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In Rem Alternatives to Extradition for Money Laundering

KEITH R. FISHER*

The Lloyds insurance market, jewelry stores, sporting goods stores, accountants, car dealerships, realtors, art galleries, video stores, dry cleaners, horse racing, the United States Postal Service, bars and night clubs, law firms, boat dealers, parking lots, travel agents—what do these things have in common? Perhaps the title of this article gives the answer away: All of them have been at least accused, and in many cases convicted, of being involved in money laundering.¹

This is only the tip of the iceberg, of course. Though often thought of as the province of financial institutions—principally banks, but also broker-dealers, thrift institutions, insurance companies, and so forth—money laundering has become much more pervasive, infecting not only other more or less financially-oriented firms (*bureaux de change*, international money transmitters, casinos) but also hotels, restaurants, vending machine operators and a host of retail businesses large and small. Virtually any business that is cash-intensive will do, and its owner may—wittingly or unwittingly—become the cat's paw of unscrupulous money launderers.

* Associate Professor of Law, Suffolk University Law School. The author wishes to express his appreciation to his colleague, Professor Valerie Epps, for her support and encouragement, as well as for her willingness to share her vast knowledge of public international law, and, as always, to Dennis J. Lehr, Esq. of Hogan & Hartson for his peerless insights and sophistication in financial regulatory matters.

1. Money laundering, traditionally defined, is the act of concealing or disguising the proceeds of criminal activity in order to make them appear to have been legitimately obtained. Recent developments have shown that money laundering can also involve the unlawful movement of legitimate funds for the purpose of financing nefarious activity—so-called “reverse” money laundering, which has been linked to terrorism.

Notwithstanding the internationalization of anti-money laundering enforcement, extradition has not proved to be useful. This is so for a number of reasons.

Extradition—the practice of prising the scoundrel from his last refuge²—is a process of international cooperation that not only is anachronistic³ but also poses many legal hurdles. First, any *obligation*⁴ of international extradition is regarded by national courts as subject to treaty.⁵ The same is true in multinational judicial bodies, such as the International Court of Justice: Country B has no obligation to extradite one of its residents to Country A in the absence of an extradition treaty.⁶ Second, such treaties are generally bilateral, making extradition from certain bank secrecy jurisdictions problematic, since they are unlikely to part too willingly with the goose that lays the golden egg.⁷ Third, the crime

2. A more precise definition of extradition is the “surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.” BLACK’S LAW DICTIONARY 585 (6th ed. 1990).

3. “The present extradition laws belong to the ‘world of the horse and buggy and the steamship, not in the world of commercial jet air transportation and high speed telecommunications.’” GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 1 (1991) (quoting a letter to Senator Edward Kennedy from former U.S. Attorney General Benjamin Civiletti).

4. Exceptionally, in some countries, extradition may be provided as a matter of comity, reciprocity, or further to appropriate domestic legislation. See *United States v. Raushcer*, 119 U.S. 407, 411–12 (1886). Obviously, this is purely a matter of national discretion, not of binding international obligation; see also M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION 17 (3d ed. 1996).

5. See, e.g., *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933); *In re Extradition of Howard*, 996 F.2d 1320, 1329 (1st Cir. 1993); *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir. 1986); see also Valerie C. Epps, *The Validity of the Political Offender Exception in Extradition: Treaties in Anglo-American Jurisprudence*, 20 HARV. J. INT’L L. 61, 74 (1979). Such treaties may be either bilateral or multilateral. BASSIOUNI, *supra* note 4, at 49.

6. See, e.g., *The Lockerbie Case*, 1992 ICJ Rep. 24, 31 I.L.M. 662, 666–67 (1992).

7. This is particularly true of so-called offshore financial centers (OFCs) which offer, in exchange for substantial revenues from those seeking anonymity, essentially tax-free havens with strong bank secrecy laws; state of the art telecommunications; no exchange controls; lax or non-existent regulation of banks and corporate entities (little or no auditing, no annual or other periodic reporting requirements); corporate structures that can be organized or acquired cheaply, quickly, and anonymously (including the ability to disguise the ownership of corporations or trusts through the use of nominee directors, bearer shares, and ready-for-hire trustees); predominant use of a major international currency (e.g., U.S. dollars, pounds sterling, euros); and no binding international agreements regarding cooperative law enforcement. When one associates these sorts of factors with particular jurisdictions, one would normally think of places like Antigua, the Bahamas, the Cayman Islands, Guernsey, the Netherlands Antilles, Costa Rica, Panama, and even more out of the way places like the Seychelles, Mauritius, and Vanuatu.

in question must constitute an “extraditable offense,” *i.e.*, one for which extradition is proper.⁸ Fourth, even if Country B is a party to an extradition treaty, the underlying offense for which Country A seeks to prosecute must generally also be characterized as an offense under the municipal laws of Country B.⁹ Nor is an “end run” possible: Country A cannot seek to extradite someone for one particular offense, which does satisfy this double criminality requirement, and then proceed to try him as well for another offense, which does not.¹⁰ Fifth, even a demand for extradition that satisfies all of the above criteria may be denied on the grounds of one or more domestic public policy exceptions,¹¹ perhaps the most often invoked of which is the “political offense” exception.¹²

However, more mainstream jurisdictions offer many of these benefits, *e.g.*, Liechtenstein, Austria, Luxembourg, Switzerland, as well as such “romantic” locales as Monaco, Gibraltar, and Madeira. See generally PETER LILLEY, *DIRTY DEALING: THE UNTOLD TRUTH ABOUT GLOBAL MONEY LAUNDERING* 85–104 (2000).

8. In the absence of an extradition treaty, the domicile will look to its customary practice in determining whether the offense is extraditable. BASSIOUNI, *supra* note 4, at 393. Where an extradition treaty exists, it will typically adopt one of two methods in reaching this determination: an essentially enumerative method, where the treaty simply lists those offenses that are extraditable, or an “eliminative method,” which prescribes minimum punitive measures for offenses under the municipal laws of the demanding country in order for those offenses to qualify as extraditable (thereby eliminating trivial offenses from consideration). See generally Barbara Sicalides, Comment, *RICO, CCE, and International Extradition*, 62 TEMP. L. REV. 1281, 1293–95 (1989).

9. BASSIOUNI, *supra* note 4, at 388. This is often referred to as the “double criminality” factor. Even then, extradition will depend upon the strictness or liberality of Country B’s interpretation of its own laws. A strict interpretation would require that the criminal conduct be prosecutable with the possibility of conviction under the laws of both the domicile and the demanding country; a liberal interpretation would require merely that the conduct be chargeable in both countries as a criminal offense, even if it is not the same criminal offense. *Id.* at 390.

10. Country A may prosecute only those crimes specifically listed in the extradition request. BASSIOUNI, *supra* note 4, at 429. This is known as the “specialty principle.” Note, however, that U.S. courts have occasionally permitted prosecution for additional offenses where the extraditing state is willing to waive the specialty principle, *e.g.*, *United States v. Fuentes*, 50 F.3d 1567, 1575 (11th Cir. 1995), or where it can be presumed that the extraditing state would permit it, *e.g.*, *United States v. Andonian*, 29 F.3d 1432, 1437 (9th Cir. 1994).

11. Traditionally, extradition has been refused if the offense arose under military law (*e.g.*, desertion) and not the criminal law generally applicable to the civilian (in the sense of non-military, not civil law) population. See Dominique Poncet & Paul Gully-Hart, *Extradition: The European Model*, in 2 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed. 1987).

12. BASSIOUNI, *supra* note 4, at 512 (giving as examples treason, sedition, and espionage). The political offense exception enjoys many formulations. See generally Christine van den Wijngaert, *THE POLITICAL OFFENSE EXCEPTION IN EXTRADITION* (1980); Christine E. Cervasio, *Extradition and the International Criminal Court: The*

This, like other public policy matters, will be idiosyncratically construed by the domicile's own courts, though even an intrinsically political offense (by any nation's standard) might lose that status if conjoined to a more common crime (e.g., murder, larceny) or to a particularly heinous international crime (e.g., genocide, piracy).¹³ From this lengthy (but still not comprehensive) list of excuses, one is tempted to amend the modern adaptation of Grotius's famous phrase¹⁴ to *aut dedere, aut judicare, aut tergiversari*.¹⁵

Noteworthy, in the context of anti-money laundering enforcement, is that there has also been some resistance to extradition for "fiscal" offenses.¹⁶ This category comprises offenses in connection with taxes, duties, and customs, and it is by no means a foregone conclusion that money laundering would qualify as a "fiscal" offense (it certainly would not under an *ejusdem generis* interpretation, which would likely emphasize a nexus to revenues). Nevertheless, there has been a trend away from this exception.¹⁷

Future of the Political Offense Doctrine, 11 PACE INT'L L. REV. 419 (1999); Valerie C. Epps, *Abolishing the Political Offense Exception*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM 203, 204-06 (M. Cherif Bassiouni ed. 1988).

13. BASSIOUNI, *supra* note 4, at 515-52, 567-73. Cf. European Convention on the Suppression of Terrorism art. 1, *opened for signature* Jan. 27, 1977, Europ. T.S. No. 90, 15 I.L.M. 1272, 1272 (1976) (excluding several acts from the concept of political offense).

14. *Aut dedere, aut judicare* is the modern adaptation; the phrase actually used by Grotius was *aut dedere, aut punire*. See Michael Plachta, *(Non-) Extradition of Nationals: A Neverending Story?*, 13 EMORY INT'L L. REV. 77, 123-24 (1999), citing Hugo Grotius, *De Jure Belli ac Pacis* in THE CLASSICS OF INTERNATIONAL LAW, bk. II, ch. XXI, at 526-28 (James Brown Scott ed. & Francis W. Kelsey trans., 1925).

15. Freely translated: "to hand over, to prosecute, or to shuffle and find excuses."

16. See, e.g., European Convention on Extradition, Paris, 13 Dec. 1957, E.T.S. 24; see also Bruce Zagaris, *Avoiding Criminal Liability in the Conduct of International Business*, 21 WM. MITCHELL L. REV. 749, 833 n.524 (1996) (listing tax-related or other fiscal offenses among traditional exceptions).

17. Article 2 of the Second Additional Protocol to the European Convention on Extradition, *supra* note 16, abolishes the blanket fiscal offense exception. See Gert Vermeulen & Tom Vander Beken, *New Conventions on Extradition and the European Union: Analysis and Evaluation*, 15 DICK. J. INT'L L. 265, 293-94 (1997). Given the linkage between money laundering and financing of terrorism, an innovative provision in the International Convention for the Suppression of the Financing of Terrorism affirmatively prohibits refusal of extradition on the ground that the underlying offense is a fiscal offense. International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109 (Dec. 9, 1999), available at <http://untreaty.un.org/English/Terrorism/Conv12.pdf> (last visited Sept. 21, 2003). This convention has not yet entered into force.

Even more significant, perhaps, than any of these technical legal factors, extradition is likely to be unavailable or unavailing, because the person who is prosecutable for the money laundering offense is rarely the person law enforcement really wants, the one at the top of the pyramid of unlawful activity; he is typically insulated from the nitty gritty of criminal activity, and largely operates with impunity, secure in the knowledge that he faces little risk of arrest or prosecution. Rather, the prosecutable person is likely to be someone farther down the criminal food chain, someone who can be sacrificed, if need be, without doing more than inconveniencing the criminal enterprise, and then only slightly. To visit anything more than inconvenience on a criminal enterprise, one must cause it to sacrifice more than a pawn.

If the *in personam* method of bringing the perpetrators to justice faces too many practical difficulties, then it makes sense to bring justice to the perpetrators via an *in rem* method. This is the logic behind asset forfeiture. By forcing the sacrifice of the laundered proceeds themselves, law enforcement is able to deal a genuine blow to the criminal enterprise.

For activity as global as money laundering, however, effective asset forfeiture regimes must be international in their sweep. Otherwise, criminal enterprises may easily defeat municipal forfeiture laws by the simple expedient of transferring their ill-gotten gains to another jurisdiction. Modern technology allows this to be done from the privacy of one's dwelling with the click of a mouse or the touch of a keyboard. Indeed, technological advances have been much more helpful to money launderers than to law enforcement, not only because of the increased ease and speed of global money transfers and the anonymity conferred by sophisticated encryption techniques,¹⁸ but also because of the creation of new modalities of laundering, as shown in the next section.

Part I of this article will outline, in broad terms, the scope of the problem posed by global money laundering. Part II will review the development of international asset forfeiture regimes, including an assessment of some of their current strengths and weaknesses. Finally, Part III will discuss some ideas for dealing with the more obvious weaknesses.

18. See generally Andres Rueda, *The Implications of Strong Encryption Technology on Money Laundering*, 12 ALB. L.J. SCI. & TECH. 1 (2001).

I. THE SCOPE OF THE PROBLEM

Sadly, the size and sophistication of organized crime bears little resemblance to what one would infer from the louche characters in popular media portrayals, such as the cable television series *The Sopranos*, but great resemblance to efficiently managed multinational corporations.¹⁹ Among the most commonly encountered denizens of the underground money laundering world are the so-called “Big Five”²⁰—comprising the Colombian drug cartels, the Italian Mafia, the Russian “Mafiya”,²¹ the Chinese Triads, and the Japanese Yakuza—as well as the Mexican drug cartels and various Mediterranean or Middle Eastern drug gangs (Kurds, Turks, Cypriots, etc.), terrorist groups (chiefly Islamic but others as well), Nigerian crime syndicates, and various other random outlaws (e.g., Hell’s Angels in Canada).²² Of all these groups, the Colombians—though by no means the largest or the most dangerous worldwide—have perhaps the most sophisticated, corporate-type structure,²³ of particular concern to the United States as the Colombians’ protean distribution system manages to nullify even significant law enforcement successes.²⁴

Worse yet, even as law enforcement authorities pursue international cooperation, these multinational organized criminal

19. See JOHN KERRY, *THE NEW WAR: THE WEB OF CRIME THAT THREATENS AMERICA’S SECURITY* 19 (1997). The author of this book, the junior senator from Massachusetts, has been active in congressional investigations of money laundering issues, including the BCCI scandal.

20. *Id.* at 21.

21. “Mafiya” is so spelled in order to distinguish the Russian variety from the Italian, following the usage in STEPHEN HANDELMAN, *COMRADE CRIMINAL* 21–22 (1995). The former is, despite its appellation, not limited to the current Russian Republic, of course, but spans the entirety of the former Union of Soviet Socialist Republics. See *Russian Organized Crime in the United States: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 104th Cong., 2d Sess. 2 (1996) (remarks of Senator Roth).

22. LILLEY, *supra* note 7, at 18–23.

23. See *Problems and Dangers Posed by Organized Transnational Crime in the Various Regions of the World*, in *THE UNITED NATIONS AND TRANSNATIONAL ORGANIZED CRIME* 12 (Phil Williams & Ernest U. Savona eds., 1996).

24. Some popular press accounts have chronicled the development of Caribbean gateways to the U.S. market when law enforcement coups threatened to pinch the Mexican distribution pipeline. See Douglas Farah & Serge Kovaleski, *Cartels Make Puerto Rico a Major Gateway to the U.S.*, WASH. POST, Feb. 16, 1988, at A1; Serge Kovaleski, *Cartels ‘Buying’ Haiti; Corruption is Widespread; Drug-Related Corruption Epidemic*, *id.* at A22.

enterprises have themselves made common cause in a number of instances. As Senator Kerry points out:

[C]rime today is not simply random or local; more often it is purposeful and global. The vast poppy fields in eastern Turkey are linked to the heroin dealer in downtown Detroit; the banker laundering drug money in Vienna is in league with the thriving cocaine refineries in Colombia. The men of the Chinese triads who control gambling and extortion in San Francisco's Chinatown work the same network as the Singapore gang that turns out millions of fake credit cards. The contract hit man who flies in from Moscow to kill an uncooperative store owner in New York, on behalf of the Organizatsiya, gets his fake papers by supplying the Sicilian Mafia with Soviet Army surplus ground-to-air missiles to smuggle into the Balkans to supply the Bosnian Serbs with the firepower to take on U.N. security forces.²⁵

Relatively recent estimates of the extent of global money laundering annually vary, ranging from U.S. \$500–800 billion²⁶ to U.S. \$1 trillion.²⁷ (These estimates are converted to U.S. dollars for convenience, but include, of course, laundering in all currencies). According to the International Monetary Fund, this amounts to anywhere from 2% to 5% of the world's gross domestic product.²⁸ The General Accounting Office has estimated that, in U.S. dollar-denominated assets alone, \$100–300 billion are

25. KERRY, *supra* note 19, at 24. Indeed, the increased level of cooperation among the Big Five in relation to their criminal enterprises—a kind of “honor among thieves” to the nth power—parallels that of the industrialized countries in fields such as law enforcement and economic (e.g., banking and securities) regulation. Reports of a convocation in France of “businessmen” from the Russian republic, Japan, Italy, Colombia, and Hong Kong have it that the discussion was devoted to market allocation: “carving up western Europe for drugs, prostitution, smuggling and extortion rackets.” See Andrew Alderson & Carey Scott, *Crime Kings Meet to Carve Up Europe*, SUN. TIMES, Mar. 29, 1988.

26. See *Money Laundering: Hearing Before the Comm. on Banking and Financial Services*, 106th Cong., 2d Sess. 210 (2000) [hereinafter “2000 LAUNDERING HEARINGS”] (remarks of Sen. Charles E. Schumer).

27. See *Criminal Money Laundering and Illegal Flight Capital: Hearings Before the U.S. House of Representatives Comm. on Banking and Financial Services*, 106th Cong., 2d Sess. 214, 217 (2000) (testimony of Dr. Raymond Baker, Senior Fellow, Brookings Institution).

28. 2000 LAUNDERING HEARINGS, *supra* note 26, at 67–68 (testimony of Deputy Secretary of the Treasury Stuart Eizenstat).

laundered each year.²⁹ Ominously, all of these estimates are likely to be understated, as they fail to take into account weapons of mass destruction (WMD) and terrorist dollar flow amounts.³⁰

“Cleanliness is next to Godliness,” the old adage goes, but laundering dirty money has rather the opposite tendency:

Money laundering has devastating social consequences and is a threat to national security because money laundering provides the fuel for drug dealers, terrorists, arms dealers, and other criminals to operate and expand their criminal enterprises. In doing so, criminals manipulate financial systems in the United States and abroad. Unchecked, money laundering can erode the integrity of a nation's financial institutions. Due to the high integration of capital markets, money laundering can also negatively affect national and global interest rates as launderers reinvest funds where their schemes are less likely to be detected rather than where rates of return are higher because of sound economic principles. Organized financial crime is assuming an increasingly significant role that threatens the safety and security of peoples, states, and democratic institutions. Moreover, our ability to conduct foreign policy and to promote our economic security and prosperity is hindered by these threats to our democratic and free-market partners.³¹

Similar sentiments about the deleterious effects upon society have been expressed by the Office of the U.N. Secretary General,³² by

29. U.S. General Accounting Office, *Money Laundering: FinCEN's Law Enforcement Support Role Is Evolving*, GAO/GGD-98-117 at 1 (June 19, 1998).

30. The linkage of financial crime to terrorist activities has led the Treasury Department recently to establish a new unit, known as the Executive Office for Terrorist Financing and Financial Crimes, that will oversee the Financial Crimes Enforcement Network bureau (FinCEN) and the Office of Foreign Asset Controls. See Glenn R. Simpson, *New Treasury Office to Focus on Terror Financing*, WALL ST. J., Mar. 3, 2003, at A14. The office is charged with developing and implementing U.S. government strategies to combat terrorist financing, developing and implementing the National Money Laundering Strategy and similar initiatives, participating in Treasury's evolving policies and regulations in support of the USA PATRIOT Act, and representing the United States at focused international bodies dedicated to fighting terrorist financing and financial crime. See *infra* note 50; see also Derrick Cain, *Homeland Security: Treasury Announces New Executive Office to Lead Efforts Against Terrorist Financing*, 80 BANKING REP. (BNA) 415 (Mar. 10, 2003).

31. U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, 1997, at 2 (Mar. 1998).

32. See generally Secretary-General of the United Nations, Note, *Strengthening Existing International Cooperation in Crime Prevention and Criminal Justice, Including Technical Cooperation in Developing Countries, with Special Emphasis on Combating*

economic studies performed by staff at the International Monetary Fund,³³ and by recent scholarship.³⁴

Money laundering allows criminals to infuse their ill-gotten money into the stream of commerce, in the process not only tainting with corruption a variety of financial institutions and the nation's money supply but also assisting criminals to achieve economic power that can be used to subvert other segments of the economy. By allowing past criminality to go undetected, by providing the criminal with the means to enjoy the fruits of that criminality, and by furnishing the wherewithal to finance even greater and, particularly in the case of terrorist financing, more sinister criminal schemes in the future, money laundering actually promotes continuous (and continuously growing) criminal enterprises.

Among the first nations to recognize the threat posed by money laundering was the United States. In an effort to deter routine deposits of "shopping-bagfuls" (or, indeed, truckfuls) of cash into the banking system, Congress imposed currency reporting requirements on banks and other financial institutions. Pursuant to what is commonly referred to as the Bank Secrecy Act,³⁵ financial institutions were required to file a report with the

Organized Crime, Addendum: Money Laundering and Associated Issues: the Need for International Cooperation, E/CN.15/1992/4/ Add.5 (1992).

33. See, e.g., Vito Tanzi, International Monetary Fund Working Paper 96/55, *Money Laundering and the International Financial System* (1996) (arguing that money laundering distributes tainted money around the world not on the basis of economically efficient uses, or even expected rates of return, but on the basis of ease of avoiding governmental controls, thereby distorting international allocation of resources); Peter Quirk, International Monetary Fund Working Paper 96/66, *Macroeconomic Implications of Money Laundering* (1996) (arguing that money laundering undermines the governance of banks and corrupts bankers, leading to non-market behavior that increases safety and soundness risks, and may also threaten to corrupt regulators, thereby reducing the efficacy of bank supervision).

34. See, e.g., Peter Alldridge, *The Moral Limits of the Crime of Money Laundering*, 5 BUFF. CRIM. L.R. 279, 307, nn. 81–82 (2001) (citing Donato Masciandaro, *Money Laundering: The Economics of Regulation*, 7 EUR. J. L. & ECON. 225 (1999) (asserting increasingly pollutant effect of money laundering—introduction of tainted money into the system spreads the taint to other funds)); Donato Masciandaro, *The Economics of Money Laundering (L'Economia del Riciclaggio e Della Politica Antiriciclaggio)*, LIV GIORNALE DEGLI ECONOMISTI E ANNALI DI ECONOMIA 211 (1995) (*simile*); Gianandrea Goisis, *Economic Impact of Rules Against Money Laundering*, 43 RIVISTA INTERNAZIONALE DI SCIENZE ECONOMICHE E COMMERCIALI 303 (1996) (*simile*).

35. Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in sections of 12, 18, and 31 U.S.C.) [hereinafter referred to as the "BSA"].

government (initially, with the Internal Revenue Service) on any cash transaction in excess of \$10,000—thereby creating the sort of paper trail that criminals wallowing in the anonymity of cash businesses go to great lengths to avoid.³⁶

Seek to avoid it they did—first, by “smurfing”—dividing cash deposits into amounts under \$10,000 and dispatching low-level employees to make deposits in multiple branches of multiple financial institutions; second, by availing themselves of cash substitutes such as postal money orders and “smurfing” those (in the process making the U.S. Postal Service one of the largest money launderers in the world, at least until computerized systems were developed to monitor and counter this technique); and third, by commingling “dirty” money with income from legitimate businesses and engaging in transactions in the names of third parties. This not only muddies the waters for investigators but also allows the taint of laundered money to infect these legitimate businesses and suborn other criminal misconduct.³⁷

To address these problems, Congress, more than 15 years after the BSA’s enactment, passed the Money Laundering Control Act of 1986,³⁸ this time making the act of money laundering itself a crime.³⁹ Whenever a transaction in excess of \$10,000 implicates a financial institution and involves property derived from anything on a long list of specified unlawful activities,⁴⁰ stiff civil and criminal sanctions may be imposed, including fines, imprisonment, and forfeiture.⁴¹

36. The BSA established the system of reporting requirements known as Currency Transaction Reports (CTR’s), and was aimed not at money laundering per se but at facilitating not only criminal investigations but also civil tax and financial regulatory investigations by creating a paper trail for currency transactions in excess of the statutory figure of \$10,000. See 31 U.S.C. § 5311 *et seq.*

37. See, e.g., LILLEY, *supra* note 7, at 30–34, 72–76, 80–83.

38. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of 12, 18, and 31 U.S.C.) [hereinafter the “MLCA”].

39. See 18 U.S.C. §§ 1956–57. The MLCA was the first specific criminalization of money laundering under U.S. law, including aiding and abetting money laundering, knowingly (or by ostrich-like unwillingness to see the truth) engaging in transactions involving \$10,000 or more worth of property derived from criminal activity, and structuring transactions in order to avoid BSA reporting requirements.

40. *E.g.*, narcotics trafficking, murder, kidnaping, and extortion, and extending further to cover other offenses such as espionage, bribery of foreign officials, and even food stamp fraud. See 18 U.S.C. § 1956(c)(7).

41. Where laundered funds have been commingled with “clean” money, courts are often willing to allow forfeiture of the latter, on the ground that they facilitated money laundering by obscuring the source of criminal proceeds. See, e.g., *United States v.*

These measures were reasonably effective at first and resulted in many successful prosecutions for money laundering and the confiscation of hundreds of millions of dollars in laundered funds.⁴² Nonetheless criminals, ever adaptive, found new ways to beat the system.⁴³ The ingenuity of the criminal class in transporting large amounts of cash ranged from the low-tech avoidance of the banking system altogether by old-fashioned bulk cash smuggling—using couriers to move large bundles of currency in boxes, suitcases, and concealed compartments in vehicles and shipped appliances—to increasingly complex, and increasingly international methods of laundering, for example by sending money abroad through a complex series of transactions involving shell corporations and offshore banks operating in countries without effective currency reporting or other money laundering laws.

In the United States alone, then, anti-money laundering has been the object of several legislative efforts spanning a period of over thirty years, with enactments becoming increasingly frequent during the last fifteen. After the BSA and the MLCA came, in fairly rapid succession, the Anti-Drug Abuse Act of 1988,⁴⁴ Section

Contents of Account Numbers 208-06070 and 208-06068-1-2, 847 F. Supp. 329, 335 (S.D.N.Y. 1994).

42. See 18 U.S.C. §§ 981–986.

43. This is hardly a recent development: Hawala and other Asian systems of “underground banking” have been practiced for centuries. See generally U.S. DEP’T OF THE TREASURY, FINANCIAL CRIMES ENFORCEMENT NETWORK, & INTERPOL/FOPAC, THE HAWALA ALTERNATIVE REMITTANCE SYSTEM AND ITS ROLE IN MONEY LAUNDERING.

44. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of the U.S. Code). The Anti-Drug Abuse Act, *inter alia*, enhanced civil and criminal penalties for money laundering offenses and BSA violations and established the *in rem* remedy of forfeiture of real or personal property related to any such infractions.

2532 of the Crime Control Act of 1990,⁴⁵ and the Annunzio-Wylie Anti-Money Laundering Act of 1992.⁴⁶

Even as U.S. money launderers perfected their techniques of global transfer, foreign criminals discovered the ease with which they can place the proceeds of their overseas crimes in the United States. The Bank of New York⁴⁷ and Citibank/Raul Salinas⁴⁸

45. Pub. L. No. 101-647, § 2532, 104 Stat. 4789, 4880 (1990) (codified at 12 U.S.C. § 1818(v)). The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act constitutes Title XXV of the Crime Control Act of 1990. Section 2532 thereof authorizes foreign investigations by federal bank regulators, requests for assistance from foreign banking authorities, and providing them in turn with assistance for their U.S. investigations. Cf. Federal Deposit Insurance Corporation Improvements Act of 1991, Pub. L. No. 102-242, § 206, 105 Stat. 2236, 2294 (1991) (codified at 12 U.S.C. § 3109) (authorizing disclosure of information to foreign banking supervisors where not prejudicial to the interests of the United States and, where necessary, with confidentiality undertakings).

46. See Housing and Community Development Act of 1992, tit. xv, Pub. L. No. 102-550, 106 Stat. 3672, 4044 (1992) (codified as amended in scattered sections of 12 and 31 U.S.C.) [hereinafter Annunzio-Wylie]. Targeted primarily at regulated financial institutions, Annunzio-Wylie further enhanced penalties for violations of the anti-money laundering statutes, including (in the case of depository institutions) termination of deposit insurance or involuntary conservatorship, as well as removal and prohibition orders against any institution-affiliated party (as defined in § 8(u) of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(u)) complicit in such violations. The statute also granted each financial institution immunity from civil liability to any customer (a so-called "safe harbor") as a result of the institution's compliance with reporting obligations to, or cooperation with investigative efforts by, the government, but created an additional criminal offense for "tipping off" any customer about a pending grand jury investigation or subpoena.

47. Lucy Edwards (né Lyudmilla Pritzker), a Russian-born Bank of New York executive who supervised Eastern European accounts, and her husband, Peter Berlin, pleaded guilty to laundering approximately \$7 billion in funds originating in Russia and transferred through Bank of New York accounts to third parties all over the world from 1996 to 1999. See, e.g., Raymond Bonner & Timothy L. O'Brien, *Guilty Pleas Seen in the Laundering of Russian Money*, N.Y. TIMES, Feb. 15, 2000, at A1; Liz Moyer, *Couple Plead Guilty in \$ 7B Laundering Case at Bank of N.Y.*, AM. BANKER, Feb. 17, 2000, at 18 (noting also that during this time, Edwards and Berlin transferred funds from two Russian banks, Depozitarno-Kliringovy Bank and Commercial Bank Flamingo, through Bank of New York and other international banks).

48. Raul Salinas, brother of the former President of Mexico, had extensive banking relationships with Citibank in New York. Although Raul never earned more than a salary of \$190,000, he deposited some \$100 million with Citibank. According to the *Wall Street Journal*, Citibank's handling of the matter not only represented an utter abdication of its obligations to report suspicious transactions but also, when an internal investigation was belatedly begun, was conducted by senior bank officials in a manner that blocked the bank's top money laundering compliance officer from participation. See Laurie Hays, *Citibank 'Cop' Was Kept Off Salinas Probe*, WALL ST. J., June 11, 1996, at A3 (noting also that Citibank moves U.S. \$98 trillion through ninety-seven countries each year); Laurie Hays, *U.S. Is Pressing Probe of How Citibank Handled \$100 Million for Raul Salinas*, WALL ST. J., Sept. 23, 1996, at A4; see also Anthony DePalma & Peter Truell, *A Mexican*

scandals revealed millions of dollars derived from organized crime in Russia and Mexican governmental corruption, respectively, being placed in major banks in New York. Terrorist funds from the Hamas organization in the Middle East were discovered in Chicago, as were links to Osama bin Laden.⁴⁹

Manifestly, then, the rather large documentation and regulatory compliance burden that has been imposed under U.S. law upon depository institutions has not been effective at preventing criminals from continuing to use those institutions to launder vast sums of money. Nor are depository institutions the only regulated enterprises that are vulnerable to such use. Quite obviously, securities brokers and dealers, commodities brokers, and investment companies are also likely targets for the unscrupulous. These have become subject to ever-more-exacting anti-money laundering regulation,⁵⁰ but there remain loopholes large enough to drive through a large truckload of dirty money.

Mover and Shaker Got the Red Carpet at Citibank, N.Y. TIMES, June 5, 1996, at A1; U.S. Government Accounting Office, *Private Banking: Raul Salinas, Citibank, and Alleged Money Laundering*, GAO/OSI 99-1 (Oct. 1998).

49. See, e.g., Robert Manor & Laurie Cohen, *Chicago Link Emerges as U.S. Freezes More Assets*, CHI. TRIB., Oct. 13, 2001, at 1; Laurie Cohen, Robert Manor & Stephen Franklin, *Area Group Linked to Hamas, U.S. Says; Documents Allege Role as Terrorists' Propaganda Arm*, CHI. TRIB., Dec. 16, 2001, at 1; Jeff Gerth & Judith Miller, *A Nation Challenged: On the List—Philanthropist, or Fount of Funds for Terrorists?*, N.Y. TIMES, Oct. 13, 2001, at B3; Philip Shenon, *A Nation Challenged: The Money Trail—U.S. Muslim-Based Charity Raided by NATO in Kosovo*, N.Y. TIMES, Dec. 17, 2001, at B6.

50. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 [hereinafter referred to as "USA PATRIOT Act"], Pub. L. No. 107-56, § 356, 115 Stat. 272, 324 (2001) (requiring the Secretary of the Treasury, after consultation with the SEC and the Federal Reserve Board, to promulgate no later than January 1, 2002 proposed regulations (and final regulations no later than July 1, 2002) requiring registered broker-dealers to submit suspicious activity reports (SARs) pursuant to 31 U.S.C. § 5318(g)). For the text of the final regulations, see Dept. of Treasury, Financial Crimes Enforcement Network (FinCEN), *Amendment to the Bank Secrecy Act Regulations—Requirement that Brokers or Dealers in Securities Report Suspicious Transactions*, 67 Fed. Reg. 44,048 (July 1, 2002) (codified at 31 C.F.R. pt. 103). Subsequent Treasury Department regulations have applied SAR requirements to casinos and card clubs, 67 Fed. Reg. 60,722 (Sept. 26, 2002), insurance companies, 67 Fed. Reg. 64,067 (Oct. 17, 2002), currency dealers, 67 Fed. Reg. 64,075 (Oct. 17, 2002), and mutual funds, 68 Fed. Reg. 2,716 (Jan. 21, 2003); see also Securities and Exchange Commission, *Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Chicago Board Options Exchange, Inc. To Establish CBOE Rule 4.20 Requiring Each Member and Member Organization To Develop and Implement an Anti-Money Laundering Compliance Program*, 67 Fed. Reg. 58,665 (Sept. 17, 2002).

For example, as recently as 2001, responding to a request from Senator Carl Levin, Ranking Member of the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, the General Accounting Office issued an interim report on the impact of the Gramm-Leach-Bliley Act of 1999⁵¹ on oversight of the securities industry's compliance with anti-money laundering requirements. Prior to GLEBA, U.S. bank regulators, as part of their supervisory responsibilities with respect to depository institutions and their holding companies, routinely examined broker-dealers affiliated with such depository institutions or holding companies⁵² for compliance with, *inter alia*, obligations to make CTR and suspicious activity report (SAR) filings. GLEBA, however, inaugurated a regime of "functional regulation,"⁵³ whereby the bank regulators lost jurisdiction to oversee those broker-dealers, which became the sole responsibility of the SEC.⁵⁴ Since GLEBA's enactment in 1999, then, the GAO

51. Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered provisions of 12 and 15 U.S.C.) [hereinafter referred to as "GLEBA"]. In brief, GLEBA effected sweeping changes to several regulatory regimes, among which was the elimination of prohibitions against the combination of banking, securities, and insurance under a single holding company umbrella. For more detailed information on GLEBA, see generally Keith R. Fisher, *Orphan of Invention: Why the Gramm-Leach-Bliley Act Was Unnecessary*, 80 ORE. L. REV. 1301, 1396-1421 (2002); PATRICIA A. MCCOY (ED.), *FINANCIAL MODERNIZATION AFTER GRAMM-LEACH-BLILEY* (2002).

52. Notwithstanding the partial separation of commercial and investment banking wrought by the Glass-Steagall Act, bank holding companies were permitted to have broker-dealer subsidiaries (so-called "Section 20 subsidiaries") engaged in underwriting and dealing, to a limited extent, in all types of securities, and banks and thrift institutions likewise were permitted to engage (either directly or through subsidiaries, depending upon the nature of the activity) in a variety of securities activities. For a more detailed treatment of bank securities activities in the pre-GLEBA environment, see, e.g., Keith R. Fisher, *Reweaving the Safety Net: Bank Diversification into Securities and Insurance Activities*, 27 WAKE FOREST L. REV. 123, 147-89 (1992).

53. This is an approach to financial regulation predicated on the belief that similar activities should be regulated by the same regulator regardless of where those activities may be located. Prior to GLEBA, bank securities activities were not subject to regulation by the Securities and Exchange Commission (SEC) because of statutory exemptions contained in the federal securities laws. For example, Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 excluded banks from the definitions of "broker" and "dealer," respectively. 15 U.S.C. §§ 78c(a)(4), (5) (repealed by GLEBA in 1999). Under functional regulation, by contrast, in whatever nook or cranny of a financial holding company structure an activity may be housed or conducted, it will be subject, if it is a securities activity, to regulation by the SEC.

54. See GLEBA §§ 201-202, 15 U.S.C. § 78c(a)(4)-(5) (West Supp. 2002). The same is true for bank investment advisory activities (other than trust department activities), as GLEBA eliminated bank exemptions from the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*, and the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1, *et seq.*

found, “the broker-dealer subsidiaries of depository institutions and their holding companies, which are still subject to banking SAR rules, are not being examined for compliance . . . [therewith].”⁵⁵ Nor was the slack being taken up by the SEC, which disavowed any “specifically assigned authority to enforce the [banking] rules and related requirements” until such time as the Treasury Department issued a rule specific to the securities industry.⁵⁶ It is shocking, to say the least, that such a gaping chasm—virtually an engraved invitation to money laundering at broker-dealers representing just short of half of the assets of New York Stock Exchange firms doing business with the public—could have slipped through the cracks not just temporarily but remained so for an extended period while federal regulators stood wringing their hands over a jurisdictional lacuna but did nothing to remedy it. *Quis custodet custodes ipsos?*

Even as the Keystone Cops mottle the financial regulatory landscape with anti-money laundering impedimenta strewn hither and yon, the criminals effortlessly jump over these low hurdles or else nimbly dance around them. They use front companies—typically cash-intensive businesses that they’ve acquired either “legitimately” or through extortion and violence—mixing and diluting illegal with legal revenues to place money in the financial system without raising any eyebrows. Or they employ methods used for decades to conceal illegal flight capital—falsification of international trade prices, such as by overpricing imports and underpricing exports:

For example, a business manager or owner in Venezuela negotiates to purchase machinery from a U.S. manufacturer. He requests that the \$1 million price be increased by 10 percent

55. U.S. General Accounting Office, *Money Laundering: Oversight of Suspicious Activity Reporting at Bank-Affiliated Broker-Dealers*, GAO-01-474, at 8 (Mar. 2001). According to the Federal Reserve using data as of year-end 1999, those broker-dealer affiliates “accounted for 44% of the assets represented by New York Stock Exchange Members doing business with the public.” U.S. General Accounting Office, *Money Laundering: Oversight of Suspicious Activity Reporting at Bank-Affiliated Broker-Dealers*, GAO-01-474, at 4 (Mar. 2001).

56. *Id.* at 11. This deplorable state of affairs was finally remedied with the promulgation of regulations by the Treasury Department pursuant to congressional mandate in Section 356 of the USA PATRIOT Act—see *supra* note 50—though those regulations vouchsafed primary examination and enforcement authority not to the SEC but to FinCEN, with the added requirement that the requisite reports also be made available by broker-dealers to a self-regulatory organization registered with the SEC that examines the broker-dealer for compliance. 31 C.F.R. § 103.19(g) (2002).

so that upon payment of \$1.1 million for the machinery the extra \$100,000 is to be deposited into his private bank account in the United States. . . . Similarly, an exporter of art works in Ukraine can sell her paintings, sculptures, and icons to a West European dealer for, say, 50 percent less than their negotiated value, with the understanding that when payment is made the extra 50 percent will be deposited into her German bank account. . . . There are many other ways the same end is accomplished, including paying for imports and exports that do not exist or for services never rendered, cross trading through cooperative brokers who eventually lose one leg of the deal, transferring business and property ownerships offshore without repatriating full compensation, and carefully constructing bank transfers of untaxed funds. . . . Bankers . . . approach foreigners to make arrangements for the movement of flight capital, advising how other customers have done it, providing introductions to overseas traders, offering to assist with necessary credits and documentation and ultimately managing the accumulating funds in their private banking departments. . . . [I]n New Delhi recently, a Swiss banker was calling on potential customers offering to set up private accounts in her bank, even though it is against the law for Indians to have such accounts out of the country.⁵⁷

Then there are the underground bankers, international funds transmitters such as those involved in the notorious Colombian Black Market Peso Exchange⁵⁸ and the money launderer *du jour*, Hawala. Tracing its ancient lineage to Asia, Hawala has evolved into a common method of money transmission throughout the Third World, including much of the Middle East. In contrast to

57. Raymond W. Baker, *The Biggest Loophole in the Free-Market System*, WASH. Q. 29, 33–34 (Autumn 1999).

58. Having evolved as a means of facilitating flight capital, the black market peso exchange was an ideal vehicle for Colombian drug lords to use in reverse, converting dollar proceeds of U.S. drug sales into pesos at home. The money transmitter would make the currency exchange considerably below the official exchange rate, pocketing the difference as his profit, but the drug lords didn't care, given the huge profits from drug trafficking. The transmitter would take the risk of smurfing the dollars into the U.S. financial system. Sometimes these dollars could then be wired to personal accounts or used to purchase good and services that could then be exported from the U.S. to Colombia and resold for pesos. For more detailed discussion of the Colombian black market peso exchange, see, e.g., William F. Bruton, *Money Laundering: Is It Now a Corporate Problem?*, 17 DICK. J. INT'L L. 437, 438–48 (1999); Luz Estella Nagle, *U.S. Mutual Assistance to Colombia: Vague Promises and Diminishing Returns*, 23 FORDHAM INT'L L.J. 1235, 1263–66 (2000).

modern banking operations, which operate more on the basis of negotiable instruments and government guarantees (e.g., deposit insurance), Hawala is a system dependent upon trust reposed in the middleman. One who wishes to send the money abroad takes it to the middleman, the Hawaladar, in exchange for some sort of receipt; the Hawaladar then notifies his contact in the desired destination country, another Hawaladar, and the latter will make the original amount of money, less a commission, available to a designated recipient (analogous to a “payee”) at the other end.⁵⁹

Criminal enterprises, sometimes using *mainstream* financial institutions, learned to exploit yet another layer of anonymity through the use of correspondent accounts. There, launderers deposit tainted funds into dollar-denominated accounts at foreign banks that, in turn, deposit those funds in correspondent accounts maintained in their own names at major U.S. financial institutions. Such correspondent accounts have numerous, legitimate business purposes in the world of commercial banking, yet, as with many other business practices, they can be exploited by the unscrupulous.

Again, unlike the usual deposit account, the account holder in a correspondent account (the person who has control over the funds) is the foreign bank. Since money is fungible, the funds deposited in the correspondent account may well represent the amount of the criminal proceeds, but nominally the owner of the account is the foreign bank, not the criminal depositor (or his money launderer). The latter remains off-shore, beyond the reach of U.S. law enforcement, but able at any time to withdraw the funds indirectly from the U.S. correspondent by instructions to the foreign bank. In this way, the tainted money has been safely invested in the United States in the name of the foreign bank and, of course, successfully “placed” in the life cycle of laundering

59. There need be no physical transfer of currency; everything can readily be done by book entries as long as the movement of funds is two-way. The books are balanced by means of future money transfers or exchanges of goods between the two Hawaladars. No records of the transaction are available for the prying eyes of law enforcement. In fact, no physical money has ever left the original country, nor has any physical money ever come into the destination country, but the value has been transferred between the two Hawaladars. For descriptions of Hawala, see, e.g., James J. Savage, *Executive Use of the International Emergency Economic Powers Act - Evolution through the Terrorist and Taliban Sanctions*, 10 CURRENTS INT’L TRADE L.J. 28, 38–39 (2001); Douglas Frantz, *Ancient Secret System Moves Money Globally*, N.Y. TIMES, Oct. 3, 2001, at B5.

money.⁶⁰ Subsequent instructions to the foreign bank can result in the tainted money being wired elsewhere, domestically or internationally, or used to acquire goods that in turn can be exported for resale, thereby successfully completing the laundering process.

Under prior law, innocent owners of criminal proceeds were not subject to confiscation.⁶¹ Even assuming that law enforcement could identify the funds in the correspondent account as derived from proceeds of a specific crime, the funds were taboo because the law regarded the foreign bank as the innocent owner. Gradually, it became clear that correspondent accounts represented a serious chink in the U.S. anti-money laundering armor.⁶²

Further legislation to respond to these and other developments is unfailingly predictable and ever necessary. Yet, the proposed (but not ultimately enacted) Money Laundering Deterrence Act of 1998,⁶³ and even the modestly successful International Money Laundering Abatement and Anti-terrorist

60. "Placement" is the first of three stages of money laundering and consists of arranging for the tainted funds to enter the financial system, either through deposit directly into a bank account or through the purchase of financial instruments (e.g., money orders) that are then collected and deposited into accounts elsewhere. The second stage is "layering," during which the funds are transmitted and scattered through a series of accounts at a variety of financial institutions in diverse geographic locations. The third and final state, "integration," involves the reentry of the funds into the financial system or the economy as "legitimate" funds, suitable for investment or purchase of assets. See generally FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, BASIC FACTS ABOUT MONEY LAUNDERING, HOW IS MONEY LAUNDERED?, available at http://www.fatf-gafi.org/Mlaundering_en.htm (last visited Sept. 21, 2003).

61. 18 U.S.C. § 983(d).

62. See MINORITY STAFF OF THE U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, REPORT ON CORRESPONDENT BANKING: A GATEWAY TO MONEY LAUNDERING (Feb. 5, 2001) (detailing instances of money laundering via correspondent accounts), reprinted in *Role of U.S. Correspondent Banking in International Money Laundering: Hearings Before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs*, 107th Cong., 1st Sess., v.1, 273-696 (Comm. Print 2001), available at http://trwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:71166.pdf (last visited Sept. 21, 2003).

63. H.R. 4005, 105th Cong., 2d Sess. (1998). The proposed legislation, which passed the House but died in the Senate, recognized the extent of organized crime's infiltration of financial and commercial enterprises, would have broadened the investigative power of the government, enhanced safe harbor protections considerably, including for accountants and self-regulatory organizations (as defined by the Securities Exchange Act of 1934) who filed SARs), and required the promulgation of know-your customer (KYC) regulations by the Treasury Department and the bank regulatory agencies.

Financing Act of 2001⁶⁴ have not kept pace with criminal ingenuity. The proliferation and increasing sophistication of global money laundering has confounded law enforcement authorities. Playing “catch up” may be an occupational hazard for them, but the realization that, far from gaining on their adversaries, they are falling farther and farther behind, gives rise to considerable frustration. That frustration is compounded when, even after a successful money-laundering investigation has been concluded, existing legal regimes often remain inadequate not only to bring perpetrators domiciled in another country to justice but to confiscate enough money to do more than inconvenience criminal enterprises.

II. EVOLUTION OF INTERNATIONAL *IN REM* REGIMES

A. *Traditional In Rem Approaches*

Of the well-established criminal offenses that are typically connected with, and predicates for, money laundering—offenses such as arms trafficking, fraud, terrorism, and narcotics trafficking—the latter certainly takes pride of place in terms of both dollar volume and the attention it has received from law enforcement. Several multilateral and bilateral treaties are intended to foster international cooperation in narcotics enforcement.⁶⁵ The most important of these international

64. Pub. L. No. 107-56, tit. iii, 115 Stat. 272, 296 (2001) [hereinafter referred to as “IMLAAFA”]. For a suggestion of a substitute, Tolkienesque acronym (IMLADRI), see Keith R. Fisher, *Foreword: International Banking at the Dawn of the Millennium*, 25 SUFFOLK TRANSNAT’L L. REV. xiv, xvi n.8 (2002).

65. Indeed, in the seventy-six-year period between 1912 and 1988, notwithstanding two world wars, one worldwide depression, and countless revolutions and other conflicts (including the rise and fall of communism in Europe), the international community saw fit to adopt a dozen multilateral conventions endeavoring to regulate the drug trade. See, e.g., Single Convention on Narcotic Drugs of 1961, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204 (entered into force Dec. 13, 1964); Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (entered into force Dec. 4, 1969); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565 (entered into force Jan. 26, 1973); Protocol Amending the Single Convention, Mar. 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3 (entered into force Aug. 8, 1975); Convention on Psychotropic Substances, Feb. 2, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (entered into force Aug. 16, 1976); International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205, 18 I.L.M. 1456 (entered into force June 3, 1983); 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and

anti-drug conventions is the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,⁶⁶ which was an outgrowth of a late 1988 conference in Vienna⁶⁷ and was intended to promote international cooperation in law enforcement efforts directed against "various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension."⁶⁸ Notwithstanding accession to this treaty, many foreign nations have proved contumacious when it comes to complying with their legal obligations thereunder.⁶⁹

"Determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing,"⁷⁰ the signatories to the VNC have agreed to adhere to a legal structure contemplating enactment by each of them of comprehensive legislation authorizing confiscation of drug proceeds⁷¹ or instrumentalities used, intended to be used, or derived from proscribed narcotics trafficking activities.

Commonly understood, money laundering is a process whereby criminals conceal or disguise the proceeds of their crimes or convert those proceeds into goods and services.⁷² For purposes

Psychotropic Substances, 28 I.L.M. 493 (1988) (entered into force Nov. 11, 1990) [hereinafter referred to as the "Vienna Narcotics Convention" or "VNC"]. Whereas the earlier conventions did not emphasize the criminalization of drugs with tough law enforcement mechanisms (other than those in aid of administrative regulation established by those conventions), the VNC did so dramatically and thus represented a sea change in the international struggle against the drug trade.

66. For an overview of these conventions, see generally Stefan Glaser, *Droit Pénal International Conventionnel* 133-39 (1970); M. Cherif Bassiouni, *Critical Reflections on International and National Control of Drugs*, 18 *Denv. J. Int'l L. & Pol'y* 311, 312-13 & n. 3 (1990); David P. Stewart, *Internationalizing the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 *Denv. J. Int'l L. & Pol'y* 387, 388-90 (1990); Vienna Narcotics Convention, *supra* note 65.

67. For background on this conference, see generally Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 *DEN. J. INT'L L. & POL'Y* 339, 340-41 (1990).

68. Vienna Narcotics Convention, *supra* note 65, art. 2(1), 28 I.L.M. at 500.

69. See Madelyn J. Daley, *Effectiveness of United States and International Efforts to Combat International Money Laundering*, 2000 *ST. LOUIS-WARSAW TRANSATLANTIC L.J.* 175, 198, note 129, *infra*.

70. Vienna Narcotics Convention, *supra* note 65, pmbl., 28 I.L.M. at 498 (emphasis in original).

71. For purposes of the VNC, "[p]roceeds' means any property derived from or obtained, directly or indirectly, through the commission of an offense established in accordance with article 3, paragraph 1." *Id.* art. 1(p), 28 I.L.M. at 500.

72. A new and more sinister form of money laundering, known as "reverse money laundering," involves the movement of legitimate money, unconnected with any prior criminal activity, through a series of transactions the ultimate purpose of which is to

of the Vienna Narcotics Convention, money laundering is defined as:

(i) The conversion or transfer of property,⁷³ knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph⁷⁴ . . . , for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph⁷⁵

Having defined the nature of the offenses, the VNC requires its signatories to enact legislation to “identify, trace, and freeze or seize proceeds, property, instrumentalities or any other [tainted assets]. . . for the purpose of eventual confiscation.”⁷⁶ Such property must be restrained or frozen even before entry of a domestic order of forfeiture.⁷⁷ Each signatory shall then “confiscate”⁷⁸ all forms of property, proceeds, or instrumentalities

finance the commission of a crime or, worse yet, an act of terrorism, all without leaving a paper trail.

73. For purposes of the VNC, “[p]roperty’ means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets.” Vienna Narcotics Convention, *supra* note 65, art. 1(q), 28 I.L.M. at 500.

74. Said subparagraph (a) requires each signatory to criminalize a laundry list of offenses relating to narcotics trafficking, including the production, manufacture, distribution, cultivation, possession, or purchase of any narcotic drug or psychotropic substance, the manufacture, transportation, or distribution of any equipment, materials, or substances knowing that they are to be used to manufacture illicit drugs, and the organization, management, or financing of any such drug offenses. *Id.* art. 3(1)(a)(i)–(v), 28 I.L.M. at 500–01.

75. *Id.* art. 3(1)(b)(i)–(ii), 28 I.L.M. at 501. Failure to enact domestic legislation criminalizing efforts aimed at concealing or disguising the illicit source of drug and money laundering proceeds constitutes non-compliance under the VNC. *Id.* art. 5, 28 I.L.M. at 504.

76. *Id.* art. 5(2), 28 I.L.M. at 504.

77. *Id.*

78. “Confiscation” for this purpose is defined to include freezing, seizure, and forfeiture of assets. *Compare id.* at art. 1(f), 28 I.L.M. at 499 (“‘Confiscation’ . . . including forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority.”) *with id.* at art. 1(l), 28 I.L.M. at 500 (“‘Freezing’ or ‘seizure’ means temporarily prohibiting the transfer, conversion, disposition or movement

utilized in or derived from said offenses by enactment of appropriate municipal laws,⁷⁹ subject only to protection of innocent, bona fide third parties.⁸⁰ This is so even if proceeds of the unlawful activity have been converted into other property⁸¹ or intermingled with legitimate money or property,⁸² and forfeiture is also to be imposed upon after-acquired property derived from (or from income or other benefits arising from) any of the foregoing.⁸³ No bank secrecy laws enacted by any signatory will excuse its failure to comply with these requirements.⁸⁴

In order to prevent forfeitable property from being expatriated out of the reach of law enforcement, restraint and freezing of tainted assets should also be done for the benefit of any other signatory having jurisdiction over an offense established pursuant to the VNC.⁸⁵ Specifically, with respect to any such offense, each signatory is to afford every other signatory "the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings."⁸⁶ This includes obtaining an order of confiscation for the other party's benefit with respect to forfeitable property within a signatory's jurisdiction,⁸⁷ or, in the alternative, enforcing the other party's order of forfeiture with respect thereto.⁸⁸

The same year that the VNC was negotiated, the Basel Committee on Banking Regulation and Supervisory Practices, a group formed under the auspices of the Bank for International Settlements in Basel, Switzerland and originally comprising bank regulators and central bank representatives⁸⁹ of the Group of Ten

of property or temporarily assuming custody or control of property on the basis of an order issued by a court or a competent authority.").

79. *Id.* art. 5(1), 28 I.L.M. at 504.

80. *Id.* art. 5(8), 28 I.L.M. at 507.

81. *Id.* art. 5(6)(a), 28 I.L.M. at 506.

82. *Id.* art. 5(6)(b), 28 I.L.M. at 506.

83. *Id.* art. 5(6)(c), 28 I.L.M. at 506.

84. *Id.* art. 5(3), 28 I.L.M. at 505.

85. *Id.* art. 5(4)(b), 28 I.L.M. at 505.

86. *Id.* art. 7(1), 28 I.L.M. at 508.

87. *Id.* art. 5(4)(a)(i), 28 I.L.M. at 505.

88. *Id.* art. 5(4)(a)(ii), 28 I.L.M. at 505.

89. The Basel Committee is best known for its development, during the 1980s, of international standards setting forth "the details of the agreed framework for measuring capital adequacy and the minimum standard to be achieved which the national supervisory authorities represented on the Committee intend to implement in their respective countries." BANK FOR INTERNATIONAL SETTLEMENTS, FINAL REPORT FOR INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL

countries,⁹⁰ adopted its own Statement of Principles regarding money laundering.⁹¹ Prompted by concerns that adverse publicity flowing from the association (witting or unwitting, voluntary or involuntary) of banking organizations with criminal elements would erode public confidence in and the stability of the banking system, these Basel “Principles” do not have the force of treaty or, indeed, any other legally binding character with respect to the member countries, and are largely aspirational in nature.⁹² Furthermore, they are directed at banking institutions within the member countries only. Nonetheless, they introduced “KYC” standards intended to discourage banks from doing business with a customer who prefers to remain anonymous. These standards also encourage banks, if it should come to their attention that funds on deposit are the proceeds of illicit activity, to refuse to continue serving that customer and possibly, in addition to closing the account, freezing the funds within.⁹³

STANDARDS, *reprinted in* 4 Fed. Banking L. Rep. (CCH) at 47–105 (Mar. 15, 1996). For discussion of how these standards were implemented in U.S. law, see KEITH R. FISHER, *MERGERS AND ACQUISITIONS OF BANKS AND SAVINGS INSTITUTIONS* § 3.16 (1993). For discussion of the Basel framework and of recently proposed revisions thereto, see Michael P. Malloy, *Capital Adequacy and Regulatory Objectives*, 25 SUFFOLK TRANSNAT’L L. REV. 299 (2002).

90. To wit: Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom, and the United States, with additional participation from Switzerland (*ab initio*) and later from Luxembourg.

91. COMMITTEE ON BANKING REGULATION AND SUPERVISORY PRACTICES, *BASEL, SWITZERLAND, PREVENTION OF CRIMINAL USE OF THE BANKING SYSTEM FOR THE PURPOSE OF MONEY LAUNDERING, STATEMENT OF PRINCIPLES* (1988) *available at* <http://www.bis.org/bcbs/publ.htm> (last visited Sept. 21, 2003).

92. Even so, the Basle Statement of Principles has occasionally been made indirectly binding by references in national legislation or by carrot and stick approaches wielded by bank regulators. The Bank of England, for example, is said to factor in compliance with these Principles when deciding on the extension of bank licenses, *see* John Drage, *Countering Money Laundering: The Response of the Financial Sector*, in *MONEY LAUNDERING* 62 (Hume Papers on Public Policy, vol. 1, no. 2, 1993), and the USA PATRIOT Act amended the Bank Holding Company Act to require the Federal Reserve Board, in connection with any application by a bank holding company to acquire a bank or merge with another bank holding company, to consider (in addition to the financial, managerial, competitive, and community needs factors already statutorily ordained, *see* FISHER, *supra* note 89, §§ 3.2, 3.9–19) the applicant’s “effectiveness in combating money laundering activities, including in overseas branches.” USA PATRIOT Act, *supra* note 50, § 327 (codified at 12 U.S.C. § 1842(c)(6)). A coordinate amendment was also made to the Bank Merger Act, 12 U.S.C. § 1828(c)(11).

93. *See generally* Ronald K. Noble & Court E. Golumbic, *A New Anti-Crime Framework for the World: Merging the Objective and Subjective Models for Fighting Money Laundering*, 30 N.Y.U. J. INT’L L. & POL. 79, 116 (1997–98).

The following year saw the formation of what has become one of the most influential international bodies dedicated to combating global money laundering, the Financial Action Task Force on Money Laundering (the "FATF"). Established by the G-7 Summit held in Paris in 1989,⁹⁴ the FATF is charged with analyzing and keeping abreast of money laundering trends⁹⁵ and has improved on the Basel approach by promulgating a list of forty recommendations⁹⁶ that are updated regularly and that constitute a transnational framework for combating money laundering (and, since October 2001, combating financing of terrorism as well).⁹⁷ Each of the twenty-nine member nations⁹⁸ furnishes information annually on the status of its domestic implementation of the 40 Recommendations and submits to on-site assessments by the FATF.⁹⁹ This regime, like the Basel Statement of Principles, is not legally binding but operates instead by a process of peer pressure and moral suasion, which has proved to be reasonably efficacious

94. Group of Seven Economic Declaration of July 16, 1989, *reprinted in* WILLIAM C. GILMORE (ED.), *INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING* 3 (1992). The "G-7" countries are Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING REPORT*, Introduction (1990).

95. *FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING - FATF*, *available at* http://www1.oecd.org/fatf/pdf/brochure-2000_en.pdf (last visited Sept. 21, 2003).

96. *FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS OF THE FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING*, *available at* http://www1.oecd.org/fatf/40Recs_en.htm (last visited Sept. 21, 2003).

97. *FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, TERRORIST FINANCING*, *available at* http://www1.oecd.org/fatf/TerFinance_en.htm (last visited Sept. 21, 2003).

98. Two international organizations, the European Commission, and the Gulf Cooperation Council, are also members, and the International Monetary Fund is an observer. *See* *FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, MEMBERS AND OBSERVERS*, *available at* http://www1.oecd.org/fatf/Members_en.htm (last visited Sept. 21, 2003). For discussion of the membership and functions of the FATF, see WILLIAM C. GILMORE, *DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTERMEASURES* 93-98 (1995). The author of this book, Mr. Gilmore, is the former head of Britain's National Crime Information Service. *See* Noble & Golumbic, *supra* note 93, at 88, n.18.

99. *FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, MONITORING THE IMPLEMENTATION OF THE FORTY RECOMMENDATIONS*, *available at* http://www1.oecd.org/fatf/AboutFATF_en.htm#Monitoring (last visited Sept. 21, 2003).

in terms of inducing member states to enact implementing legislation.¹⁰⁰

Furthermore, the FATF has supported the development of FATF-like bodies outside the European region, such as the Caribbean Financial Action Task Force¹⁰¹ and the Asia/Pacific Group on Money Laundering.¹⁰² Another notable regional effort, given the extent of money laundering problems originating in Latin America, is the Organization of American States' creation of the Inter-American Drug Abuse Control Commission (CICAD)¹⁰³ and its Model Regulations intended to combat money laundering.¹⁰⁴

One year after formation of the FATF, the Council of Europe¹⁰⁵ adopted an anti-money laundering treaty which, by

100. See, e.g., Noble & Golumbic, *supra* note 93, at 123. Notwithstanding its voluntary character, the FATF Forty Recommendations have been characterized as "the single most comprehensive, significant and forceful international declaration on money laundering." Stephen Labaton, *Group of 7 Asks Money-Laundering Curbs*, N.Y. TIMES, Apr. 20, 1990, at D1 (quoting John Robson, Deputy Secretary of the Treasury), cited in Jeffrey Lowell Quillen, Note, *The International Attack on Money Laundering, European Initiatives*, 1991 DUKE J. COMP. & INT'L L. 213, 218 n.27.

101. The Caribbean Financial Action Task Force (CFATF) was formed during the June 1990 Caribbean Drug Money Laundering Conference. See CARIBBEAN FINANCIAL ACTION TASK FORCE, OVERVIEW, available at <http://www.cfatf.org/eng> (last visited Sept. 21, 2003); see also Berta Esperanza Hernández, *RIP to IRP - Money Laundering and Drug Trafficking Controls Score a Knockout Victory Over Bank Secrecy*, 18 N.C. J. INT'L L. & COM. REG. 235, 289 (1993); Report of the Caribbean Drug Money Laundering Conference, reprinted in GILMORE, INTERNATIONAL EFFORTS, *supra* note 94, at 25. The CFATF has agreed to follow the FATF's Forty Recommendations, along with additional recommendations (originally twenty-one in number, nineteen of which were adopted at the Kingston Ministerial Meeting on Money Laundering, November 5-6, 1992). See CARIBBEAN FINANCIAL ACTION TASK FORCE, RECOMMENDATIONS, available at <http://www.cfatf.org/eng/recommendations> (last visited Sept. 21, 2003); see also *Money Launderers Turning to New Institutions, Task Force Reports*, 61 BANKING REP. (BNA) 34, 35 (July 5, 1993).

102. See ASIA/PACIFIC GROUP ON MONEY LAUNDERING, available at http://www1.oecd.org/fatf/Ctry-orgpages/org-appg_en.htm (last visited Sept. 21, 2003).

103. Hernández, *supra* note 101, at 290. The acronym CICAD is derived from the Spanish: La Comición Interamericana Contra El Abuso de las Drogas. *Id.* at 369.

104. CICAD, MODEL REGULATIONS CONCERNING LAUNDERING OFFENSES CONNECTED TO ILLICIT DRUG TRAFFICKING, RELATED AND OTHER SERIOUS OFFENSES (1992, rev. 1997), available at <http://www.cicad.oas.org/en/?CICAD%20-%20New.htm> (last visited Sept. 21, 2003).

105. Not to be confused with the Council of the European Union, the Council of Europe, which was formed in May 1949, is an international organization comprised of some forty-four member nations, which share a common belief in the rule of law and in fundamental human rights. COUNCIL OF EUROPE, ABOUT THE COUNCIL OF EUROPE, available at http://www.coe.int/T/E/Com/About_COE/ (last visited Sept. 21, 2003).

encompassing a wider array of illegal activities giving rise to money laundering than just narcotics trafficking (*i.e.*, arms trafficking, terrorist activities, and fraud), is slightly broader in scope than the Vienna Narcotics Convention. This multilateral treaty¹⁰⁶ requires signatories to enact implementing legislation to criminalize the laundering of the proceeds of crime and to confiscate¹⁰⁷ such proceeds, as well as instrumentalities and property the value of which corresponds to the proceeds,¹⁰⁸ and contemplates mutual legal assistance with respect to investigations,¹⁰⁹ lifting of bank secrecy,¹¹⁰ freezing of assets,¹¹¹ and the like. Nevertheless, despite the loftiness of the words used, the Strasbourg Convention suffers from some significant limitations, chief among which is the reservation of a signatory's right to refuse cooperation where the action sought would be antithetical to the basic principles of that country's legal system,¹¹² would prejudice the sovereignty, security, *ordre public* or other essential interest,¹¹³ is not justified by the level of importance of the case (in the refusing state's opinion),¹¹⁴ relates to a political or fiscal offense,¹¹⁵ would be contrary to the principle of *ne bis in idem*,¹¹⁶ or relates to

106. Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, done at Strasbourg Nov. 8, 1990, Europ. T.S. No. 141, 30 I.L.M. 148 (1991) (entered into force Nov. 11, 1990) [hereinafter "Strasbourg Convention"], available at <http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm> (last visited Sept. 21, 2003).

107. In contrast to the VNC, which allows not just courts but any competent authority to issue a confiscation order, *see supra* note 78, the Strasbourg Convention vouchsafes this power only to judicial organs. Strasbourg Convention, *supra* note 106, art. 1(d), 30 I.L.M. at 151 ("'Confiscation' means a penalty or a measure ordered by a court following proceedings in relation to a criminal offense or criminal offenses resulting in the final deprivation of property.") (emphasis added).

108. *Id.* art. 2(1), 30 I.L.M. at 151.

109. *Id.* art. 7, 30 I.L.M. at 153.

110. *Id.* art. 4(1), 30 I.L.M. at 151.

111. *Id.* art. 11(1), 30 I.L.M. at 153.

112. *Id.* art. 18(1)(a), 30 I.L.M. at 155.

113. *Id.* art. 18(1)(b), 30 I.L.M. at 155.

114. *Id.* art. 18(1)(c), 30 I.L.M. at 155.

115. *Id.* art. 18(1)(d), 30 I.L.M. at 155. The usage of "fiscal" in this Convention as pertaining to those offenses that are revenue-related strongly supports the contention, *supra* at text accompanying notes 16-17, that "fiscal" offenses do not encompass money laundering. (If they did, then the fiscal exception would swallow the Strasbourg Convention whole).

116. *Id.* art. 18(1)(e), 30 I.L.M. at 155. The principle "*ne bis in idem*" or "*non bis in idem*" is the equivalent of the prohibition against double jeopardy, U.S. CONST., amdt. V. The Latin phrase literally means "not twice for the same thing." *See, e.g.*, E. COBHAM BREWER, DICTIONARY OF PHRASE AND FABLE (1898), available at

something which would not be an offense under the refusing state's laws if it were committed within its jurisdiction.¹¹⁷ Furthermore, each signatory may, "at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that [the adoption of confiscation measures pursuant to art. 1(1)] applies only to offenses or categories of offenses specified in such declaration."¹¹⁸

Not to be outdone, the European Union itself, through its Council of Ministers, issued its own Directive designed to achieve many of the same objectives.¹¹⁹ In addition to criminalizing money laundering without the limitation of a nexus to narcotics trafficking and encouraging multinational cooperation and coordination in investigative and enforcement efforts, the EU Directive takes a leaf from the Basel Commission's financial institution-oriented approach and adopts "KYC" rules¹²⁰ and suspicious transaction reporting requirements.¹²¹

Once again, however, there are some obvious shortcomings. One is the relatively high transaction reporting floor of € 15,000.¹²² Another is that the EU Directive does not mandate the criminalization of money laundering by domestic legislation.¹²³ A third is an exemption from KYC rules for bank-to-bank transfers,¹²⁴ thereby facilitating money laundering using correspondent banking relationships with banks in bank secrecy

<http://www.bartleby.com/81/12159.html> (last visited Sept. 21, 2003); *see also* EXPRESSIONS JURIDIQUE NON BIS IN IDEM, *available at* http://www.locutio.com/expressions-juridiques/exprjurid_non_bis.htm (last visited Sept. 21, 2003) ("En droit pénal: formule latine qui exprime le principe selon lequel une personne déjà jugée pour un fait délictueux, ne peut être poursuivi à nouveau pour le même fait.").

117. Strasbourg Convention, *supra* note 106, art. 18(1)(f), 30 I.L.M. at 155. "[T]his ground for refusal applies to cooperation . . . only in so far as the assistance sought involves coercive action." *Id.*

118. *Id.* art. 1(2), 30 I.L.M. at 151.

119. Council Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering (91/308/EEC), 1991 O.J. (L166) 77 [hereinafter "EU Directive"].

120. *Id.* art. 3(2), applicable to any transaction (or series of structured transactions) in excess of 15,000 ECU.

121. *Id.* art. 3(6).

122. Originally 15,000 ECU, *see supra* note 120, but the European currency unit converted to the Euro on January 1, 1999.

123. *See* Lisa A. Barbot, Comment, *Money Laundering: An International Challenge*, 3 TUL. J. INT'L & COMP. L. 161, 181 (1995).

124. *Supra* note 119, art. 3(7).

havens or other jurisdictions with lax (or nonexistent) anti-money laundering laws.

In addition to multilateral approaches, there are also numerous bilateral treaties creating regimes of mutual cooperation in the investigation and prosecution of transnational crime. These are known as Mutual Legal Assistance Treaties (MLATs)¹²⁵ and create individual frameworks for bilateral cooperation not only in obtaining and preserving evidence but also in providing assistance to facilitate confiscation of criminal proceeds and instrumentalities.¹²⁶ The weakness of these MLATs lies not in concept but in drafting details. Rather than imposing obligations with some specificity, along the lines of the VNC, the language negotiated is often little more than hortatory, and often key ingredients such as asset forfeiture and freeze orders are missing from individual MLAT recipes.¹²⁷ Even the multilateral Inter-American species of MLAT suffers from these same defects.¹²⁸

Both the Vienna Narcotics Convention and the Strasbourg Convention fostered a trend toward tougher international law enforcement,¹²⁹ as a number of European countries strengthened

125. See Jimmy Gurule, *The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 *FORDHAM INT'L L.J.* 74, 89–90 (1998).

126. *Id.* at 90–91 & n.55 (demonstrating that the United States has entered into numerous such treaties, including MLATs with the likes of Colombia, Mexico, the Cayman Islands, Thailand, Panama, Switzerland, and others).

127. *Id.* at 93; see, e.g., Treaty Between the United States and Barbados on Mutual Legal Assistance in Criminal Matters, Feb. 28, 1996, U.S.-Barb., S. Treaty Doc. No. 105–20, art. 16 (1996).

128. See Inter-American Convention on Mutual Assistance in Criminal Matters, Jan. 10, 1995, S. Treaty Doc. No. 104–35, art. 15 (1995) (requiring the parties to “assist each other, to the extent permitted by their respective laws, in precautionary measures for securing the proceeds, fruits, and instrumentalities of the crime”).

129. The trend is far from uniform, however, and equally far from positive. After more than a decade had elapsed since the Vienna Narcotics Convention entered into force, a number of narcotics-producing nations that were nonetheless signatories to the VNC—countries such as Afghanistan, Algeria, Cuba, Guatemala, Iran, Pakistan, and Uruguay—had not yet ratified the convention with domestic legislation. See Daley, *supra* note 69. For information on all treaty participants, see United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Participants, available at <http://www.incb.org/e/conv/1988/resol.htm> (last visited Sept. 21, 2003). More dismaying yet, with respect to some major narcotics-producing countries that *have* already ratified the VNC, one distinguished commentator (now the Treasury Department's Undersecretary for Enforcement) has reported that no steps have been taken toward compliance with the treaty's mandate for enactment of municipal anti-money laundering legislation. See Gurule, *supra* note 125, at 86 (citing El Salvador, Haiti, and India). Even those that have complied with the mandate and enacted the requisite anti-money

their laws with respect to confiscation of the proceeds of crime (principally drug trafficking), including Belgium,¹³⁰ Luxembourg,¹³¹ the Netherlands,¹³² Switzerland,¹³³ and the U.K.¹³⁴ The United States, as noted previously, had already taken some steps in this direction, up to and including the MLCA,¹³⁵ and additional legislation was enacted shortly thereafter up through and including the Annunzio-Wylie Anti-Money Laundering Act of 1992.¹³⁶

In concept, confiscation is quintessentially an *in rem* proceeding, which can be civil or criminal (and if civil can even be prosecuted by an administrative agency), and which, unlike *in personam* procedures, can dispense with the requirement of criminally convicting a suspect and the higher standard of proof attendant upon such an effort. Another obvious advantage is that forfeiture proceedings are possible even when the criminal defendant is unavailable for prosecution.

Such an approach has a long pedigree in the U.S. legal system¹³⁷ and is more common there than elsewhere. The U.S. Supreme Court has repeatedly upheld the constitutionality of forfeiture actions,¹³⁸ though it has required that forfeitures be proportionate to the gravity of the criminal offense.¹³⁹

Both the VNC¹⁴⁰ and the Strasbourg Convention¹⁴¹ mandate that signatories implement procedures through domestic legislation for confiscation of property. Neither convention,

laundrying legislation have made scant (if any) efforts at enforcement. *Id.* at 86 (citing such mega-exporters of narcotics as Colombia, Costa Rica, Jamaica, Mexico, Nigeria, Paraguay, and the Dominican Republic).

130. Act of July 17, 1990, amending arts. 42, 43 & 505 of the Belgian Criminal Code.

131. Act of June 13, 1994, amending arts. 31–32 of the Luxembourg Criminal Code.

132. Act of Dec. 10, 1992, amending art. 36e of the Dutch Criminal Code.

133. Act of Mar. 14, 1994, amending arts. 58–59 of the Swiss Criminal Code.

134. Drug Trafficking Act, 1994, c. 37, 54(1) (Eng.) (superseding the Drug Trafficking Offenses Act, 1986).

135. See MLCA, *supra* note 38.

136. See Annunzio-Wylie, *supra* note 46.

137. See, e.g., *United States v. Various Items of Personal Property*, 82 U.S. 577, 581 (1872) (“It is the property which is proceeded against and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.”).

138. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *J.W. Goldsmith, Grant Co. v. United States*, 254 U.S. 505 (1921).

139. See *United States v. Bajakajian*, 524 U.S. 321 (1998) (stating that gross disproportionality standard necessary to pass constitutional muster under the Eighth Amendment).

140. Vienna Narcotics Convention, *supra* note 65, art. 5(1)(a), 28 I.L.M. at 504.

141. Strasbourg Convention, *supra* note 106, art. 2(1), 30 I.L.M. at 151.

however, distinguishes between two different approaches to confiscation—(A) property or object confiscation and (B) value confiscation¹⁴²—but contemplate that both models may be used, as do the majority of FATF member nations¹⁴³ (with the express encouragement of the FATF itself).¹⁴⁴ The distinction lies in the forfeiture to the state of the precise property in question versus the confiscation of a sum certain related to the value of said property.

Forfeiture of title to the precise property is so common with respect to *instrumentalities* of crime as to need no elaboration but raises interesting issues with respect to property representing *proceeds* of crime. Suppose, for example, that the criminal has, prior to arrest, already spent or otherwise alienated the proceeds. He then has enjoyed the benefits of the criminal conduct without having to worry about confiscation when caught,¹⁴⁵ by no means an uncommon scenario in the criminal world. In this situation, the goal of effective deprivation of the fruits of criminal activity would clearly be frustrated.

Another potentially thorny issue involves the treatment of innocent third party holders. This has been often encountered under U.S. law, which operates under a statutorily created¹⁴⁶ legal fiction, known as the “relation-back” doctrine, declaring that title to the property is automatically conferred upon the state at the instant the crime is committed. Consequently, any transfer of the property or proceeds thereof to a third party would theoretically be void as a matter of law. Nonetheless, the U.S. Supreme Court has required that the government obtain a judgment of forfeiture before such a retroactive transfer of title is effective, the upshot being that until such a judgment of forfeiture is obtained, an innocent third party purchaser may invoke a “holder-in-due-

142. See Barry Kellman & David S. Gualtieri, *Barricading the Nuclear Window—A Legal Regime to Curtail Nuclear Smuggling*, 1996 U. ILL. L. REV. 667, 730, n.254.

143. See, e.g., FATF, EVALUATION OF LAWS AND SYSTEMS IN FATF MEMBERS DEALING WITH ASSET CONFISCATION AND PROVISIONAL MEASURES 2, available at http://www1.oecd.org/fatf/pdf/CONFISC_en.pdf (last visited Sept. 21, 2003).

144. See, e.g., CARIBBEAN FINANCIAL ACTION TASK FORCE, RECOMMENDATION 8, available at <http://www.cfatf.org/eng> (last visited Sept. 21, 2003).

145. See *United States v. Ginsburg*, 773 F.2d 789, 802 (7th Cir. 1985) (“A racketeer who dissipates the profits . . . on wine, women and song has profited from organized crime to the same extent as if he had put the money in his bank account.”).

146. See 21 U.S.C. §§ 853(c), 881(h).

course"-like defense,¹⁴⁷ assuming, of course, that the statute contemplates the availability of such a defense.

Similarly, neither the Vienna Narcotics Convention nor the Strasbourg Convention forbids the forfeiture of property in the hands of innocent third parties, though each addresses the rights of such individuals.¹⁴⁸ For example, rights of third parties that are affected by a judicial decision of a signatory to the Strasbourg Convention are taken into account, and such decisions must be recognized unless the third parties did not have adequate opportunity to participate in the proceeding, the decision is incompatible with one already taken in the country requesting confiscation, or the decision is incompatible with the *ordre public* of the country receiving the request.¹⁴⁹ Many municipal laws, as well as the U.N. Model money laundering law, that endeavor to protect the rights of innocent third parties¹⁵⁰ may be well motivated, but from an enforcement perspective they may at times

147. United States v. 92 Buena Vista Avenue, Rumsom, N.J., 507 U.S. 111, 125–29 (1993).

148. Vienna Narcotics Convention, *supra* note 65, art. 5(8), 28 I.L.M. at 507; Strasbourg Convention, *supra* note 106, arts. 5, 21–22; 30 I.L.M. at 152, 157.

149. *Id.* art. 22. Though beyond the scope of this article, obviously there are substantial international human rights issues lurking in respect of the rights of third parties to property subject to confiscation orders, such as participation/due process/fair trial rights of the sort implicated in, e.g., article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Interestingly, however, the European Court of Human Rights has found *in rem* confiscation procedures fully consistent with those rights. See, e.g., *Allegemeine-Gold-und-Silberscheideanstalt (AGOSI) v. U.K.*, 108 Eur. Ct. H. R. (ser. A) at 20–21 (1987) (upholding seizure by U.K. customs of Krugerrands illegally smuggled into Britain, where U.K. authorities had given AGOSI a fair opportunity to be heard); *Air Canada v. U.K.*, 316 Eur. Ct. H.R. (ser. A), 20 E.H.R.R. 150 (1995) (concurring with English court's upholding of U.K. customs seizure of an Air Canada aircraft after discovery of cannabis resin in cargo container: seizure was an *in rem* procedure, not an *in personam* procedure, and thus presented no requirement that *mens rea* of the airline be established). For more on this and related subjects, see Sanja Djajic, *The Right to Property and the Vasilescu v. Romania case*, 27 SYRACUSE J. INT'L L. & COM. 363, 385–86 (2000); Erik Drewniak, Comment, *The Bosphorus Case: The Balancing of Property Rights in the European Community and the Public Interest in Ending the War in Bosnia*, 20 FORDHAM INT'L L.J. 1007, 1037–39 (1997) (discussing *Air Canada* case); Jean M. Sera, Note, *The Case for Accession by the European Union to the European Convention for the Protection of Human Rights*, 14 B.U. INT'L L.J. 151, 166 (1996) (discussing *AGOSI* case).

150. E.g., Swiss Crim. Code art. 59(1); Dutch Crim. Code art. 32(2); UNITED NATIONS OFFICE ON DRUGS AND CRIME, UNITED NATIONS INTERNATIONAL DRUG CONTROL PROGRAMME, MODEL MONEY LAUNDERING, PROCEEDS OF CRIME AND TERRORIST FINANCING BILL art. 29, available at http://www.imolin.org/poctf03.htm#_Toc49659151 (last visited Sept. 21, 2003).

make it too easy for a criminal to transfer proceeds offshore, through dummy corporations or nominees or otherwise,¹⁵¹ so that they are no longer, as a technical matter, susceptible to forfeiture.

U.S. criminal forfeiture laws render any transaction transferring criminal proceeds to a third party void unless the third party is a bona fide purchaser. Thus if the money is used to buy an automobile, the car dealer presumably gets to keep the money, but if it is given to a family member or business or domestic partner, it is forfeit.¹⁵² Practical issues remain, of course, where the third party has already spent the money or where, for whatever reason, the government just can't find it. Still, domestic law has helped a little, as in the case of a professional advisor like a lawyer claiming to be an innocent third party purchaser. In one case, where the lawyer lost that argument in court but then claimed he had already spent the money, the government was permitted to sue him for conversion of government property.¹⁵³

B. Value Confiscation: An Alternative In Rem Approach

As an alternative to object confiscation, value confiscation offers several advantages. For one thing, it is not restricted to property constituting proceeds of the crime but can be applied to property that has, in fact, been lawfully acquired. The question then is whether there need be some nexus between such lawfully acquired property and the criminal conduct giving rise to the order of confiscation. In theory, none ought to be required, but some approaches limit the confiscation of lawfully acquired property to circumstances where it has been commingled with the proceeds of the crime.¹⁵⁴ Another advantage of value confiscation is that it

151. In this regard, the proliferation of generic international business corporations (IBCs) is a huge problem. An IBC is simply a corporate vehicle that does not do business in the country under whose laws it is organized (typically an offshore haven, such as Antigua) and that can, under those laws, be owned anonymously, *e.g.*, by the use of bearer shares and nominee directors. The IBC can then be used to open bank accounts so as to shield from bank records the identity of the true owner of the funds. *See generally* LILLEY, *supra* note 7, at 91; *see also id.* at 32 (asserting the existence of more than one million such IBCs).

152. *See* 21 U.S.C. § 853(c).

153. *See* United States v. Moffitt, Zwerling & Kemler PC, 83 F.3d 660 (4th Cir. 1996).

154. *See, e.g.*, Vienna Narcotics Convention, *supra* note 65, art. 5(6)(b), 28 I.L.M. at 506.

avoids problems of the same proceeds being confiscated more than once (contrary to the principle *non bis in idem*).¹⁵⁵

Where the actual proceeds of the criminal conduct have been transferred (or laundered) to another jurisdiction, but other assets traceable to the perpetrator remain within the reach of law enforcement, value confiscation becomes a highly useful tool. A value confiscation order can be simply a court order requiring the payment of a monetary amount equivalent in value to the proceeds of the crime. Indeed, some countries, like the U.K., have adopted value confiscation as the default method.¹⁵⁶

In some respects, such an approach resembles a garden variety criminal fine, but the resemblance is superficial. Fines are subject to statutory ceilings that often have nothing to do with the value of the criminal proceeds; fines may also be influenced by prudential factors relating to the gravity of the offense and the perpetrator's financial condition, prior record, and miscellaneous personal circumstances. Value confiscation relates solely to the monetary value of the proceeds.

In sharp contrast to object confiscation, which is clearly *in rem*, value confiscation constitutes either a *quasi in rem*, or perhaps even an *in personam*, approach. The property or proceeds subject to attachment or forfeiture must be owned by the perpetrator of the criminal conduct, thereby eliminating any possible complications regarding the rights of innocent third party owners. This clean separation is double-edged, of course, in that a timely wholesale transfer of assets to third parties (who may be confederates, family members, dummy corporations, and the like) could defeat the confiscation and the law enforcement objective, though with sufficient evidence a prosecutor could simply indict such complicit third parties on substantive money laundering counts.

Both the VNC and the Strasbourg Convention give the confiscating state *carte blanche* with respect to disposition of the forfeiture proceeds.¹⁵⁷ The state may simply keep the funds or it may earmark them, as some countries do, for use by law enforcement authorities in the fight against money laundering and

155. This, it will be recalled, is a basis for refusal of cooperation under the Strasbourg Convention. See *supra* note 116.

156. See, e.g., Drug Trafficking Act 1994, *supra* note 134, §§ 2-7.

157. Vienna Narcotics Convention, *supra* note 65, art. 5(5)(a), 28 I.L.M. at 506; Strasbourg Convention, *supra* note 106, art. 15, 30 I.L.M. at 155.

other crimes. The possibility also exists for the state to share the forfeited proceeds with other states or with inter-governmental bodies dedicated to combating crime. Such sharing is, in fact, encouraged—though not required—by certain international instruments,¹⁵⁸ as well as by the U.N. General Assembly.¹⁵⁹ For states to share in this manner has been rare, except that some states have, with enactment of appropriate domestic legislation,¹⁶⁰ been willing to share with other states that have cooperated in the proceedings that led to the successful confiscation—a kind of profit-sharing in a transnational law enforcement joint venture that is facilitated by both the VNC and the Strasbourg Convention, as well as by the recommendations of the FATF.¹⁶¹

Some commentators, including my colleague Eric Blumenson and his wife Eva Nilsen,¹⁶² are skeptical of the potentially perverse incentives under a system where law enforcement agencies can, in effect, receive a considerable “reward” for their assistance in maximizing forfeiture income to the state.¹⁶³ Nevertheless, on an

158. See, e.g., Vienna Narcotics Convention, *supra* note 65, art. 5(5)(b), 28 I.L.M. at 506; INTER-AMERICAN DRUG ABUSE CONTROL COMMISSION, CICAD MODEL REGULATIONS, art. 7, available at <http://www.cicad.oas.org> (last visited Sept. 21, 2003); REPORT OF THE CARIBBEAN DRUG MONEY LAUNDERING CONFERENCE, Recommendation 9 (1990), available at <http://www.cfatf.org/eng/recommendations> (last visited Sept. 21, 2003).

159. See, e.g., U.N. Press Release GA/9413 (June 8, 1998).

160. The United States, given its high-profile anti-money laundering and War on Drugs initiatives, has been in the forefront of this practice. See, e.g., 18 U.S.C. §§ 981(i)(1) (authorizing the Attorney General or the Secretary of the Treasury, under appropriate circumstances, to transfer forfeited property or the proceeds thereof to any foreign nation that directly or indirectly participated in the confiscation); 1616a(c)(2) (*simile*, with respect to property seized by the Customs Service); 21 U.S.C. § 881(e)(1)(E) (*simile*, with specific reference to drug-related property).

161. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS, Recommendations 38–39, available at http://www1.oecd.org/fatf/40Recs_en.htm (last visited Sept. 21, 2003); see also FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, EVALUATION OF LAWS AND SYSTEMS IN FATF MEMBERS DEALING WITH ASSET CONFISCATION AND PROVISIONAL MEASURES ¶ 37 (detailing sixteen FATF member states that have enacted legislation authorizing the sharing of confiscated assets), available at http://www1.oecd.org/fatf/pdf/CONFISC_en.pdf (last visited Sept. 21, 2003).

162. See Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 51–83 (1998). This Article, it should be clarified, considers only sharing of forfeited assets under U.S. law and among U.S. law enforcement agencies, not sharing such assets transnationally further to treaty obligations.

163. See also *Caplin & Drysdale v. United States*, 491 U.S. 617, 629 (1989) (noting the questionable nature of the legitimacy of the government's interest in using the profits of crime to fund law enforcement activities).

international level, the imprimatura of the two major conventions, of the FATF, and even of the U.N. General Assembly suggest that sharing of forfeited assets, whatever its potential moral shortcomings, has a firm legal foundation and is, moreover, regarded as an indispensable tool in the struggle against organized crime.

III. SHORING UP OBVIOUS WEAKNESSES

Given the merely modest success that has favored frequently herculean law-enforcement efforts to combat international money laundering, one is chary of offering suggestions toward solving this monumental and seemingly intractable problem. Nevertheless, attention to a number of glaring weaknesses in both international and U.S. domestic anti-money laundering approaches may yield perceptible law enforcement gains. Indeed, virtually any positive suggestion at all is an improvement over the disingenuous hand-wringing that all too often serves as a substitute for legal analysis, creative thinking, and political will in the struggle against money laundering.

A. Targeting International Weaknesses

Effective enforcement of legal obligations is, of course, the bane of public international law. If anything could be used to characterize international anti-money laundering regulation (or even international legal regimes in general), it would be too much “carrot” and not enough “stick.” Widely hailed as the most effective of the extant approaches, the FATF operates on the basis of moral suasion—in effect, using a published list of noncomplying countries as a means to “shame” them into compliance.

This approach will often be effective, but only as a type of self-fulfilling prophecy. That is, those countries for which moral suasion will be effective tend to be those that were predisposed towards compliance in the first place. For those which, in contrast, are predisposed (or find it to be in their economic self-interest) to be recalcitrant, generally no amount of suasion or “shaming” will suffice.

As the increase in volume of laundered funds amply demonstrates, passive regimes relying on the force of moral suasion have not stemmed the rising tide of money laundering. If the international community is *truly* serious about making concerted efforts to criminalize money laundering and deter it

through the aggressive use of confiscation, then the cooperation of bank secrecy jurisdictions, tax havens, and other recalcitrant parties must be secured by more aggressive techniques. Clearly, cooperation from these jurisdictions will be effected only when it is in their economic self-interest to cooperate. Therefore, the "stick" of economic sanctions suggests itself as the most promising approach.

In the first place, more aggressive use can be made of the mechanism already built into the VNC for signatories not in compliance with its provisions. In addition to a provision encouraging dispute settlement by "negotiation, inquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of [the parties'] own choice,"¹⁶⁴ the mandatory jurisdiction¹⁶⁵ of the International Court of Justice (ICJ) can sometimes be invoked.¹⁶⁶ If such a case is successfully prosecuted in the ICJ against a contumacious signatory to the VNC, failure of that party to abide by the Court's judgment allows the prevailing party recourse to the Security Council,¹⁶⁷ including requests for imposition of economic sanctions.

ICJ jurisdiction under the Strasbourg Convention is not mandatory but permissive. That treaty provides for dispute resolution in the first instance by settlement through negotiation or any other means of the parties' device, "including submission of the dispute to the European Commission on Crime Problems, to an arbitral tribunal whose decisions shall be binding upon the Parties, or to the International Court of Justice, *as agreed upon by the Parties concerned.*"¹⁶⁸

Given VNC and Strasbourg Convention signatories' ability to avoid mandatory ICJ jurisdiction, and in view of the dire

164. Vienna Narcotics Convention, *supra* note 65, art. 32(1).

165. Article 36(1) of the Statute of the International Court of Justice provides for jurisdiction over matters "specifically provided for in... treaties and conventions in force."

166. Vienna Narcotics Convention, *supra* note 65, art. 32(2). This invocation presupposes not only the failure of the settlement approaches identified in art. 32(1) but also that the party against whom enforcement is sought has not, in its accession to the VNC, declared that it is not agreeing to be bound by mandatory ICJ jurisdiction under Article 32(2). Vienna Narcotics Convention, *supra* note 65, art. 32(4).

167. See U.N. Charter art. 94(2).

168. Strasbourg Convention, *supra* note 106, art. 42(2), 30 I.L.M. at 163 (emphasis added). Of course, in a permissive jurisdiction regime such as this, no specific reservation procedure on their part comparable to VNC art. 32(4) is necessary. See *supra* note 166.

macroeconomic consequences of money laundering¹⁶⁹ and the use of laundered funds (as well as legitimate funds, in so-called “reverse money laundering”) to further, among other things, arms trafficking and terrorism,¹⁷⁰ sufficient grounds arguably exist to apprehend a threat to international peace and security,¹⁷¹ thereby justifying a more direct approach to invocation by the Security Council of its power to impose economic sanctions.¹⁷² As is well known, the Security Council has used its authority under Article 41 to impose economic sanctions against South Africa and Rhodesia to achieve human rights goals,¹⁷³ against Iraq as a punitive measure resulting from its invasion of Kuwait,¹⁷⁴ and against Serbia and Montenegro, as a reprisal against various condemned Serbian acts.¹⁷⁵

An alternative, and possibly more productive approach in the long run, would be to amend both the Vienna Narcotics Convention and the Strasbourg Convention to include explicit provisions for sanctions in the event of noncompliance with treaty obligations. This might, of course, lead to denunciation or withdrawal from the treaties by some of the most notoriously

169. See *supra* notes 33–34 and accompanying text.

170. See, e.g., FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, GUIDANCE FOR FINANCIAL INSTITUTIONS IN DETECTING TERRORIST FINANCING ¶¶ 15–18 (2002), available at http://www1.oecd.org/fatf/pdf/GuidFITF01_en.pdf (last visited Sept. 21, 2003).

171. See U.N. Charter, art. 39. Current events, including the suicide bomber terrorist attacks of September 11, 2001, the proliferation of fanatical suicide bombers in Israel, and the possession by rogue states (e.g., North Korea, Iraq) of weapons of mass destruction all amply support this contention.

172. U.N. Charter, art. 41. As recognized by the Secretary-General, economic sanctions are an important tool, enabling the Security Council to exert pressure without recourse to force. See *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 52d Sess., Supp. No. 1, P89, U.N. Doc. A/52/1 (1997); see also W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT’L L. 86, 90 (1998) (explaining that sanctions are an instrument of strategy designed to change the attitudes and behavior of the target).

173. See e.g., S.C. Res. 181, U.N. SCOR, 18th Sess. 1056th mtg. at 7, U.N. Doc. S/RES/181 (1963) (South Africa); S.C. Res. 221, U.N. SCOR, 21st Sess., 1277th mtg. at 5, U.N. Doc. S/RES/221 (1966) (Rhodesia); S.C. Res. 232, U.N. SCOR 21st Sess., 1340th mtg., U.N. Doc. S/RES/232 (1966) (Rhodesia).

174. See, e.g., S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg. at 19, U.N. Doc. S/INF/46 (1990); S.C. Res. 670, U.N. SCOR, 45th Sess. 2943d mtg., U.N. Doc. S/INF/46 (1990).

175. See, e.g., S.C. Res. 757, U.N. SCOR, 46th Sess., 3082d mtg., U.N. Doc. S/RES/757 (1992); S.C. Res. 820, U.N. SCOR, 47th Sess., 3120th mtg. (1993).

recalcitrant signatories, but that would scarcely leave the international community worse off than it is with their continued, if useless, accession. Then again, political factors might cause the recalcitrant to reconsider their contumacy and mend their ways. These factors include not merely the unpalatability of branding oneself as an outlaw nation that supports international organized crime, but also the potential for concerted economic action against such rogue states (either on a regional basis or, with the added political justification, through the U.N. Security Council, as aforesaid).

Economic sanctions are no panacea, however. Indeed, there has been considerable debate about their overall effectiveness.¹⁷⁶ Yet, there is evidence that targeted sanctions, such as the European Union blacklist of Serbian President Slobodan Milosevic and a variety of asset freezes, have achieved some measure of success.¹⁷⁷

The stick can, of course, be combined with a juicier carrot. More liberal sharing of forfeiture proceeds among nations that cooperated in the investigation and recovery of laundered funds can be a powerful incentive, given the estimated annual volume of such funds.¹⁷⁸ Such sharing is expressly contemplated by the VNC,¹⁷⁹ and provisions therefore have also been enshrined in U.S. law.¹⁸⁰

Furthermore, there are possibilities for increased multilateral cooperation in plugging those international trade loopholes that foster money laundering. As Baker observes:

[A] selection can be made of several hundred documents covering imports into and exports out of a foreign country. Prices on these transactions can be checked by negotiating fresh

176. See, e.g., BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS 14–24 (1988); GARY E. HUFBAUER, JEFFREY J. SCHOTT & KIMBERLY A. ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED 33–42, 92–93 (2d ed. 1990). For a cogent review of the literature, see MICHAEL P. MALLOY, U.S. ECONOMIC SANCTIONS: THEORY & PRACTICE 339–83 (2001).

177. See Gary E. Hufbauer & Barbara Oegg, *Targeted Sanctions: A Policy Alternative?*, 32 LAW & POL'Y INT'L BUS. 11, 15–18 (2000).

178. See *supra* notes 34–37 and accompanying text. Asset sharing “may be among the most potent inducements to international cooperation and may result in significant enhancement of law enforcement capabilities in [drug-producing countries and drug-transit countries].” Stewart, *supra* note 65, at 396.

179. VNC, *supra* note 65, art. 5(5), 28 I.L.M. at 506.

180. See 18 U.S.C. § 981(i).

quotations on the same items under the same terms with the same suppliers, but with different destinations to disguise the inquiry. This process, and others, can reveal a pattern of mispricing, and such a pattern can be tested by additional investigative methods that focus specifically on kickbacks paid abroad.¹⁸¹

Using data garnered in this fashion with respect to overvalued Swiss imports and undervalued Swiss exports, one recent study has measured the effectiveness of Switzerland's anti-money laundering law on capital flows.¹⁸²

Clearly then, Baker is quite right that law enforcement can detect and deter abnormal pricing in international trade transactions. All that is lacking is the will to devote resources to do so.

B. Targeting U.S. Domestic Weaknesses

The waging of the United States' so-called War on Drugs, and the concomitant struggle against money-laundering, has hardly been a resounding success. Short of actually legalizing narcotics,¹⁸³ which would certainly deprive money laundering of its principal *raison d'être*, the United States must adopt Executive branch policies that are more far-sighted and legislation that is more aggressive in order to make a dent in the vast volume of laundered funds.

181. Baker, *supra* note 57, at 36. Baker's methodology is aimed at estimating flight capital, but it works equally well with respect to money laundering. He estimates annual flight capital from Latin America at \$25–30 billion, from Africa at \$10–15 billion, from Russia at \$15–25 billion, from other CIS countries (e.g., Ukraine, Belarus, Uzbekistan, and Kazakstan) at \$5–10 billion, the Middle East at \$5–10 billion, China at a minimum of \$10 billion, and other Asian countries (Indonesia, Pakistan, India, Thailand, and Myanmar: notably, Baker did not estimate Hong Kong, South Korea, and the Philippines) at \$5–10 billion. *Id.* at 36–37.

182. Maria E. De Boyrie, Simon J. Pak & John S. Zdanowicz, *The Impact of Switzerland's Money Laundering Law on Capital Flows Through Abnormal Pricing in International Trade*, CIBER Working Paper, Center for International Business and Education Research, Florida International University, available at <http://papers.ssrn.com/sol3/papers.cfm?cfid=534688&cftoken=61702573&Abstractid=268444> (last visited Sept. 21, 2003).

183. The author takes no position herein on this hotly debated topic, which clearly is well beyond the scope of this article but which has a rich literature of its own. For a small sampling, see, e.g., James Ostrowski, *The Moral and Political Case for Drug Legalization*, 18 HOFSTRA L. REV. 607 (1990); Juan R. Torruella, *The "War on Drugs": One Judge's Attempt at a Rational Discussion*, 14 YALE J. ON REG. 235 (1997).

The power of the purse is doubtless one of the most effective tools of persuasion that the United States has at its disposal vis-a-vis other nations. The Foreign Assistance Act of 1961, as amended,¹⁸⁴ links provision of U.S. assistance¹⁸⁵ to the recipient country's cooperation in combating international narcotics trafficking.¹⁸⁶ The Act requires the President to identify "major illicit drug-producing countries,"¹⁸⁷ "major drug transit countries,"¹⁸⁸ and "money laundering countries,"¹⁸⁹ and then mandates the withholding of bilateral and multilateral assistance to those countries in the first two (but not the third) of such categories, except where the President makes certain certifications. Thus, withholding of assistance will not take place where the President certifies that an identified country has cooperated fully with the United States (or, in the alternative, has taken adequate steps on its own to comply with the VNC)¹⁹⁰ or, in the alternative,

184. Act of Sept. 4, 1961, Pub. L. No. 87-195 (codified at 22 U.S.C. § 2151 *et seq.*).

185. "U.S. assistance" is defined broadly to include sales, or financing on any terms, under the Arms Export Control Act, 22 U.S.C. § 2751 *et seq.*; the provision of agricultural commodities, other than food, under the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. § 1691 *et seq.*; financing under the Export-Import Bank Act of 1945, 12 U.S.C. § 635a *et seq.*; and any assistance whatsoever under the Foreign Assistance Act of 1961, (including certain Overseas Private Investment Corporation programs under 22 U.S.C. § 2191 *et seq.*), with the exception of international narcotics control assistance and various forms of humanitarian assistance (*e.g.*, for disaster relief, refugees, etc.). 22 U.S.C. § 2291(e)(4).

186. See 21 U.S.C. § 2291j.

187. This term is defined as including any country in which (A) 1,000 hectares or more of illicit opium poppy is cultivated or harvested during a year; (B) 1,000 hectares or more of illicit coca is cultivated or harvested during a year; or (C) 5,000 hectares or more of illicit cannabis is cultivated or harvested during a year, unless the President determines that such illicit cannabis production does not significantly affect the United States. 22 U.S.C. § 2291(e)(2).

188. This term is defined as including any country that is a significant direct source of illicit narcotic or psychotropic drugs or other controlled substances significantly affecting the United States or through which such drugs or substances are transported. 22 U.S.C. § 2291(e)(5).

189. These are countries "whose financial institutions engage in currency transactions involving significant amounts of proceeds from international narcotics trafficking." 22 U.S.C. § 2291(e)(7).

190. 22 U.S.C. § 2291j(b)(1)(A). "Cooperation" for these purposes means that the President must consider the extent to which a country: (a) met the goals and objectives of the VNC, including action on such issues as illicit cultivation, production, distribution, sale, transport and financing, and money laundering, asset seizure, extradition, mutual legal assistance, law enforcement and transit cooperation, precursor chemical control, and demand reduction; (b) accomplished the goals described in an applicable bilateral narcotics agreement with the United States or a multilateral agreement; and (c) took legal and law enforcement measures to prevent and punish public corruption, especially by

that the vital national interests of the United States require that assistance that would otherwise be withheld be provided and that the United States not vote against multilateral development bank assistance for that country.¹⁹¹ Any identified country not so certified will lose fifty percent of U.S. bilateral assistance to that country, and the United States will also oppose assistance from “multilateral development banks.”¹⁹²

The first obvious improvement on this scheme would be to amend the Foreign Assistance Act to treat “money laundering countries” *in pari materia* with “major illicit drug-producing countries” and “major drug transit countries” for purposes of withholding U.S. assistance. A second (and no less obvious) improvement would be a more consistent and hard-line approach to the granting of Presidential “vital national interest” certifications.

For example, in 1998, former President Clinton determined that Afghanistan, Iran, and Nigeria were not in compliance with the goals and objectives of the VNC and hence ineligible for U.S. assistance,¹⁹³ but he simultaneously certified Colombia, Pakistan, and Paraguay—countries equally not in compliance—as eligible due to “vital national interests.”¹⁹⁴ While the author was not privy to the councils of the mighty, it does seem that this disparity was both ludicrous and short-sighted, the more so when one also considers that one Clinton Cabinet member said that money-laundering activities in Russia might jeopardize assistance to that

senior government officials, that facilitates the production, processing, or shipment of narcotic and psychotropic drugs and other controlled substances, or that discourages the investigation or prosecution of such acts. 22 U.S.C. § 2291j(b)(2).

191. 22 U.S.C. § 2291j(b)(1)(B). A Presidential certification under this provision must furnish: (a) a full and complete description of the vital national interests placed at risk if U.S. bilateral assistance to that country is terminated and multilateral development bank assistance is not provided; and (b) a statement weighing the above-described risk against the risks posed to the vital national interests of the United States by the failure of such country to cooperate fully with the United States in combating narcotics or to take adequate steps to combat narcotics on its own. 22 U.S.C. § 2291j(b)(3).

192. See 22 U.S.C. § 2291j(a)(1)–(2). For this purpose, “multilateral development bank” means the International Bank for Reconstruction and Development, the International Development Association, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development. 22 U.S.C. § 2291j(a)(2).

193. See Gurule, *supra* note 125, at 86–87.

194. *Id.* at 87–88.

country!¹⁹⁵ With respect to which of these seven countries, one wonders rhetorically, would a certification based on the “vital national interests” of the United States be most appropriate?

On the legislative front, some progress was, in fact, made with IMLAAFA,¹⁹⁶ though it is scandalous that it took heinous acts of terrorism and the destruction of the World Trade Center in New York City to provide Congress with the requisite backbone. Three examples of the simplicity entailed in making this progress—provisions dealing with correspondent accounts, bulk cash smuggling, and enforcement of foreign confiscation orders (the latter actually antedating IMLAAFA by one year)—will serve to underscore how easily further improvements to the efficacy of law enforcement could be effected legislatively.

The problem with correspondent accounts was discussed above,¹⁹⁷ and Congress addressed the problem with the creation of a value confiscation regime for correspondent accounts. Since IMLAAFA, when law enforcement authorities know that tainted money has been deposited overseas into an account at a foreign bank having a U.S. correspondent account, funds in the latter account in an amount equivalent to the tainted funds on deposit overseas are subject to immediate forfeiture.¹⁹⁸ In the ensuing forfeiture action, the burden is on the foreign depositor—who now is considered for purposes of U.S. law to be the owner of the funds—to challenge the forfeiture action in the U.S. courts. No innocent third party concerns apply here as, if the depositor does not initiate such a challenge or is unsuccessful in one, the foreign bank may always recover the funds taken from its correspondent account by debiting the foreign bank account containing the tainted funds.

Furthermore, IMLAAFA authorizes U.S. law enforcement agencies to obtain records from foreign banks regarding transactions that take place abroad. As a condition of opening a

195. See *Money Laundering Allegations May Affect Food Aid*, CHI. TRIB., Sept. 30, 1999, at D1 (quoting former U.S. Agriculture Secretary Dan Glickman). Similar inanity (though not as to food aid) was expressed by former Republican Congressman and House Banking Committee Chairman Jim Leach: “We should also emphasize retrieving stolen assets for the Russian people rather than giving new aid, except perhaps food assistance.” James A. Leach, *The New Russian Menace*, N.Y. TIMES, Sept. 10, 1999, at A25.

196. See *supra* note 72.

197. See notes 60–62 and accompanying text.

198. IMLAAFA, *supra* note 72, § 319(a) (codified at 18 U.S.C. § 981(k)).

correspondent account in the United States, foreign banks are now required to designate a U.S. person authorized to accept a subpoena for bank records, and both the Attorney General and the Secretary of the Treasury are authorized to serve that person with a subpoena for records concerning transactions that took place in a non-U.S. office of the foreign bank.¹⁹⁹ Refusal to comply with such a subpoena constitutes grounds for closing the correspondent account.²⁰⁰

The growing problem of bulk cash smuggling was also addressed—at least partially—in IMLAAFA. The only benefit to the vast volume of cash generated by street-level drug sales is that it creates a logistical nightmare for drug dealers. Cash is bulkier, far heavier, and more difficult to conceal than most drugs, and hence more susceptible to discovery and confiscation.

Obstacles posed by the BSA and its amendments have effectively shut down many smurfing and other structuring operations. Professional money launderers now endeavor physically to smuggle cash out of the country, and deposit it into a foreign bank or sell it on the black market.²⁰¹ Prior to IMLAAFA, the only available options for law enforcement were to confiscate the cash and to prosecute the courier for a customs violation (not declaring on a customs form the expatriation of more than \$10,000),²⁰² or to confiscate the money on the ground that it represented the proceeds of a criminal offense²⁰³ and hope to be able to make the case. The customs violation prosecution—far from an ideal law enforcement tool—became even less useful when the Supreme Court decided that outright confiscation of the smuggled cash is unconstitutional because it is “grossly disproportional to the gravity of the offense.”²⁰⁴ The option of trying to prove that the cash was derived from criminal proceeds can often be successful, particularly given helpful cases allowing the requisite proof by recourse to positive alerts from dogs trained

199. IMLAAFA, *supra* note 72, § 319(b) (codified at 31 U.S.C. § 5318(k)).

200. *Id.* § 319(b) (codified at 31 U.S.C. § 5318(k)).

201. See Testimony of Assistant Attorney General James Robinson, House Crime Subcommittee, Feb. 10, 2000, text available at <http://www.house.gov/judiciary/robi0210.htm> (last visited Sept. 21, 2003).

202. See 31 U.S.C. § 5316.

203. See 18 U.S.C. § 981(a)(1)(C).

204. See *United States v. Bajakajian*, 524 U.S. 321 (1998).

to detect traces of narcotics,²⁰⁵ but it allows the courier to go on his merry way²⁰⁶ and is no use at all in a reverse money laundering scenario, where the cash is, by definition, legitimate.

IMLAFA partially addressed this problem by creating a new crime of bulk cash smuggling: transporting more than \$10,000 into or out of the United States with the intent to evade the customs laws.²⁰⁷ The penalty for the offense includes the confiscation of the cash.

IMLAFA does not, however, criminalize transporting cash in excess of \$10,000 solely within the United States itself, even where the courier knows the cash constitutes proceeds of criminal activity or, as in reverse money laundering, that it is intended to be used for an unlawful purpose. The ease with which terrorists can move cash within the United States to fund and facilitate their nefarious plots is ample evidence that more ought to be done in this regard.²⁰⁸

Finally, notwithstanding the length of time that the VNC and the Strasbourg Convention have been in force, only recently has the United States enacted domestic legislation consistent with the international cooperation regime for confiscation orders contemplated thereunder. This was accomplished in a provision enacted as part of the Civil Asset Forfeiture Reform Act of 2000,²⁰⁹ which implemented procedures²¹⁰ reminiscent of uniform state laws for enforcement of foreign civil judgments. Under the Uniform Foreign Money Judgments Recognition Act, for example, a foreign damages judgment will be enforced if it was obtained with

205. See *United States v. \$22,474 in U.S. Currency*, 246 F.3d 1212 (9th Cir. 2001).

206. Cases had established that mere transport of criminal proceeds does not constitute money laundering. See, e.g., *United States v. Puig-Infante*, 19 F.3d 929 (5th Cir. 1994).

207. IMLAFA, *supra* note 72, § 371 (codified at 31 U.S.C. § 5332).

208. See, e.g., Barry Flynn, *Hijackers Had Cash in Suntrust; An Investigation by the FBI Showed that the Accounts Were Opened Legally*, ORLANDO SENTINEL, July 11, 2002, at A1; James Risen, *Traces of Terror; The Money Trail: Money Transfers by Hijackers Did Not Set Off Alarms for Banking Regulators*, N.Y. TIMES, July 17, 2002, at A16, col. 1; see also Desmond Butler, *Threats and Responses: Intelligence; Germans Were Tracking Sept. 11 Conspirators as Early as 1998, Documents Disclose*, N.Y. TIMES, Jan. 18, 2003, at A10, col. 1 (reporting that Mounir el-Motassadeq, a Moroccan who came to Germany in 1993 to study engineering, is being prosecuted in Germany for providing logistical support for the planners of the September 11, 2001 acts of terrorism in the United States, including transferring money to the hijackers after they moved to the United States for flight training).

209. Pub. L. No. 106-85, 114 Stat. 202 (2000) [hereinafter referred to as "CAFRA"].

210. See 28 U.S.C. § 2467.

sufficient indicia of what courts in the United States traditionally consider due process, *i.e.*, a full and fair opportunity for a hearing, conducted with regular proceedings before a court of competent jurisdiction in a nation with an impartial judicial system and in the absence of any indication of prejudice or fraud.²¹¹ So too under CAFRA, where the government is satisfied that the foreign confiscation order was obtained with sufficient indicia of due process, it may apply to a federal court for judicial enforcement thereof.

The fly in the ointment, as originally enacted, was the absence of any procedure for freezing the assets in the United States while the foreign authorities obtained their confiscation order, transmitted it to the United States, and the U.S. authorities took the requisite steps to enforce it. Given the sophistication of criminal enterprises engaged in multinational money laundering, it would be remarkable—to say the least—if the funds sat patiently awaiting the completion of these formalities.

Once again, IMLAAFA came to the rescue, adding new language authorizing a federal district court to “preserve the availability of property subject to a foreign forfeiture or confiscation judgment” by issuing a restraining order “at any time before or after” the government receives a final judgment of forfeiture from the foreign court.²¹² In issuing the restraining order, the court may either rely on an affidavit “describing the nature of the proceeding or investigation underway in the foreign country” and setting forth the basis for the restraint, or “register and enforce” a foreign court’s restraining order.²¹³ Moreover, duplicative challenges in both jurisdictions are avoided by statutory language preventing a challenge “on any ground that is the subject of parallel litigation involving the same property that is pending in a foreign court.”²¹⁴

Many more domestic loopholes for money launderers require plugging. As Stefan Casella points out, the statutory laundry list of “specified unlawful activities”²¹⁵ that are predicates for money

211. Uniform Foreign Money Judgments Act, 13 U.L.A. 263 (1980). See RALPH H. FOLSOM, MICHAEL WALLACE GORDON & JOHN A. SPANOGLE, JR., *INTERNATIONAL BUSINESS TRANSACTIONS* 1282–1306 (4th ed. 1999).

212. See IMLAAFA, *supra* note 72, § 323 (codified at 28 U.S.C. § 2467(d)(3)).

213. *Id.* § 323.

214. *Id.* § 323.

215. See 18 U.S.C. § 1956(c)(7).

laundering prosecutions, while extensive (comprising over 200 separate offenses), includes relatively few crimes committed overseas:²¹⁶

The great majority of other foreign crimes—crimes that routinely generate money that the criminal wants to hide or invest somewhere else, or that may be used to finance criminal acts in the United States (such as consumer fraud, theft, and tax evasion, to mention only a few)—are not on the list, making it very difficult for a prosecutor to use the money laundering laws to prevent banks in the United States from being used to wash the proceeds of the crimes committed around the world.²¹⁷

There is no conceivable public policy justification for not keeping the proceeds of *all* foreign crimes, not just some, out of the U.S. financial system. Accomplishing this requires but a simple, straightforward amendment to the MLCA to make laundering criminal proceeds a crime regardless of where the underlying crime was committed.

Casella also identifies a problem involving the ability of the government to confiscate laundered money when it has been commingled in bank accounts with non-laundered funds. “The civil forfeiture laws require that the property being seized be directly traceable to the property that was generated by the criminal act. . . . [It isn’t] if the balance . . . [fluctuated] between the time of the deposit and the time the government discovered the money. Placing money in a volatile bank account, in other words, destroys the link between the initial deposit and the eventual seizure.”²¹⁸

Another problem is that current forfeiture statutes regard money as fungible for only one year.²¹⁹ This creates enormous practical problems given the length of time required for consummation of a successful undercover investigation. As Casella suggests, “The solution is simple: in money laundering cases, there should be no limit on how long money is considered

216. See Stefan Casella, *Money Laundering Has Gone Global: It's Time to Update the Federal Laws*, FED. LAW., Jan. 2002, 24, 26 (citing as examples drug trafficking, bank fraud, public corruption, and crimes of violence). Mr. Casella is assistant chief of the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice.

217. *Id.*

218. *Id.* at 28 (citing *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986)).

219. Casella, *supra* note 216, at 28 (citing 18 U.S.C. § 984).

fungible. Any other rule only encourages the shell game involving electronic funds that the money laundering laws were intended to avoid.²²⁰

Finally, insufficient attention has been given to the terrorism-related threats posed by reverse money laundering and Hawala. While existing law does criminalize the transfer of money across the U.S. border with the intent to use it in aid of a criminal offense,²²¹ purely internal money transmission for the same purpose is not unlawful. Here again, a simple amendment would provide law enforcement (and the new Department of Homeland Security)²²² with valuable tools.

Hawala is a more difficult problem, in that criminalizing that activity outright would be not only an overbroad response to the danger posed but also constitutionally problematic. The simple solution, instead, is to mandate that all money transmission businesses be licensed and subjected to *comprehensive*²²³ examination and supervision by state or federal regulators. Implementation of such a licensing requirement makes it easy both to monitor the flow of funds and to criminalize the conduct of any such business on an unlicensed basis. Once licensed, moreover, these businesses can readily be made subject to existing currency reporting and SAR requirements, *in pari materia* with other licensed financial intermediaries.

220. *Id.*

221. *See* 18 U.S.C. § 1956(a)(2)(A).

222. Created as an Executive Department by the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), the Department of Homeland Security is tasked, *inter alia*, with the mission of preventing terrorist attacks within the United States and reducing the country's vulnerability to terrorism. *Id.* § 101(b)(1)(A)–(B), 116 Stat. at 2142.

223. FinCEN has already promulgated a rule requiring “money service businesses”—a term broadly defined to include “money transmitters,” to file SAR’s. *See* Dep’t of the Treasury, Financial Crimes Enforcement Network, Amendments to the Bank Secrecy Act Regulations—Requirement that Money Transmitters and Money Order and Traveler’s Check Issuers, Sellers, and Redeemers Report Suspicious Transactions, 65 Fed. Reg. 13,683 (2000) (codified at 31 C.F.R. § 103.20). Even though a hawaladar may technically fall within the catchall provision of the defined term “money transmitter,” *see* 12 C.F.R. § 103.11(uu)(5)(i)(B) (2003), the level of supervision and regulation necessary to accomplish fundamental regulatory goals is far in excess of a mere SAR obligation, assuming that is even enforceable against such low-profile operators.

IV. CONCLUSION

Much of the intractability of money laundering to effective detection and deterrence is based not on a lack of law enforcement tools but on their relative lack of efficacy. Confiscation represents the clearest and best technique—depriving the malefactors of their ill-gotten gains. While both international and domestic frameworks have been created to foster and facilitate law enforcement authorities' use of this tool, a number of practical political and legal problems diminish its potency. Potential legal solutions are fairly straightforward, and some of these are suggested in this article. All that is required is the political will of the international community to implement them.