the organisation, as well as to non-member States, particularly those who participated in GRECO's establishment. This explains why the United States and Belarus are members and why Canada, the Holy See, Japan and Mexico could join at any time and with little formality if they wish, according to the Group's Statute.

[65] On-site visits feature the work of GRECO, OECD WGB, GRETA and GREVIO. By contrast, the IACAC, AUCPCC, Lanzarote Convention and the Warsaw Convention do not foresee the possibility of on-site visits by monitoring bodies.

[66] This kind of assessment is common with monitoring bodies that publish periodic general reports on their activities and/or thematic reports on specific issues. See, e.g., Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS No 198, "Third Activity Report (2018–2020)", available at www.coe.int/en/web/cop198/home, accessed on 20 September 2021. The report covers the activities of the Conference of the Parties to CETS 198 as a Council of Europe monitoring mechanism during the period 2018–2020 and provides a brief horizontal review of compliance with the provisions of international standards. For a very recent example of thematic report see Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, "Thematic Monitoring Review of the Conference of the Parties to CETS No.198 on Article 10 (1 and 2), ('Corporate Liability')", C198-COP(2021)6_HR, Strasbourg 19 November 2021, available at https://rm.coe.int/c198-cop-2021-6prov-hr-art10-final/1680a53db0.

[67] Article 30 of the Council of Europe Convention on the Prevention of Terrorism contains only a general obligation for State Parties "to consult periodically with a view to making proposals to facilitate or improve the effective use and implementation of this Convention, including the identification of any problems and the effects of any declaration made under this Convention." Similarly, the Budapest Convention foresees regular consultations of the Parties who meet at least once per year as the Cybercrime Convention Committee (T-CY). More precisely, T-CY is the mechanism "enabling" consultations in line with Article 46 of the Convention, which states that the Parties "shall consult periodically . . . with a view to facilitating": "the effective use and implementation of the Convention"; "the exchange of information"; and "the consideration of possible supplementation or amendment of the Convention." The operation and activities of the T-CY are further defined by Rules of Procedure as adopted by the T-CY (Council of Europe, Cybercrime Convention Committee (T-CY), "T-CY Rules of Procedure. As revised by T-CY on 16 October 2020", T-CY (2013) (25 rev). These state in Article 1 that in pursuance of its functions, the T-CY shall, among other things, undertake assessments of the implementation of the Convention by the Parties and adopt

that originally patronized the adoption of the monitored treaties concerned,[68] certain conventions are heavily monitored with supervisory bodies working through phased reviews of the quality of implementing legislation, the application of implementing legislation, the enforcement of law and detection and other specified enforcement issues.[69] This forensic process is sometimes coupled with specific recommendations that target recalcitrant States Parties and aim to orient their future actions with regard to specific aspects of their treaty obligations.[70]

On occasion though, the same international organizations that have patronized the adoption of a given criminal law convention put out general recommendations, which, despite being related to the performance in good faith of the treaty obligations, go beyond what is strictly prescribed by the treaty regime.[71] In such cases, treaty bodies and NCMs serve also to monitor compliance with, and effective implementation of, the organization's non-binding standards, through the same type of

opinions and recommendations on the interpretation and implementation of the Convention, including Guiding Notes.

[68] Pursuant to Article 25 of the ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, the ECOWAS Executive Secretary is responsible for supporting and supervising the application of the provisions of the same treaty. Similarly, at the Third Ministerial Review Conference of the Nairobi Declaration, in June 2005, member States decided to transform the Nairobi Secretariat into a Regional Centre for Small Arms and Light Weapons (RECSA). This is now the body coordinating national efforts to implement the Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa. The same Review Conference also agreed to a set of non-binding Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol, which provide policy and practice recommendations on implementation of the Protocol.

[69] Cases in point are the Council of Europe Convention on Action against Trafficking in Human Beings, OECD Anti-Bribery Convention and CoECLCC.

[70] For instance, the monitoring mechanism of the Council of Europe Convention on Action against Trafficking in Human Beings consists of two distinct, but interacting, bodies: an independent expert body, the GRETA, which is composed of fifteen members who sit in their individual capacity; and a political body, the Committee of the Parties, which is composed of the representatives on the Committee of Ministers of the Council of Europe of the member States Parties to the Convention and representatives of the Parties to the Convention, which are not members of the Council of Europe. The main task of this latter body is to make specific recommendations, based on the GRETA's evaluation, to a Party concerning the measures to be taken as a follow-up to the GRETA's Report.

[71] A very recent case is given by the 2021 Anti-Bribery Recommendation adopted by the OECD Council on 26 November 2021, which puts in place new measures to reinforce the efforts of Parties to the OECD Anti-Bribery Convention to prevent, detect and investigate foreign bribery. See www.oecd.org/daf/anti-bribery/2021-oecd-anti-bribery-recommendation.htm, accessed 9 January 2022.

process of evaluation and pressure with the aim of inducing compliance with the treaty.[72] Also, certain monitoring bodies, like the Group of States Against Corruption (the anti-corruption body of the CoE (GRECO)),[73] have of late published reports with a view to disseminating information concerning bad and good practices in the implementation of supervised treaties and "derivative" recommendations (follow-up recommendations to supervised States about specific actions to undertake in order to pursue more effectively the general goals of the treaty in question).[74] Interestingly, particularly as opposed to a mixed practice of monitoring bodies established by universal suppression conventions, some recent regional criminal law conventions regulate the participation of civil society and NGOs in their monitoring process.[75]

17.2.3 A "Hard" Non-Compliance Mechanism Attached to Non-Binding Standards

In her chapter for this book, Malgosia Fitzmaurice discusses the development of non-compliance procedures in international environmental law

[72] For example, to prevent and combat corruption, the Council of Europe adopted a number of multifaceted legal instruments, including non-binding instruments such as Twenty Guiding Principles against Corruption (Resolution (97) 24); the Recommendation on Codes of Conduct for Public Officials (Recommendation No R (2000) 10); and the Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (Recommendation Rec(2003)4). GRECO monitors compliance with and effective implementation of the organisation's anti-corruption standards, including non-binding codes, through the same process of mutual evaluation and peer pressure.

[73] See n 64.

[74] See, e.g., Council of Europe, "Codes of Conduct for Public Officials: GRECO Findings & Recommendations", GRECO (2019)5, Strasbourg 20 March 2019, available at https://rm.coe.int/codes-of-conduct-for-public-officials-greco-findings-recommendations-p/168094256b, accessed 29 September 2021. On this practice, see generally, R Kicker and M Möstl, *Standard-Setting through Monitoring? The Role of Council of Europe Expert in the Development of Human Rights* (Council of Europe 2012) esp. 105–15.

[75] This is the case with some of the more recent COE criminal law conventions: the Council of Europe Convention against Trafficking in Human Organs establishes in Article 23 a committee which according to Article 25 shall monitor the implementation of the Convention. Article 24, para 5 of the Convention provides that "representatives of civil society, and in particular non-governmental organisations, may be admitted as observers to the Committee of the Parties", reflecting a balanced representation of the sectors concerned. Equivalent regulations are included in Article 24 para 5 of the COE Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health; and in Article 39, para 3 of the Lanzarote Convention.

by looking at their recent evolution from hard to soft; that is to say, procedures based on more facilitative than coercive methods to elicit compliance with the obligations established by multilateral environmental agreements. The case I illustrate here moves in the opposite direction, with the operation of a robust (and effective) NCM to ensure that international standards on the prevention and repression of money laundering and terrorist financing are effectively put into action, despite the fact that such codes are not legally binding. I am referring to the review mechanism attached to the forty Recommendations[76] adopted by the Financial Action Task Force (FATF) in 1990.[77] This mechanism consists of mutual evaluations or peer reviews among the organization's thirty-nine members, involving also several other jurisdictions. The FATF review process involves country visits by mutual evaluators and FATF's personnel. Under the FATF review process, member States are subject to review by their peers, under ad hoc-created groups of officials from other States. The review process culminates in the publication of

[76] FATF Recommendations, available at www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html. FATF standards currently consist of forty consolidated recommendations comprising administrative and regulatory measures to prevent the proceeds of crime from entering into the legitimate financial system, as well as wide-ranging recommendations regarding criminal law and procedure and international cooperation. As an ad hoc intergovernmental body created in 1989 to combat money laundering in the context of drug trafficking, it produced forty Recommendations on anti-money laundering in 1990. In 2001, its remit was expanded to include CTF. Since then, FATF has periodically revised these norms, so that now they also cover the financing of proliferation of weapons of mass destruction (WMD), and have been adapted, inter alia, to financial innovations introduced by new technologies, services and products, such as virtual assets, that can attract criminals and terrorists who wish to use them to launder the proceeds of their crimes and finance their illicit activities. FATF last strengthened its standards in 2019 to clarify the application of anti-money laundering/CFT financing requirements on virtual assets and virtual asset service providers. See also Y Ishii, "Blockchain Technology and Anti-Money Laundering Regulation under International Law" 2019 23(1) *ASIL Insights*, offering a preliminary discussion of the vulnerabilities of the global anti-money laundering/CFT system to these new technologies.

[77] The FATF initially consisted exclusively of developed countries, but now includes also some emerging States. Its membership embraces thirty-seven member jurisdictions and two international regional organizations (the Gulf Cooperation Council and the EU, represented by the European Commission). FATF has expanded incrementally beyond Europe, North America, the Gulf and Japan, with the addition of Argentina, Brazil and Mexico in 2000; Russia and South Africa in 2003; China in 2007; the Republic of Korea in 2009; India in 2010; Malaysia in 2016; and Saudi Arabia in 2019. FATF has also extended observer status to a number of international organizations with financial integrity functions, including the International Monetary Fund (IMF) and the World Bank.

mutual evaluation reports.[78] The first three rounds of mutual evaluations focussed on implementation of the Recommendations, while the fourth round, which is currently ongoing, covers also the effectiveness of members' anti-money laundering and counter-terrorist financing systems.[79]

To be clear, FATF develops and produces policies, not laws.[80] However, FATF's institutional design, practices and monitoring process have contributed to the spread of its standards and their influence on domestic legislation with respect to both form and content, despite the non-binding nature of these norms. As FATF has come to serve as the international standard-setter in the anti-money laundering field, about 200 countries and jurisdictions around the world have adopted anti-money laundering policies, including States like the tiny Pacific Island nation of Nauru, with a population of 10,000, no financial institutions, significant unemployment and an external debt which amounts to 75 per cent of its GDP.[81] In the case of FATF, international financial regulation, though not emanating from traditionally binding sources, is sustained by a range of enforcement tools and consequences that make it more

[78] More specifically, under FATF's Mutual Evaluation Process, member States are subject to review by their peers, in the form of ad hoc groups of officials from other States. The process, which is formalized under a specific set of FATF rules, includes visits by the evaluation group to local officials, extensive interviews and assessment of implementation on the ground. The assessment culminates with a Mutual Evaluation Report for each State, which identifies gaps in national legislation and practice regarding money laundering and terrorist financing, and suggests corrective actions. FATF publishes the main findings of the report, as well as the overall evaluation, on its website. This means that the public can see if a country is fully or partially compliant, and what the main compliance problems are. Where a member is found only partially compliant, FATF will subsequently follow up to check whether it has taken action to remedy compliance gaps. FATF closely monitors the progress made by identified jurisdictions and reflects this in FATF's public statements at the end of each plenary meeting.

Regular members of FATF go through the Mutual Evaluation Process every few years. For a synthetic overview of the Mutual Evaluation Process and Report and preliminary information about the recent round of reviews see FATF, (n 22) 29–36.

[79] See FATF, "Procedures for the FATF Fourth Round of AML/CFT Evaluations" (2021), available at www.fatf-gafi.org/en/publications/Mutualevaluations/4th-round-procedures.html.

[80] FATF Recommendations take the form of a non-binding instrument, and the thirty-nine members of FATF have made a political rather than a legal commitment to implement the FATF Recommendations. Despite the regulatory precision of their content, the Recommendations employ hortatory language, providing "only that FATF members 'should' rather than 'shall' implement them."

[81] Republic of Nauru Department of Finance, "2021 Republic of Nauru Dept Report", 1 June 2021, 5.

coercive than traditional theories of international law might predict.[82] These include the reputational and economic consequences of non-compliance in international relations.[83] Granted, FATF has no enforcement capability. But in order to become part of FATF, a candidate country must comply with a set of legal and institutional requirements, *including the implementation* of the FATF Recommendations in the form of *hard law at the domestic level*,[84] which is a mandatory requirement to remain or become a member of FATF,[85] and the FATF can suspend member countries that fail to comply on a timely basis with its standards.

Moreover, FATF has a global reach. *International expansion* has been a key FATF goal since its inception. Rather than expanding its own membership in order to achieve this, FATF has worked together with other intergovernmental bodies, known as FATF-style regional bodies (FSRBs) to create a network of nearly 200 countries. FSRBs are made up of countries that are not necessarily FATF members. They are considered FATF "associate members" and apply their own evaluation processes, which means that FSRB member countries are subject to mutual evaluations regarding compliance with FATF standards.[86] Many countries in

[82] See generally C Brummer, *Soft Law and the Global Financial System: Rule-Making in the 21st Century* (2nd ed., Cambridge University Press 2015) 143–62. See also, with specific regard to the FATF standards, L Borlini, "Soft law, soft organizations e regolamentazione 'tecnica' di problemi di sicurezza pubblica e integrità finanziaria" (2017) 100(2) *Rivista di diritto internazionale* 356; A Rodiles, *Coalitions of the Willing and International Law: The Interplay between Formality and Informality* (Cambridge University Press 2018) 158–67; and F Ní Aoláin "'Soft Law', Informal Law-making and 'New Institutions' in the Global Counter-Terrorism Architecture" (2021) 32(3) *European Journal of International Law* 919.

[83] As C Chinkin, "Normative Development in the International Legal System" in D Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in The International Legal System* (Oxford University Press 2000) 21, at 24, notes even legal norms "are not monolithic, and it is intuitively accepted that some norms are accorded greater weight than others and some are precisely framed, while others are open-ended, indeterminate, and incapable of creating precise preconditions of future behavior."

[84] The [FATF] *Handbook for Countries and Assessors on AML/ CFT Evaluations and Assessments* emphasizes that domestic measures implementing the Recommendations should impose a legal obligation. The *Handbook* specifically notes that "this standard would not be met by codes of conduct issued by private sector associations, non-binding guidance issued by a supervisory authority, or voluntary private sector behavior."

[85] Financial Action Task Force, "Process and Criteria to Become a FATF Member," available at www.fatf-gafi.org/about/membersandobservers/membershipprocessandcriteria.html.

[86] FSRBs and their members can participate in FATF meetings, provide input and engage in joint projects with FATF. When considering a revision of the forty Recommendations,

the developing world that are not members of FATF itself have become subject to FATF's standards as a result of the establishment of these regional bodies. Importantly, *FATF also holds States that are neither FATF nor FSRB members to its recommendations*. Its stated mission is to "identify national-level vulnerabilities" and, to this end, it aims to identify and engage "with high-risk, non-co-operative jurisdictions and those with strategic deficiencies in their national regimes" that pose a threat to the financial system's integrity.[87] Gadinis has convincingly argued that the *network effect* is important in anti-money efforts, because the appeal of FATF increases when new members join, as each country's addition to the FATF network increases the number of potential co-operators for countries seeking to join.[88] Also, international financial institutions' efforts to promote the stability of financial markets contribute to the reach of FATF. Recognizing the central role that FATF standards occupy in global financial regulation, influential international organizations have embraced its standards in an effort to develop robust and stable markets around the world. In their ongoing evaluation of countries' financial systems, the *International Monetary Fund (IMF) and World Bank use the FATF* standards in the context of the Financial Sector *Assessment Program (FSAP)*,[89] their joint programme aimed at providing a comprehensive framework through which assessors and authorities in participating countries can identify financial system vulnerabilities and develop appropriate policy responses.

FSRB members can offer their views but have no vote. FATF is the sole standard setter, and only FATF members vote.

[87] Financial Action Task Force, "FATF Mandate" (2019), available at www.fatf-gafi.org/publications/fatfgeneral/documents/fatf-mandate.html, Article 4. Currently, only North Korea and Iran are included in what is often externally referred to as the "black list."

[88] S Gadinis, "Three Pathways to Global Standards: Private, Regulation and Ministry Networks" (2015) 109(1) *American Journal of International Law* 1, esp. 28–32.

[89] The FSAP is a joint programme of the International Monetary Fund and the World Bank. Launched in 1999 in the wake of the Asian financial crisis, the programme brings together Bank and Fund expertise to help countries reduce the likelihood and severity of financial sector crises. The FSAP follows a three-pronged approach when looking at the country's financial sector, examining: the soundness of a financial system versus its vulnerabilities and risks that increase the likelihood or potential severity of financial sector crises; as well as a country's developmental needs in terms of infrastructure, institutions and markets; and a country's compliance with the observance of selected financial sector standards and codes. For further information, see International Monetary Fund, "Financial Sector Assessment Program (FSAP)", available at www.imf.org/en/Publications/fssa.

Finally, FATF Recommendations are backed up by *mechanisms of "soft liability"* and *"soft sanctions"*[90] that can themselves exert discipline by generating continuous pressure for compliance.[91] FATF has a rigorous process of identifying high-risk and non-cooperative jurisdictions.[92] FATF members that do not implement FATF Recommendations effectively, as indicated in their country reports, risk losing their membership. That loss could compromise a State's participation in other international fora that include government representatives, such as the Financial Stability Board.[93] Secondly, FATF's "soft sanctions" reach not only FATF members but also countries that are members of its regional bodies or that have no relationship to FATF, but that FATF suspects of harboring money launderers. On top of that, FATF calls upon its members to severely restrict, and even prohibit fully, transactions with

[90] Some authors do not hesitate to speak of soft liability, soft dispute settlement and soft sanctions. See, among others, I Seidl-Hohenveldern, "International 'Economic' Soft Law" (1997) 163 *Recueil des cours* 165–246, and, with critical tones, J Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International 1996) 158.

[91] Together with the precision of their normative content that renders them readily applicable as sufficiently identifiable prescriptive behavior, the existence of follow-up mechanisms generating pressure for compliance helps to gauge the real weight of the FATF standards and understand where they are positioned, along an ideal spectrum from soft to hard. On this continuum see O Schachter, *The Twilight Existence of Nonbinding International Agreements* (1977) 71 *American Journal of International Law* 296.

[92] As sovereign governments interested in securing one another's compliance, FATF members have mutually agreed to submit their governments' implementation efforts to periodic monitoring by foreign officials.

[93] The Financial Stability Board (FSB) was established in April 2009 as the successor to the Financial Stability Forum (FSF). At the Pittsburgh Summit, the Heads of State and Government of the G20 endorsed the FSB's original Charter of 25 September 2009 which set out the FSB's objectives and mandate, and organizational structure. The FSB has assumed a key role in promoting the reform of international financial regulation and supervision worldwide. At the Cannes Summit in November 2011, the G20 called for a strengthening of the FSB's capacity resources and governance through establishment of the FSB on an enduring organizational basis. In its Report to the G20 Los Cabos Summit on Strengthening FSB Capacity, Resources and Governance, the FSB set out concrete steps to strengthen the FSB's capacity, resources and governance and establish it on an enduring organizational footing. At the Los Cabos Summit on 19 June 2012, the Heads of State and Government of the G20 endorsed the FSB's restated and amended Charter which reinforces certain elements of its mandate, including its role in standard-setting and in promoting members' implementation of international standards and agreed G20 and FSB commitments and policy recommendations. On 28 January 2013, the FSB established itself as a not-for-profit association under Swiss law with its seat in Basel, Switzerland.

financial institutions from blacklisted jurisdictions.[94] Such limitations do not violate any international legal obligations, though they are unfriendly and thus constitute a form of retortion. FATF members control access to the most important financial markets. Shutting out countries, or persons operating from their jurisdiction, from the global financial system imposes great pressure on violators' and potential violators' governments.

All these factors taken together account for the effectiveness of the FATF review process in ensuring that international standards against money laundering and terrorist financing are complied with and put into action by States around the globe.

17.3 Nature of the Pursued Interest: Why Non-Compliance Mechanisms in International Criminal Law?

Having mapped the current state of international supervision in the area of international criminal law in Section 17.2, this section goes on to address the nature of the interests pursued by such mechanisms vis-à-vis the increasing complexity of international criminal law treaties and standards. The fragmentation and complexity of international criminal law treaties and standards is indeed key to the nature of the interest pursued by NCMs in international criminal law. International criminal law treaties concluded in the past were typically reactive in nature. These conventions mainly required the criminalization of particular conduct in

[94] See Recommendation 19 and Interpretative Note 19. Since 2000, FATF has adopted a naming and shaming approach that effectively generates a blacklist: the Non-Cooperating Countries and Territories (NCCT) process. FATF members and then controversially non-members were measured against twenty-five criteria based on the 1990 FATF Recommendations. Those that fell short were identified and classified as non-cooperative and subject to "countermeasures." The NCCT process was replaced by the International Cooperation and Review Group (ICRG) in 2006, which began operating in 2007. States revealed by this mutual evaluation process to have key deficiencies in implementation are referred for review by an ICRG regional review group and can be placed in one of two tiers either calling for consideration of the risks arising from their strategic deficiencies (the "grey" list), or the application of countermeasures by FATF members (the "black" list). Placement on the blacklist is associated with a lack of political commitment to the implementation of the Recommendations. Countermeasures include risk mitigation measures such as limiting dealings with the identified country or persons operating from that jurisdiction. For an informed introduction to this system see, among many, L de Koker and M Turkington, "Transnational Organised Crime and the Anti-Money Laundering Regime" in P Hauck and S Peterke (eds), *International Law and Transnational Organized Crime* (Oxford University Press 2016) 241.

response to ongoing problems or incidents. The terrorism suppression conventions "illustrate this point. States adopted a 'sectoral approach' to treaty-making";[95] whereby the negotiation of a treaty responded to a recent terrorism crisis or string of incidents.[96] By contrast, a number of contemporary criminal law treaties currently include a wide array of more forward-looking rules, ranging from pure criminal repression,[97] to wide-ranging preventive provisions and chapters,[98] to a cornucopia of forms of international cooperation,[99] to technical assistance rules aimed at supporting contracting Parties in the progressive fulfillment of the treaties' objectives[100] and complex rules to pursue forms of redistributive justice, epitomized by the norms on asset recovery of the UNCAC and AUCPCC.[101] In sum, modern international criminal law treaties are geared towards mitigating an ongoing criminal problem, shared by different States, with a view to achieving or maintaining a particular result in the future, including the prevention and deterrence of crime and enduring international cooperation in diverse forms.[102] Recent practice shows particularly that the "preventive component" (viz. the inclusion in the treaty regime of measures which are prophylactic in nature) is gaining importance. Obviously, the precise content of the rules on prevention varies with treaties.[103] But they have all in common that the

[95] Rose (n 4) 55.

[96] KN 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.

[97] Modern criminal law conventions oblige the Parties to criminalize a vast range of activities, and attach sanctions, including for legal persons.

[98] Comprehensive preventive measures occupy a significant part of a number of recent criminal law conventions and standards. Examples are the Lanzarote Convention; the Istanbul Convention; the Nicosia Convention; the Budapest Convention; UNCAC and AUCPCC; and the FATF Recommendations.

[99] Typically, State Parties also agree to treat the offences listed in the conventions as extraditable offences and commit to a cornucopia of forms of international cooperation, including measures of mutual legal assistance in investigations, prosecutions and judicial proceedings, for purposes such as, for example, taking evidence, executing searches and seizures, examining sites and providing information. These conventions also pave the way for further cooperation, including the exchange of information about suspects, the secondment of liaison officers or even the establishment of joint teams.

[100] Quite innovatively, at least for a universal suppression convention, UNCAC includes an entire chapter devoted to the regulation of technical assistance.

[101] See generally Arnone and Borlini (n 19) chapter 17.

[102] See also Rose (n 5) 56–57.

[103] Compare, for instance, the wide-array of preventive measures set in chapter 2 of the UNCAC with the detailed obligations to adopt specific legislation and take measures to

obligations they establish are not only normative, but also prospective in nature.

In order for these treaties to function properly, States Parties often require information about their current state of implementation, as well as the ability to adjust the rules accordingly. Viewed from this perspective, NCMs enable the operation of international criminal law treaties and standards. Despite their sometimes considerable differences in institutional architecture, powers and procedures, it is fair to say that all the analyzed mechanisms are designed not to allocate legal liability, but rather to encourage States, by influence and soft power, to adopt behaviors and practices that comply with international obligations and standards. Much like their well-known counterparts in the fields of human rights and environmental law, monitoring treaty bodies and NCMs dealing with international crimes are well-suited to apply measures of a *more facilitative quality* in lieu of traditional coercive approaches, consonant with the view that a cooperative and "managerial" approach, rather than an enforcement approach, may better address non-compliance issues, and, hence, favor prevention and consistency with international law, rather than reparation after a violation has occurred.[104] The *paradigmatic (or normative)* goal of modern international criminal law conventions (hence, the non-reciprocal character of the international obligations they establish), and their *forward-looking character* mean that adjudication may scarcely be appropriate. An infringement by one of the Parties might go by unheeded if it were only the other contracting State that has the right to demand compliance.

Most criminal law treaties today respond to the working hypothesis that there is an "interest-outcome" conundrum. The more broadly a (legal) interest is shared among States Parties (e.g., common concerns regarding specific forms of crime), and the less desirable a particular result (e.g., the proliferation of crime), then the more relevant is the shared ownership of the monitoring process. For broadly shared interests, such as, for instance, the rule of law, NCMs provide a "safer" avenue for States to address concerns than independent international courts. Traditional methods provided by the law of treaties or general

prevent sexual violence, and to protect child victims, established by chapter 2 and chapter IV of the Lanzarote Convention.

[104] A Cassese, "Supervision and Fact-Finding as Alternatives to Judicial Review: Fostering Increased Conformity with International Standards" in A Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 295.

international law are likely to be of little help in ensuring effective compliance. International oversight in the field of international criminal law is designed not to assign blame, with the gravitas and severity of "Justitia's sword," but rather to encourage States to adopt desired behaviors and practices. The overall approach is not sanctions-based; it is more educative in nature, as it works through normative alignment. In this field, NCMs are functionally directed to bypass the possibility of a unilateral assessment of non-compliance with the relevant international standards by States. Quite the reverse, they operate to verify compliance with, and induce respect for, a wide array of international rules of paradigmatic, as opposed to synallagmatic, character.[105]

17.4 Qualitative Analysis: Determinants of Effectiveness in Monitoring and Addressing Situations of Non-Compliance

Suppression of crime, future deterrence and prevention are the overarching goals of the criminal law conventions and instruments discussed in this chapter. Achieving these objectives requires implementation of the rules of the relevant criminal law conventions – both substantive and procedural – in municipal law. It also requires effective compliance with these rules,[106] particularly through enforcement of national implementing legislation and international cooperation. As suggested by a commentator, the Doha Declaration,[107] adopted in 2015 at the UN Crime Congress held in Doha, "provides a convenient lens" through which to assess "the implementation of and compliance with [international] criminal law".[108] The Doha Declaration aspires to integrate crime prevention into "the wider UN agenda addressing social and economic challenges

[105] The functional difference between these bodies and international courts raises questions about similarities and differences between the expectations associated with coercive justice, based on an "imperium," and the soft power that characterizes both the functions and design of international monitoring procedures.

[106] On this distinction see K Raustiala and A Slaughter, "International Law, International Relations and Compliance" in W Carlsnaes, T Risse and BE Simmons (eds), *Handbook of International Relations* (Sage 2002) 538 referred to also by Boister (n 6) 401.

[107] Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation (UN 2015), available at www.unodc.org/documents/congress/Declaration/V1504151_English.pdf, accessed 6 October 2021 (Doha Declaration).

[108] Boister (n 6) 402.

and promoting the rule of law,"[109] openly recognizing that "sustainable development and the rule of law are strongly interrelated and mutually reinforcing".[110]

There is a gap between suppression conventions and their implementation. These treaties "have not yielded the expected dividends in terms of effective international cooperation".[111] Boister goes further in observing that "[m]any states join these treaties, some reform their laws, but most never use them," concluding that "general support for them appears to be largely rhetorical."[112] Formal commitment is not the same as material compliance. What is undisputable is that neither implementation of, nor compliance with these treaties can be taken for granted. And States are rarely held legally accountable through international dispute settlement for non-compliance.[113]

Compliance is in fact the "product of a range of complex interactions between legal, political, social, and moral norms as well as the real advantages/disadvantages of compliance and the pressure that large powerful states and civil society exert in the promotion of compliance."[114] These relations are imponderable in the abstract. However, scholars and practitioners have identified the circumstances that, in general, favor or jeopardize implementation and compliance with

[109] Ibid. 402.

[110] Doha Declaration, para 4. As it is known, Goal 16 of the UN's post-2015 SDGs is the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and the building of effective, accountable institutions at all levels. Among the objectives indicated in Goal 16 of direct relevance to the suppression of the international crimes discussed in this chapter are the ending of child trafficking, significant reduction of arms trafficking, significant reduction of illicit financial flows, strengthening of stolen asset recovery, combating organized crime, reducing corruption and developing capacity to combat violence, terrorism and crime.

[111] Y Dandurand and V Chin, "Implementation of Transnational Criminal Law", in Boister and Currie (n 12) 437, at 440.

[112] Boister (n 6) 402.

[113] Note, for instance, the UN suppression conventions contain the standard compromissory clauses for the settlement of disputes about implementation: negotiation, arbitration and finally submission for adjudication before the International Court of Justice (ICJ). See, e.g., Article 32(4) of the 1988 Drug Trafficking Convention; Article 35 of the UNTOC; Article 66 of the UNCAC. However, as a matter of fact, the dispute resolution mechanisms established by international criminal law treaties have not been used, often because Parties to these conventions very rarely hold each other to legal account for violation of suppression conventions, preferring to deal with these matters through diplomacy.

[114] Boister (n 6) 418.

international criminal conventions.[115] Among these conditions, effective mechanisms to review implementation and incentivize compliance are usually considered critical. Gathering and reviewing information about the steps State Parties have taken to implement a suppression convention bears the potential embarrassment "of publicity about poor performance."[116] Although typically contemplated in the form of a facilitative mechanism, a finding of non-compliance may indeed be regarded *latu senso* as a "sanction," creating political discomfort for the State concerned.[117] Importantly, such a finding does not entail legal consequences. The relative effectiveness of different NCMs in international criminal law, indeed, mainly depends on operational factors.

What are the elements impacting on the effectiveness of the various NCMs? Certain elements are general and highly contextual, but, at the same time, may be decisive. By way of example, the global political climate has lately become less hospitable to internationalization efforts of the kind described in this work, with increasing tensions among global powers, nationalism on the rise and international organizations under stress. This has an effect on the operation of NCMs irrespective of their specific features. Similarly, the low cost of commitment in jurisdictions where the rule of law is not embedded encourages treaty ratification and

[115] Other than the existence and effectiveness of NCMs, a number of other factors obviously impact on compliance with international criminal law conventions, including the general reluctance of States to submit their criminal justice systems to external scrutiny; whether norms are self-executing or not; the hierarchical rank they have under national law; the quality and formulation of specific obligations (e.g., whether they set minimum standards or best practices); States Parties' actual capacity for implementation, especially developing countries; the fact that suppression conventions are not designed with a coherent system of implementation in mind and, hence, most new treaties present States with an entirely separate law reform exercise; and the persistence of the States' will to implement obligations undertaken at diplomatic conferences when the time comes. This latter determinant depends on a variety of circumstances, including the motivations driving the participation in the treaty making process – it is not infrequent that States have participated in the process of the development of the treaty for reasons other than an authentic desire to suppress the particular conduct, such as, for instance, pressure by other States or promise of aid. Also, as Boister (n 6) 406 notes, "there may have been very little agreement to take concrete steps in the first place, something usually indicated by the fragmented nature of the legal obligations in a convention (e.g., take the Firearms Protocol)."

[116] Ibid., 407.

[117] See G Ulfstein, "Treaty Bodies and Regimes" in DB Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press 2012), 428, 441–42.

jeopardizes compliance.[118] Further, States "with integrity deficits resist being scrutinized by others."[119]

Other factors of particular interest to us here are more strictly related to the design and architecture of NCMs. Consider self-reporting in answer to a questionnaire. It is a common method,[120] especially insofar as it constitutes the first step of more sophisticated procedures. Depending on the Parties alone is,[121] however, "an invitation to abuse."[122] This is why modern suppression conventions resort to two main alternatives, by relying either on *expert review* or on *peer review* of a Party's performance. Independent expert review is epitomized by committees like GRETA, which gathers information for evaluation from Parties by questionnaire (which Parties are obliged to answer) and from civil society, and may also use in-country visits and hearings before making a report.[123] The Group's evaluation reports are rigorous and of high quality.[124] This is essential also for the accuracy of the specific recommendations the Committee of the Parties may make, on the basis of the report and conclusions of GRETA, to a Party concerning the measures to be taken as a follow-up to a GRETA Report. The precision of GRETA evaluations depends on different elements, particularly the expertise of its individual members in the areas covered by the supervised Convention; the structure of the evaluation procedures in multiple rounds; and the body's own capacity both to identify shortcomings,

[118] See OA Hathaway, "The Cost of Commitment", John M Olin Center for Studies in Law, Economics, and Public Policy Working Papers No 273, available at http://digitalcommons.law.yale.edu/lepp_papers/273/ accessed 4 October 2021.

[119] SM Redo, *Blue Criminology: The Power of United Nations Ideas to Counter Crime Globally* (HEUNI 2012) 189.

[120] Completed questionnaires must be submitted on a periodic basis and are used by convention secretariats to compile reports for the purpose of review. As aptly remarked by Dandurand and Chin (n 111) 478, reporting is often encumbered by technical issues, lack of human and financial resources, language barriers, and complexity of, and lack of clarity about the nature and relevance of the information required.

[121] The self-assessment was the primary means of review of implementation of UNCAC up until the establishment of the IRG pursuant to Article 63(5) in 2009. Initially, a Self-Assessment Checklist was created on the initiative of the Conference of State Parties (CoSP) by the secretariat so that State Parties could identify their technical assistance needs. In response, seventy-two States Parties submitted self-assessment reports to the Secretariat.

[122] Boister (n 5) 407.

[123] See www.coe.int/en/web/anti-human-trafficking/greta, accessed 2 January 2022.

[124] See, e.g., the recent evaluation's report on Croatia. GRETA, "Evaluation Report: Croatia. Access to Justice and Effective Remedies for Victims of Trafficking in Human Beings", GRETA(2020)10, 3 December 2020.

and to take cognisance of good practices in compliance with the CoE Convention on Action against Trafficking in Human Beings. A precondition for GRETA's "effective" operation is the identification and collection of information allowing a quantitative and qualitative analysis of the effectiveness of member States' judicial systems. This is information that, like the other CoE's monitoring bodies,[125] GRETA can leverage: the work of an important late addition to the organization's institutional construction, the European Commission for the Efficiency of Justice (CEPEJ),[126] a body that has no equivalent in other international organizations.

As a second alternative to self-reporting, peer review of a Party's performance by other Parties is generally assumed to be a powerful monitoring methodology because it involves peer pressure.[127] While mutual evaluation of this kind was already used within the FATF system, it was pioneered in its treaty form under the OECD Anti-Bribery Convention and, then, by GRECO, which, as noted, was set up to complement the CoE's six anti-corruption instruments. The GRECO monitoring mechanism has two main components: an evaluation procedure which is based on on-site visits and the issuing of evaluation reports, as well as country-specific recommendations; and a fully-fledged impact assessment ("compliance procedure") designed to appraise the measures taken by its members to implement the recommendations emanating from country evaluations.[128]

Having spelled out the main alternatives for effective review, it remains to note that the form of review *per se* is no guarantee of effectiveness. As a matter of fact, poorly effective mechanisms exist among both expert- and

[125] To remain in the area of expert review, this is the case, for instance, of GREVIO and the Lanzarote Committee.

[126] A relatively late, and yet essential, initiative taken to take cognisance of good practices in compliance with the organization's *acquis juridique* dates back to 2002 when the Committee of Ministers established the European CEPEJ. Its objective is to compare judicial systems, exchange experiences and to define concrete measures to improve the efficiency and functioning of legal systems in Europe, including a better implementation of international legal standards elaborated under the auspices of the Council of Europe. See Council of Europe, CM Res (2002)12; for a detailed overview, see M Breuer, "Establishing Common Standards and Securing the Rule of Law" in S Schmahl and M Breuer (eds), *The Council of Europe: Its Law and Policies* (Oxford University Press 2017) para 28.55.

[127] This position is voiced, among others, by Boister (n 6) 408.

[128] For an informed assessment of this monitoring mechanism see W Rau, "Group of States Against Corruption" in Schmahl and Breuer (n 126) 444.

peer review-based varieties. Expert committees may be fairly powerless in some instances. The Advisory Board set up under the auspices of the AUCPCC, for example, has, virtually no role in monitoring, and is, in effect, "a toothless think tank."[129] NCMs based on peer review, too, have been criticized for their inability to orient the future conduct of States and incentivize compliance with criminal law treaties. Non-compliance mechanisms in the area of the suppression of trafficking in firearms, when existent at all, have been so far poorly effective.[130] Looking again at anti-corruption treaties, MESICIC has not been able to modify the excessive discretion the IACAC gives to States Parties as to the timetable within which they have to implement treaty obligations. And, while the OECD WGB has developed a robust peer review mechanism that adopted a four-phase review of the quality of implementing legislation, the application of implementing legislation, the enforcement of law and detection and other enforcement issues,[131] the peer review system established in 2009 by the CoSP to the UNCAC is affected by the scarcity of available information on country visits; the absence of follow-up procedures on recommendations made in country reviews; and the fact that publication of self-assessment reports and country review reports is not mandatory and depends on the authorization of States Parties.[132] Not

[129] Boister (n 6) 408. See also J Wouters, C Ryngaert and S Cloots, "The International Legal Framework against Corruption: Achievements and Challenges" (2013) 14 *Melbourne Journal of International Law* 205, 230–31.

[130] See CE Drummond and AE Cassimatis, "Weapons Smuggling" in Boister and Currie (n 12) 247.

[131] The above-described forensic process has allowed the OECD Working Group of Bribery (WGB) to target recalcitrant parties. For example, an increasingly hostile attitude from the WGB pressured the UK into adopting the Bribery Act 2010. Prior to that, the UK – a party to the convention since 1997 – had had a poor record in regard to the adoption of legal machinery to combat corruption and had failed to pass the necessary laws to prevent British companies from engaging in foreign corruption. The UK's ineffectual response drew strong criticism from the Working Group on Bribery, whose chairman, frustrated at the British Chamber of Industries' long rearguard action resisting change eventually threatened the UK with sanctions (a power the Convention did not actually provide for). See C Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford University Press 2015), 83 et seq. For a general assessment of peer review and compliance with the 1997 OECD Convention against bribery see H Jongen, "Peer Review and Compliance with International Anti-Corruption Norms: Insights from the OECD Working Group on Bribery" (2021) 47(3) *Review of International Studies* 331–52.

[132] When a State Party refuses to authorize the publication of reports, the UNODC can only publish the executive summaries. These summaries are informative, but the relatively low number of published country review reports considerably restricts the possibility of

surprisingly, similar drawbacks seem to affect the review mechanism created to monitor the implementation of UNCTOC and its Protocols.[133]

To conclude on the point, the analysis of the NCMs discussed in this chapter shows that it is the combination of a number of legal and extra-legal factors surrounding the design and functioning of these mechanisms that most impacts on their relative effectiveness. In general, the problems surrounding the design and operation of NCMs established under regional conventions and treaties among "like-minded" States, on the one hand, and universal treaties, on the other, are hardly comparable. With the former category of treaties, the creation of robust review mechanisms that can substantially pressure States Parties into improving compliance is certainly less difficult, as implicitly confirmed by the protracted negotiations that eventually led to the creation of UNCTOC's Review System. Funding and allocation of resources are obviously critical factors and are frequently divisive issues as among the Parties to universal suppression conventions.[134]

From an institutional perspective, important elements are: (a) a balanced mix of "vertical," (i.e., a single State's performance may be evaluated across a range of obligations), and "horizontal" monitoring, (in which many States' performance of a single obligation or of a group of related obligations may be compared);[135] (b) the division of the monitoring process into phased reviews of the quality of implementing legislation, its application, enforcement of the law and detection of offences and other enforcement issues;[136] as well as (c) the institution of follow-up procedures based on full-fledged evaluation reports on implementation.[137] Even if exceptional in international criminal law, treaty bodies of a so-called "quasi-judicial" nature (bodies that are not courts, but do decide individual complaints), may help put greater

assessing the adequacy of the summaries and the availability of detailed information on the shortcomings of national implementing legislation.

[133] As observed *supra* Section 17.2.1, the two treaties are closely related and UNCTOC's Review Mechanism took UNCAC's Review Mechanism as a model. Early criticism on the effectiveness of UNCTOC's Review Mechanism is expressed by Rose (n 25) 59–62. A different view is proposed by SM Redo, "The United Nations Criminal Justice System in the Suppression of Transnational Crime" in Boister and Currie (n 12) 57, esp. 62–65.

[134] See further Rose (n 25) 59–60.

[135] Vertical review, in particular, provides a channel to share good practices and challenges.

[136] The cases of GRECO, OECD WGB, GRETA and the FATF Mutual Evaluations are most illustrative.

[137] Recall again the complex monitoring mechanism of the Council of Europe Convention on Action against Trafficking in Human Beings.

compliance pressure on States.[138] As the creation of the CEPEJ shows, intra-organizational cooperation may also strengthen monitoring.[139] The same holds true with inter-organizational cooperation, especially when it is directed to channel expertise and challenges among monitoring mechanisms supervising treaties on similar/identical crimes, and, hence, also streamline burdensome reporting requirements. For instance, sharing of expertise and coordination of planning among GRECO, the WGB, MESICIC and the UNCAC monitoring system is facilitated through the close relations maintained among relevant international organizations, which have observer status within one another's NCMs.[140]

Finally, multilateral criminal treaties themselves do not commonly grant powers of sanction to monitoring bodies. The 1961 Single Convention (as amended) and the 1971 Psychotropic Conventions are the exceptions in that they grant the International Narcotics Control Board (INCB) power to impose sanctions on State Parties.[141] However, "these powers have never been used and similar powers have not been included in other treaties."[142] As explained above, a finding of non-compliance may determine only negative consequences in international relations by exposing the State concerned to political embarrassment or, as the outstanding example of the FATF standards evidences, to harsh forms of "market pressure."

[138] This is relevant for the purposes of this chapter only in relation to monitoring bodies established in human rights treaties that include also criminal law obligations, such as the international conventions against torture. See A Cassese, "A New Approach to Human Rights: The European Convention for the Prevention of Torture" (1989) 83(1) *American Journal of International Law* 128.

[139] For a discussion of other insightful examples of intra-organizational cooperation see Rau (n 127) 21.15–21.19.

[140] Cf. Conference of the States Parties to the United Nations Convention against Corruption, Resolution 7/4, "Enhancing Synergies between Relevant Multilateral Organizations Responsible for Review Mechanisms in the Field of Anti-Corruption", adopted at its Seventh Session, Vienna, 6–10 November 2017, available at www.unodc.org/unodc/en/corruption/COSP/session7-resolutions.html, accessed 31 July 2021; and GRECO, 80th GRECO Plenary Meeting, Decisions, Greco(2018)11, Strasbourg, 22 June 2018, para 35–36, available at https://rm.coe.int/decisions-80th-greco-plenary-meetingstrasbourg-18-22-june-2018-/16808b655f, accessed 31 July 2021.

[141] In terms of Article 145 of the 1961 Single Convention, for example, the INCB can call the parties' attention to breaches and call for special studies to be made. In the case of a serious endangerment of the Convention's aims or the development of a serious situation, or where these measures are most appropriate to facilitate cooperative action, it can make a report to the United Nations Economic and Social Council (ECOSOC) and recommend an embargo on the import and export of drugs to the defaulting State.

[142] Boister (n 5) 412.