

## HAWALA, MONEY LAUNDERING, AND TERRORISM FINANCE: MICRO-LENDING AS AN END TO ILLICIT REMITTANCE

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### I. INTRODUCTION

“Hawala”, in Arabic, means “to transfer;”<sup>1</sup> it is also known as “Hundi,” meaning “to collect” - from Sanskrit root.<sup>2</sup> Though the term might be a new addition to the western lexicon, it is used quite readily the world-over in some form. A traveler’s check, for example, is known as “hawala safir” from parts of Africa to Asia and throughout the Middle East.<sup>3</sup> This paper, as interlocutor, seeks to introduce (to re-introduce to some) not only the term hawala, but the unique security challenges this concept - that of an informal, and less than transparent, value transfer system - presents. Beyond examining the role of hawala in money laundering and terrorism finance, the objective of this work is to weigh the effectiveness of current efforts in addressing these issues, both at the street-level and in the legislative realm, post September 11, 2001 (9/11). Lastly, the author offers recommendations based on US, UAE, Turkey, and Netherlands-based research coupled with numerous interviews with various subject-matter experts ranging from international bankers to legislators to diplomats to federal agents.

### II. THE HAWALA TRANSACTION

Hawala, in its most basic delineation, is “money transfer without money movement,”<sup>4</sup> without movement in formal financial institutions that is. Upon customer request, a US-based hawaladar - a hawala operator - will call, fax, or email their hawaladar associate in Pakistan, for example, with the specifics of the transaction (i.e. amount and password only - no names are used). This Pakistan-based hawaladar will then pay the requested amount out of his/her own funds, and in local currency, upon receiving the agreed upon password from the recipient. The only paper trail might be a notation, often encoded or in a little-known dialect

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1. Samuel Munzele Maimbo, *The Money Exchange Dealers of Kabul: A Study of the Hawala Systems in Afghanistan* v n.1 (World Bank Publication, Working Paper No. 13, 2003).

2. Saeed Al-Hamiz, *Hawala: U.A.E. Perspective*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 30, 31 (Int’l Monetary Fund, 2005).

3. *Id.*

4. JOHN A. CASSARA, HIDE & SEEK: INTELLIGENCE, LAW ENFORCEMENT, AND THE STALLED WAR ON TERRORIST FINANCE 145 (Potomac Books 2006).

(e.g. Gujarati<sup>5</sup> or Memoni<sup>6</sup>), of the debt obligation in internal books. The funds are distributed, often delivered right to the door of the intended recipient, all within a course of minutes,<sup>7</sup> without receipts or paperwork, and all outside of formal financial institutions.

Theoretically, payments between hawaladars operate both ways. In our example the Pakistani hawaladar could just as easily request that his US colleague pay out X to a US recipient. As is typically the case, however, flows tend to be asymmetrical (i.e., money leaves more developed nations bound for least developed nations in the form of remittances). It is clear, however, that this trade is not simply bilateral. Our US and Pakistani hawaladars would be dealing concurrently with operators in Dhaka, Muscat, Istanbul, London, etc.

Hundreds or thousands of these transactions are bundled together over the course of weeks or months with consolidation taking place at various levels. Mid-level hawaladars act as clearing houses for small scale operators, larger hawaladars act as clearing houses for those in the middle, and so on. In Dubai, at the mega-level, tranches of value worth £100,000 are the minimum units of trade in each hawala swap.<sup>8</sup> Despite this layering, eventually balance sheet positions, even at the lowest levels, have to be settled.

Some settlement occurs within traditional banking channels, but much of this balancing of the accounts takes place through alternative channels like cash couriers.<sup>9</sup> Despite Reports of International Transactions of Currency or Monetary Instruments (CMIR) reporting requirements,<sup>10</sup> money is effectively smuggled across our borders in this fashion every day. In fact, in the US State Department's 1998 International Narcotics Control Strategy Report, bulk cash smuggling was deemed one of the most utilized money laundering techniques in the United States and around the world. In the same report, a decade later, the same holds true: "The smuggling of bulk currency out of the United States is the largest and most significant . . . money laundering threat facing law enforcement. Deterring direct access to US financial institutions by criminals does not prevent money laundering if illicit proceeds can still reach US accounts through indirect means."<sup>11</sup>

The principal drawback of using couriers is one of logistics. One million dollars in "street cash" (i.e. bills in \$5, \$10, and \$20 denominations) weighs

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5. Patrick M. Jost & Harjit Singh Sandhu, *The Hawala Alternative Remittance System and its Role in Money Laundering* 20 n.13 (A FinCEN/Interpol Paper, 2000).

6. Memoni, often classified as a dialect of Sindhi, is spoken by roughly 500,000 people - most of whom live in Karachi. NationMaster Encyclopedia, Languages of Pakistan, <http://www.nationmaster.com/encyclopedia/Languages-of-Pakistan> (last visited Feb. 16, 2009).

7. Some hawaladars guarantee receipt of payment within 10 minutes. Interview with hawaladars, in Sharjah, Dubai, & Abu Dhabi (June 22-30, 2008).

8. Roger Ballard, *Hawala: Criminal Haven or Vital Financial Network?* Newsletter of the Int'l Inst. of Asian Studies (Int'l Inst. of Asian Studies, Univ. of Leiden), Oct. 2005, at 5.

9. CASSARA, *supra* note 4, at 146.

10. 31 U.S.C. § 5316 (2007); 31 C.F.R. § 103.23 (2009); 31 C.F.R. § 103.27 (2009).

11. U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: VOLUME II MONEY LAUNDERING AND FINANCIAL CRIMES 5 (2008) [hereinafter DEP'T OF STATE].

approximately 256 pounds.<sup>12</sup> Therefore, in larger transactions, some hawaladars (or their associates) utilize import/export businesses. Through these companies, “countervaluation” - the settling of accounts through trade rather than transfer - occurs.<sup>13</sup> Countervaluation is done either by the underinvoicing or overinvoicing of product flows between these import/export businesses.<sup>14</sup> For example, if a hawaladar owed \$25,000 to a colleague in Bishkek, he might overinvoice a shipment of carpets. The carpets, having a true value of \$25,000 would be invoiced at \$50,000; \$25,000 would cover the legitimate cost of goods and the remaining \$25,000 would settle his/her debt. As John Cassara, former CIA officer and US Customs agent, notes, “The cover of the business transaction and the documentation involved wash the money clean . . . [A] customs inspector is hard-pressed to spot moderate discrepancies in invoice pricing and product description.”<sup>15</sup> Whether carpets or gold, it’s simply unrealistic to expect customs agents to wade through mountains of pile verifying knots per square inch or the purported purity of gold; is it solid gold or simply gold-plated; is it 18-carat or 22-carat?

The products involved in countervaluation present tracking challenges in and of themselves. Though the principle focus of this paper is on the hawala transaction, the use of goods in the countervaluation process makes the mention of trade-based money laundering a necessity. And, gold, in particular, presents one of the most challenging set of security concerns. In fact, some, like Mr. Cassara, argue that for the role gold plays in ethnic-based alternative remittance systems, it should be classified as an alternative remittance system itself (more on this later).<sup>16</sup>

### III. VALUABLE REMITTANCE TOOL OR NATIONAL SECURITY THREAT?

Remittances - the money that migrant workers send back to their countries of origin<sup>17</sup> - play a large and ever growing role in the global economy. As far back as the 1990’s, “[D]eposits from emigrants . . . represented almost 20 percent of total deposits in the Portuguese banking system.”<sup>18</sup> Skip ahead a few years, and in 2002 remittances from the US to Latin America averaged \$200-300 per month per person while monthly sums to Pakistan and India were nearly three times that amount per person.<sup>19</sup> As a result, by 2003, developing countries were receiving \$96 billion in remittance inflows.<sup>20</sup> This sum accounted for more than 5 percent of

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12. CASSARA, *supra* note 4, at 131.

13. *Id.* at 146.

14. *Id.*

15. *Id.*

16. *Id.* at 150.

17. Manuel Orozco, Worker Remittances in an International Scope 1 (Multilateral Inv. Fund of the Inter-Am. Dev. Bank, Working Paper, 2003), available at [http://www.microlinks.org/ev\\_en.php?ID=7777\\_201&ID2=DO\\_TOPIC](http://www.microlinks.org/ev_en.php?ID=7777_201&ID2=DO_TOPIC).

18. *Id.* at 8.

19. *Id.* at 9.

20. Jose de Luna Martinez, *Workers’ Remittances to Developing Countries: A Survey with Central Banks on Selected Public Policy Issues 4* (World Bank Policy Research, Working Paper No. 3638, 2005), available at <http://go.worldbank.org/F43572F110>.

the 2003 GDPs for 25 developing countries,<sup>21</sup> and nearly 7.5 percent of the GDP and 160 percent of the Foreign Direct Investment (FDI) of Vietnam.<sup>22</sup> By 2005, global remittances passing through formal channels exceeded a staggering \$233 billion.<sup>23</sup>

I pause to stress two points here, the first being that the above-mentioned figures are indeed estimates. There are many reasons, but two in particular, that suggest why these numbers should be viewed with a modicum of skepticism. Firstly, there is a lack of uniformity in remittance classification. In many countries, companies which would otherwise be classified as money transmitters are considered commercial entities rather than financial institutions, and are, therefore, exempt from many of the regulatory, oversight, and reporting requirements.<sup>24</sup> In addition, remittances which are paid through post offices are seldom reported to financial authorities (as is the case in the US).<sup>25</sup> As such, those transactions also escape inclusion in remittance data. Secondly, the levels of reporting, and thus the adequacy of the data collected, vary from country to country. For example, even where money transfer companies are required to register as financial institutions, they often fail to report both the number and value of remittance transactions.<sup>26</sup>

Another point that needs to be emphasized is that these figures represent only those flows passing through formal channels. While “most countries do not measure remittances that occur through informal channels,”<sup>27</sup> international bodies do, and their figures are in the tens of billions of dollars.<sup>28</sup> Some commentators, like professor Roger Ballard, place international levels higher still: “[u]nrecorded flows moving through informal channels . . . are conservatively estimated to amount to at least 50 percent of recorded flows.”<sup>29</sup> If that statement is accurate, informal flows would amount to roughly \$115 billion annually. In Pakistan alone, “[o]fficials . . . estimate that more than \$7 billion flow into the nation through hawala channels each year.”<sup>30</sup> To put these numbers into perspective, the sum of formal and informal remittance flows is somewhere around \$350 billion per year,<sup>31</sup> while 2007 CIA Factbook figures list China’s budget revenues at just \$450 billion.<sup>32</sup>

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21. *Id.*

22. Raul Hernandez-Coss, *The Canada-Vietnam Remittance Corridor: Lessons on Shifting from Informal to Formal Transfer Systems* 4 (World Bank, Working Paper No. 48, 2005), available at <http://go.worldbank.org/TUUN6HHHE0>.

23. Ballard, *supra* note 8, at 3.

24. Martinez, *supra* note 20, at 8.

25. *Id.* at 9.

26. *Id.* at 8-9.

27. *Id.* at 12.

28. U.S. TREASURY DEP'T, CONTRIBUTIONS BY THE DEP'T OF THE TREASURY TO THE FINANCIAL WAR ON TERRORISM, Fact Sheet 15 (2002).

29. Ballard, *supra* note 8, at 3.

30. U.S. TREASURY DEP'T, *supra* note 28, at 15.

31. Ballard, *supra* note 8, at 3.

32. CENTRAL INTELLIGENCE AGENCY [CIA], THE WORLD FACTBOOK (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/>.

Cautionary notes aside, no matter how broad the discrepancies between the actual figures and the estimates above, and between reporting methodologies and the actual data, two things are clear. First, give or take hundreds of thousands of dollars, or tens of billions of dollars for that matter, and the numbers involved are still enormous. Second, there is a clear bifurcation of preference among remitters. Some choose to utilize the formal sector while others, often at risk of criminal prosecution, opt for the informal.

Why is that the case? Why would one prefer to send money through a hawaladar? There are four basic incentives that seem to fuel this choice: (1) the absence of formal sector alternatives, (2) cultural familiarity, (3) affordability, and (4) anonymity.

“[H]awala continues to be the best option for most immigrants and the only one for those coming from regions devastated by civil conflict and disasters.”<sup>33</sup> In Afghanistan, in the absence of traditional financial institutions, hawaladars provided the only viable commercial banking services while the Taliban held power.<sup>34</sup> Even after the ousting of the Taliban, what banks there were, “were plagued by significant weaknesses, among them, weak corporate governance . . . , unskilled human resources, outdated technolog[y] . . . , and grave problems of liquidity and solvency,”<sup>35</sup> not to mention corruption and outright theft.

Traditional banks and wire services were, and still are, simply reluctant to risk the capital and personnel required to set up shop in regions like Afghanistan and the tribal areas of Pakistan. Yes, traditional financial institutions do exist in the urban centers, but keep in mind that hawala is attractive not only to the un-serviced, but to the under-serviced as well. Just because bank X might have a branch in Karachi, does not mean that it is either expedient or safe to travel for hours through rough neighborhoods, cash in hand, to do business. Hawaladars, as a “safe” alternative, offer to deliver payments to the doors of recipients, even to those in rural areas - areas that are disproportionately victimized by the violence of radicals, tribal chieftans, and warlords.

Our second incentive, that of cultural familiarity, or what professor Nikos Passas, of Northeastern University, terms “cultural inertia,” also plays a significant role.<sup>36</sup> Saeed al-Hamiz, Executive Director of the Banking Supervision and Examination Department of the Central Bank of the UAE, tries to explain the cultural/historical significance of hawala as follows:

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33. Nikos Passas, *Formalizing the Informal: Problems in the National and International Regulation of Hawala*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 7, 9 (International Monetary Fund, 2005).

34. Maimbo, *supra* note 1, at 1.

35. Samuel Maimbo, *Challenges of Regulating and Supervising the Hawaladars of Kabul*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 47, 51 (IMF, 2005).

36. Passas, *supra* note 33, at 10.

Hawala . . . predates bank transfers by hundreds of years. During the twelfth and thirteenth centuries, the development of trade between regions called for the establishment of reliable and trustworthy instruments to finance those transactions . . . Hawala . . . operated within tight-knit extended families that were based in two or more major trading centers.<sup>37</sup>

At the operator level, not much has changed since the twelfth century. For example, within many hawala networks, and other informal remittance systems, the core of trust among operators still consists of familial ties. Further, they continue to be ethnically exclusive in the services they provide (e.g. you must be Vietnamese to access the Vietnamese system).<sup>38</sup> This exclusion by force of habit and community tradition acts as a formidable obstacle to commercial competition from the outside. In that sense our second incentive simply reinforces incentive one. And, again, this is particularly true in rural areas where rarer dialects, lesser known traditions, and a general distrust of outsiders act as further barriers to entry.

Despite this fairly high level of service, hawaladars manage to keep their costs, and thus their prices (i.e. a fee in the form of a percentage of the amount remitted, often only 1-2 percent),<sup>39</sup> low - our third incentive. Remittance fees (e.g. 8.3-13 percent from NY to Bangladesh, Pakistan, or Sri Lanka) can be extremely expensive, comparatively, when utilizing formal sector avenues. Unlike stand-alone banks and wire services that have to pass their high overhead costs on to their customers, hawaladars, which are often integrated with other businesses, share the costs of infrastructure.<sup>40</sup> Further, these businesses provide cover for illicit money transmitters whom subsequently save additional monies by avoiding registration and reporting requirements. In addition, many of these entities are family owned and operated.<sup>41</sup> As such, insurance, retirement plans, and minimum wage are often ignored. As an added bonus, as these businesses (e.g. ethnic grocers, foreign exchange houses, rug dealers, travel agencies, etc.) tend to cater to ethnic populations, they provide hawaladars with steady streams of potential clientele.

Lastly, the real savings that is passed on to customers is created via currency speculation. "Hawala-type transactions . . . provide special advantages in situations where the remitting country has a convertible currency and no capital controls,<sup>42</sup> and the receiving country has inconvertible currency and/or a black

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37. Al-Hamiz, *supra* note 2, at 30-31.

38. Hernandez-Coss, *supra* note 22, at 29.

39. Jost, *supra* 5, at 6.

40. U.S. DEP'T OF THE TREASURY & U.S. DEP'T OF JUSTICE, 2002 NATIONAL MONEY LAUNDERING STRATEGY 22 (2002), available at <http://www.treasury.gov/offices/enforcement/publications/ml2002.pdf>.

41. Al-Hamiz, *supra* note 2, at 31.

42. Capital Controls are government mandated conversion of foreign currency into local currency, often at unfavorable rates -- think Cuba or the former Soviet Union. CTR. FOR POPULAR ECONOMICS, CONTROLLING CAPITAL 2 (2006).

market exchange rate.”<sup>43</sup> Given the low overhead costs of hawala operations, as discussed above, hawaladars can profit from the slimmest of margins alone. A US hawaladar was quoted as saying that his business could still make money on just a 2 percent exchange rate margin.<sup>44</sup>

Ultimately, further “discounts” may be passed on to unwitting remitters by hawaladars that are willing to circulate counterfeit notes. Given that hawaladars live and die on the basis of trust, this is, admittedly, a rare thing. But, it does happen. In 2003, for example, “substantial volumes of freshly printed, shrink-wrapped Afghani notes,” of Russian origin and of questionable authenticity, were discovered in Afghanistan and were only made “available to dealers selling dollars.”<sup>45</sup>

Anonymity, our fourth and last incentive, should come as no surprise given that hawala is illegal in many countries,<sup>46</sup> and given that hawala owes much of its affordability to illegal currency speculation and other questionable business practices. This point is best illustrated by the fact that even in the United Arab Emirates (the “UAE”), where hawala is legal to the extreme, hawaladars refused to come forward in order to attend the Abu Dhabi “International Conference on Hawala.”<sup>47</sup> As a further, and more comical, illustration, in 2002, US Treasury Secretary Paul O’Neil’s advance security team visited a Dubai hawala in preparation for his visit the following day.<sup>48</sup> When Secretary O’Neil arrived for his meeting he found that not only were the hawaladars missing, but that the entire storefront had been removed the night before.<sup>49</sup>

Again, with all that we know about hawala these accounts might not be surprising. What might be surprising, however, is that this desire for secrecy extends to the remitters themselves, and not just to the obvious, *viz* money launderers, tax evaders, and terrorist organizations. Throughout their working lives, migrant workers the world-over tend to fluctuate in their legal status. Some may enter one country illegally and then subsequently “earn” the right to stay, while others might initially enter through legal channels but overstay their visas. While this legal fragility might do little to temper the flow of immigrants, or the flow of money home for that matter, what it does is create a fear of all government and quasi-government institutions - post offices, banks, etc. As a result, and coupled with the incentives above, what emerges is a natural inclination to opt for the informal versions of necessary services. In the context of money transmitters, this would be hawaladars.

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43. John F. Wilson, *Hawala and Other Informal Payment Systems: An Economic Perspective* 4 (IMF Working Paper, 2002).

44. Jost, *supra* note 5, at 7.

45. Maimbo, *supra* note 35, at 17.

46. Passas, *supra* note 33, at 13.

47. *Id.*

48. JOHN B. TAYLOR, *GLOBAL FINANCIAL WARRIORS: THE UNTOLD STORY OF INTERNATIONAL FINANCE IN THE POST-9/11 WORLD* 24 (2007).

49. *Id.*

Lastly, as an addendum to our fourth incentive, I include something that I call "anonymity by default." In Pakistan and Yemen illiteracy stands at 50 percent, while in Somalia and Afghanistan the figures are 60 percent and 70 percent respectively.<sup>50</sup> Given both the high emigration totals for countries with lower levels of education and the high rates of immigration for countries employing manual laborers, one can deduce that many remittance senders are, at best, poorly educated. Many can neither read nor write their own names, much less fill out and/or decipher account statements, deposit slips, and transfer orders. Consequently, for this segment of the population, the need for identification means little more than an invitation for ridicule. As such, the ease by which one can send money through a hawaladar by simply verbalizing a password is attractive in that it masks a lack of education; anonymity is simply an added bonus.

Despite how attractive these incentives are, and ironically due to how attractive these incentives are, hawala does have a darker potentiality. Though popular media has only recently discovered hawala and its dark side, the potential for abuse has appeared on the radars of both the law enforcement and intelligence communities for years before September the 11th, 2001. Though before 9/11, as Senior Economist of the International Monetary Fund's Middle Eastern Department John Wilson states, "This [analysis] was generally in the context of money laundering and underground banking activities. For instance, hawala has been commonly mentioned in the periodic typologies of money laundering systems prepared by the Financial Action Task Force (FATF), by FATF-affiliates such as the Asia Pacific Group on Money Laundering."<sup>51</sup>

Only after the attacks on the Twin Towers and the Pentagon did knee-jerk speculation by various federal agencies bring the presumed relationship between hawala and terrorism finance to the forefront.<sup>52</sup> This, despite the fact that hawaladars played only a minor role in the 9/11 attacks;<sup>53</sup> "most of the identified funding was transferred via cash, wire-transfers, and travelers' checks"<sup>54</sup> - the bulk of funds passing through SunTrust Bank accounts in Venice, Florida.<sup>55</sup> Further, neither method nor amount triggered Bank Secrecy Act (BSA) Suspicious Activity Reports (SARs), Currency Transaction Reports (CTRs), or Reports of International Transactions of Currency or Monetary Instruments (CMIRs).<sup>56</sup>

All that said, hawala has, on multiple occasions, been used to finance terrorist activities. A senior Indian law enforcement official even went so far as to say that all terrorist attacks in India are financed through hawala.<sup>57</sup> While certainly an overstatement, Interpol has reported verifiable accounts of terrorist funds passing

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50. See CIA, *supra* note 32.

51. Wilson, *supra* note 44, at 1.

52. Mark Butler & Rachele Boyle, *Alternative Remittance Regulation Implementation Package 5* (Asia/Pacific Group on Money Laundering Paper, 2003).

53. Passas, *supra* note 33, at 14.

54. CASSARA, *supra* note 4, at 176.

55. Ballard, *supra* note 8, at 2.

56. See CASSARA, *supra* note 4, at 190.

57. *Id.* at 178.



through hawaladars in India and elsewhere. The military hardware used to assassinate an important Indian politician was purchased with hawala funding.<sup>58</sup> The requisite explosives used in the bombing of a major Indian city in 1993 were purchased with funds flowing through hawala operators in the U.K., Dubai, and India.<sup>59</sup> And, al-Qaeda operatives, via the Saudi-based charity al-Haramain<sup>60</sup> (more on this later), responsible for the attacks on the US embassies in Nairobi and Dar es Salaam were funded, in part, through local hawaladars,<sup>61</sup> just to name a few.

While of course it is true that most of the estimated \$115 billion in informal remittances is spent in harmless ways, this should bring little comfort given that terrorist operations cost so little in relative terms. The 9/11 attacks, for example, are estimated to have cost \$300,000-\$500,000.<sup>62</sup> This is quite a small sum when one considers the more than \$1,000,000,000 in damage caused.<sup>63</sup> That fact is particularly troubling when one recognizes that the 9/11 attacks were an anomaly in terms of operational costs, most terrorist events cost far less than \$100,000.<sup>64</sup>

[A]ccording to the UN it is believed that the 1998 simultaneous truck bombings of US embassies in Kenya and Tanzania cost less than \$50,000; the October 2000 attack on the USS *Cole* in Aden is estimated to have cost less than \$10,000; the Bali bombings in October 2002 cost less than \$50,000; the 2003 bombing of the Marriott Hotel in Jakarta cost about \$30,000; the attacks in Istanbul in November 2003 cost less than \$40,000; the March 2004 Madrid train attacks cost about \$10,000;<sup>65</sup>

[and the London bombings in July 2005 cost 8,000 British pounds].<sup>66</sup>

In sum, though the concept of hawala is fairly straightforward, what should have been made clear by this discussion is that the role that it plays on the international stage is anything but straightforward. Is it a valuable remittance tool or is it a national security threat? The answer, as frustrating as it may be, is that it is both. And, it is precisely this duality – simultaneously an affordable remittance option to the unbanked and nefarious funding vehicle to terrorists and money launderers – that makes regulation both so tricky and so unattractive to politicians. There is, understandably, a reluctance in poorer countries to close the tap through which vital monies flow. But, there is an equally compelling, or perhaps more compelling, security interest in favor of regulating these informal channels (we

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58. Jost, *supra* note 5, at 14.

59. *Id.*

60. Taylor, *supra* note 49, at 22.

61. Ballard, *supra* note 8, at 2.

62. CASSARA, *supra* note 4, at 176.

63. The Institute for the Analysis of Global Security, *How much did the September 11 terrorist attack cost America?* <http://www.iags.org/costof911.html> (last visited Feb. 10, 2009).

64. CASSARA, *supra* note 4, at 190.

65. *Id.*

66. United Kingdom Home Office 2006 Press Release 7 (FATF/GAFI Working Paper on Terrorist Financing, 2008).

examine some of these regulatory efforts in the following sections). This is especially true when (1) there is a proven track record of abuse, and (2) there may be viable alternatives to hawala in the formal sector that we have yet to utilize.

#### IV. THE EFFICACY OF REGULATION EFFORTS

##### A. *International Regulation*

Prior to the September the 11th attacks the international community was well aware of the potential abuse of alternative remittance avenues in the context of money laundering. This is hardly a surprise given the sheer scale of laundered funds globally; according to International Monetary Fund (IMF) estimates, laundered funds account for as much as 5 percent of the global GDP, or \$3.6 trillion a year.<sup>67</sup> In fact, “every FATF typologies report since 1996 has noted the use of alternative remittance systems by criminal groups to launder money.”<sup>68</sup> Note: despite the ambiguity in this FATF reference to the laundering of funds by “criminal groups,” the bulk of these laundered funds, and consequently the bulk of attention paid by the international community, was/is attributed to the illicit sale of narcotics.<sup>69</sup>

Terrorism finance on the other hand, when juxtaposed with this mountain of narco-money, seems rather inconsequential. The UN dollar estimates for terrorist events, cited above, represent the direct operational costs of the attacks themselves. But, even when one also includes recruiting costs, sustenance costs, training costs, propaganda costs, etc., as one must to reach a more accurate number, the figures still pale in comparison. This statement of course assumes that within this vast pool of black money one can readily distinguish terrorist funds from those of the cartels, illegal arms brokers, car thieves, etc. This author doesn't think it is that easy given that obfuscation is built into the system at every level.

In fact, to illustrate just how tough this categorization actually is, I again cite to the US Department of State's International Narcotics Control Strategy Report. In the March 2008 edition, the report lists over fifty countries and territories that have been given the “Major money laundering countries” designation.<sup>70</sup> Major money laundering countries are defined in section 481(e)(7) of the Foreign Assistance Act of 1961 as one “whose financial institutions engage in currency transactions involving significant amounts of proceeds from international narcotics trafficking.”<sup>71</sup>

Without more, the insufficiency of this definition, akin to the very first international conventions on money laundering which made drug trafficking acts the only predicate offenses – the underlying crimes that produce the proceeds which, when laundered, lead to the offense of money laundering<sup>72</sup> - is obvious.

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67. U.S. DEP'T. OF STATE, *supra* note 11.

68. Butler & Justice, *supra* note 53, at 7.

69. See Matthew S. Morgan, *Money Laundering: The American Law and Its Global Significance*, 3-SUM NAFTA: L. & BUS. REV. AM. 24, 24-25 (1997).

70. U.S. DEP'T OF STATE, *supra* note 11, at 12.

71. *Id.* at 11.

72. PAUL ALLAN SCHOTT, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING

Thankfully, however, the 2008 report continues with the following inclusive notes:

[T]he complex nature of money laundering transactions today makes it difficult in many cases to distinguish the proceeds of narcotics trafficking from the proceeds of other serious crime . . . . [Therefore t]his year's list of major money laundering countries recognizes this relationship by including all countries and other jurisdictions whose financial institutions engage in transactions involving significant amounts of proceeds from all serious crime.<sup>73</sup>

Just as the US was compelled to expand its definition of "major money laundering countries" so too was the international community forced to adopt additional predicate offenses in recognition of this difficulty in divining the source and end-use of these funds.<sup>74</sup> After all, the same dollar, or peso, or lira that can buy cocaine today can buy a rocket-propelled grenade launcher tomorrow. In fact, the term 'narcoterrorism,' as best illustrated by groups like the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) aptly describes this cross-miscegenation. Whether the proceeds from coca or the opium poppy, a portion of these monies are recycled back into the security/terrorist apparatus necessary to cultivate, protect, move, and push their product. Bottom-line: to chip away at money laundering is to indirectly combat terrorism finance and vice versa.

#### *B. Terrorism Finance Treaties & the 1267 Committee*

In 1999, the UN adopted the International Convention for the Suppression of the Financing of Terrorism, "[n]oting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain."<sup>75</sup> Article 2(1) of the convention states the following:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex.<sup>76</sup>

Given the lack of agreement in the international legal community regarding the definition of 'terrorism,' the highlighted verbiage in Article 2(1)(a) is important. As such, I here provide the list of annexed conventions in its entirety. Convention for the Suppression of Unlawful Seizure of Aircraft (1970);<sup>77</sup>

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THE FINANCING OF TERRORISM III-1 (2d ed. 2006).

73. U.S. DEP'T OF STATE, *supra* note 11, at 11-12.

74. SCHOTT, *supra* note 73, at III-1.

75. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, at 3, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (Vol. I) (1999) (emphasis added) [hereinafter Terrorism Financing Convention].

76. *Id.* art. 2(1)(a) (emphasis added).

77. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971);<sup>78</sup> Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (1973);<sup>79</sup> International Convention Against the Taking of Hostages (1979);<sup>80</sup> Convention on the Physical Protection of Nuclear Material (1980);<sup>81</sup> Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988);<sup>82</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988);<sup>83</sup> Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988);<sup>84</sup> and the International Convention for the Suppression of Terrorist Bombings (1997).<sup>85</sup>

As biting as Article 2 may first appear there are several problems with this convention, the first being the form of the instrument itself. As a convention, further action (e.g. ratification) is required by member States before recommendations take legal effect at the domestic level. Even then (even if signed and ratified) there are several escape clauses within the convention that hinder full implementation. Article 2(2)(b) of the International Convention for the Suppression of the Financing of Terrorism, for instance, allows for the selective adoption of the treaties annexed to this convention - the very same treaties that define the crime to which this convention speaks.<sup>86</sup> By allowing limited adherence to these treaties one may effectively manage (i.e. limit) the scope of the crime as applied to his/her country.

Yet another escape clause emerges in the form of Article 8 which states that "Each State Party shall take appropriate measures . . . for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in Article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture."<sup>87</sup> Again, this language sounds

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78. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177.

79. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

80. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

81. Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 124.

82. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474.

83. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201.

84. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304.

85. International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256.

86. Terrorism Financing Convention, *supra* note 76, art. 2(2)(b).

87. *Id.* art. 8(1).

as tough as did Article 2, initially. But, Article 8 implementation is prefaced by the phrase “in accordance with [Member States’] domestic legal principles.”<sup>88</sup>

The Francois, duc de la Rochefoucauld maxim “Truth does not do as much good in the world as the semblance of truth does evil”<sup>89</sup> is certainly applicable here where international mandates are qualified by “domestic legal principles.”<sup>90</sup> Countries are thus allowed to choose how enforcement will occur at home, if at all, all the while receiving kudos for having signed an international treaty against terrorism. In reality, problem states freeze suspect assets, thereby facially complying with the law, but then refuse to prosecute based on domestic legal principles that are often antiquated, apathetic, religiously-biased, and/or altogether lacking. This inaction allows respective statutes of limitations to run, thus barring prosecution and resulting in the eventual release of the previously frozen funds.

This is exactly what hampered both the investigation and prosecution of the Saudi charity al-Haramain Islamic Foundation (AHF). According to the US Treasury’s Office of Terrorism and Financial Intelligence, the US branch of AHF, headquartered in Oregon, was involved in tax evasion and money laundering in an attempt to disguise funds bound for Chechen fighters.<sup>91</sup> In addition, it was discovered that the Somali and Bosnian branch offices had a long running association with both al-Itihaad al-Islamiya (AIAI) and al-Qaeda.<sup>92</sup>

Despite a US terrorism designation on September 9th, 2004 and a UN designation under UNSCR 1267 (see below) on September 28th, the Saudi government consistently refused, and still refuses, to prosecute its nationals, citing an insufficiency of evidence.<sup>93</sup> As the most blatant instance of this noncooperation, Suliman al-Buthe, AHF USA’s former attorney and senior executive, despite having been specially designated as a global terrorist by INTERPOL,<sup>94</sup> was given a position in the Saudi Health Ministry for his troubles.<sup>95</sup> In fact, al-Buthe felt so comfortable that he gave an interview to the BBC, from his apartment in Riyadh, in which he laughed off his special designation status.<sup>96</sup>

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88. *Id.*

89. FRANÇOIS DE LA ROCHEFOUCAULD, MAXIMS ¶ 64 (Leonard Tancock trans., Penguin Classics 1988) (1665).

90. Terrorism Financing Convention, *supra* note 76, art. 8(1).

91. Press Release, U.S. Dep’t of the Treasury, U.S.-Based Branch of Al Haramain Foundation Linked to Terror Treasury Designates U.S. Branch, Director (Sept. 9, 2004), *available at* <http://www.treas.gov/press/releases/js1895.htm>.

92. Press Release, U.S. Dep’t of the Treasury, Fact Sheet: Contributions by the Dep’t of the Treasury to the Fin. War on Terrorism (Sept. 2002), *available at* <http://www.treas.gov/press/releases/reports/2002910184556291211.pdf>.

93. *Jihad and the Petrodollar: Programme Two* (BBC News Internet podcast Nov. 2007), *available at* [http://news.bbc.co.uk/2/hi/programmes/documentary\\_archive/7108987.stm](http://news.bbc.co.uk/2/hi/programmes/documentary_archive/7108987.stm).

94. *Id.*

95. *Id.*

96. *Id.*

In 1999, as a compliment to the International Convention for the Suppression of the Financing of Terrorism, the UN Security Council passed Resolution 1267.<sup>97</sup> Resolution 1267 “require[s] member States to freeze the assets of the Taliban, Osama Bin Laden and al-Qaeda and entities owned or controlled by them, as designated by the ‘Sanctions Committee’ (now called the 1267 Committee).”<sup>98</sup> While an improvement in terms of the power of the instrument - 1267 is a Chapter VII (i.e., legally binding) Resolution which requires no further action on behalf of member States to take legal effect – the same issues of subjective application and prosecution remain. While Resolution 1267 requires the freezing of suspect assets, it does not speak to the ultimate disposition of those funds after the initial freezing. Are they to be returned to those whom have been wrongly accused of having links to the Taliban, Osama Bin Laden, and al-Qaeda? Are they to be returned upon a failure to prosecute (for any reason)? Are portions to be returned if the suspect agrees to “gift” the remainder to the government or to a religious charity?

### C. Financial Action Task Force (FATF) Recommendations

In an attempt to address some of the questions above, and to provide badly needed uniformity, the Financial Action Task Force (FATF) – originally created in 1989 by the G-7 to combat money laundering<sup>99</sup> - expanded its mission to include combating the financing of terrorism (CFT). In October of 2001, just a month after the 9/11 terrorist attacks, the FATF issued 8 *Special Recommendations on Terrorist Financing*, adopting a 9th in 2004.<sup>100</sup> When combined with its 40 *Recommendations on Money Laundering*, originally released in 1990,<sup>101</sup> the recommendations serve as a body of international mandates with regards to AML/CFT programming.

Special Recommendation 1: Ratification and implementation of UN instruments. The FATF calls for the adoption of the above-mentioned International Convention for the Suppression of the Financing of Terrorism and UNSCR 1373.<sup>102</sup> In addition, countries are urged to implement all “resolutions relating to the prevention and suppression of the financing of terrorist acts.”<sup>103</sup>

Special Recommendation 2: Criminalizing the financing of terrorism and associated money laundering. While the title is self-explanatory, the meat of this recommendation comes in the call to expand predicate offenses. This is significant because the concepts of terrorism finance and money laundering are new editions to many legal systems in the Middle East and in South Asia. In fact, “in the early

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97. G.A. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

98. SCHOTT, *supra* note 73, at III-5.

99. *Id.* at III-7 to III-8.

100. Fin. Action Task Force [FATF], 9 *Special Recommendations on Terrorist Financing* (Oct. 24, 2004), [http://www.fatf-gafi.org/document/9/0,3343,en\\_32250379\\_32236920\\_34032073\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/document/9/0,3343,en_32250379_32236920_34032073_1_1_1_1,00.html).

101. FATF, *The 40 Recommendations* (June 2003), [http://www.fatf-gafi.org/document/28/0,3343,en\\_32250379\\_32236930\\_33658140\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html).

102. SCHOTT, *supra* note 73, at Annex V-1.

103. *Id.*

1990s fewer than two dozen nations had criminalized money laundering.”<sup>104</sup> Today that number has increased nearly eight fold.<sup>105</sup> By the end of 2007, reflecting a comparable upward trend, the number of jurisdictions that had criminalized terrorist financing reached 137.<sup>106</sup>

Special Recommendation 3: Freezing and confiscating terrorist assets. Recommendation 3 calls not only for the freezing and confiscation of terrorist assets, it targets the proceeds and assets purchased with the proceeds of such activities as well, no matter how removed. If applied in broad strokes, the incentive for legitimate companies (e.g. ethnic grocers) to allow illicit remittance operations to piggyback on their infrastructure, for example, is substantively decreased. Grocers who might receive a few hundred dollars in ‘hush-money’ each month now have to contemplate losing their entire business, their home, their cars, their accounts, anything that that money was either spent on or comingled with.

Special Recommendation 4: Reporting suspicious transactions related to terrorism. Recommendation 4 calls for “financial institutions, or other businesses or entities subject to anti-money laundering obligations” to report suspect transactions.<sup>107</sup> Suspicion alone is apparently the standard of proof which sets into motion this reporting requirement.

Special Recommendation 5: International cooperation. Countries shall ensure territorial integrity with regard to terrorists, terrorist organizations, and terrorist financiers. That is to say, countries shall not provide, nor acquiesce in being used as, a terrorist safe haven.

Special Recommendation 6: Alternative remittance. All countries should require either the licensing or registration of all formal and informal money/value transfer services. In addition, both formal and informal money/value transfer services should be subject to the FATF *40 Recommendations*. Lastly, failure to comply should result in appropriate sanction.

Special Recommendation 7: Wire transfers. Financial institutions of all stripes are required to supply “meaningful originator information (name, address, and account number)”. Further, they are either to refuse or to scrutinize transfers that contain incomplete originator information.

Special Recommendation 8: Non-profit organizations. In recognition of the particular ease by which criminal elements can masquerade as non-profits, countries are called on to strengthen applicable transparency laws (e.g. auditing requirements, governance, etc.). In addition, countries are called on to prevent the exploitation of legitimate entities by nefarious organizations.

Special Recommendation 9: Cash couriers. “Countries should have measures in place to detect the physical cross-border transportation of currency and bearer

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104. CASSARA, *supra* note 4, at 139.

105. *Id.*

106. U.S. DEP’T OF STATE, *supra* note 11, at 4.

107. SCHOTT, *supra* note 73, at Annex V-2.

negotiable instruments . . .” Further, in the case of detection, authorities should be granted the power to confiscate suspect currency or monetary instruments.

The initial international cohesion that FATF Special Recommendations provided, post 9/11, was certainly needed. However, as now applied, these recommendations are of limited value. This is principally because the FATF is merely an intergovernmental policy group. As such, it has no enforcement capability whatsoever, which, despite global notoriety, is exactly why FATF intellectual products are termed “recommendations.” Without an enforcement mandate, countries are free to trim, or altogether ignore, policy implementation.

At the individual level, Special Recommendation 1 does nothing more than incorporate UN instruments that, as discussed above, can be gamed to the point of being rendered ineffectual. And, while in theory, Special Recommendation 2 is a welcomed broadening of predicate offenses, in practice, it was difficult to get countries excited about enforcement when there were only a handful of applicable offenses. Now, complements of Recommendation 2, policing agencies abroad face expanding responsibilities without commensurate increases in enforcement budgets. A wider net alone does not guarantee a larger catch if one lacks either the will or the strength to hoist the net back into the boat.

Special Recommendations 3 and 4 both suffer from qualitative enforcement issues. As to Recommendation 3, the freezing and seizure of assets means very little if an eventual prosecution does not follow. Funds are all too often allowed to thaw and assets are all too often returned. As to Recommendation 4, the reporting of suspicious transactions applies only to financial institutions and to those entities that are subject to anti-money laundering obligations. As discussed in the Valuable Remittance Tool or National Security Threat section,<sup>108</sup> in many countries, businesses that would otherwise be classified as financial institutions are considered mere commercial entities. As such, they often escape both the definitional stigma of ‘financial institution’ and the subjection to anti-money laundering obligations. Further, even when financial institutions and money transfer services are subject to such obligations they are incentivized by the absence of enforcement to underreport both the value and numeracy of legitimate transfers, let alone suspicious transactions - which would bring unwanted regulatory attention.

Special Recommendation 5 calls for the denial of safe havens to terrorists, terrorist organizations, and terrorist financiers. Below is just a sampling of the many instances where reality veers from legislative idealism. I again cite to the Al Haramain case above, and to the following: ETA continues to operate in the Basque areas of Spain and in southern France,<sup>109</sup> Jemaah Islamiyah and Abu Sayyaf Group fighters continue to shelter in both the Philippines and Indonesia,<sup>110</sup>

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108. *See supra* pp. 10-11.

109. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM ch. 8 (2006), available at <http://www.state.gov/s/ct/rls/crt/2005/65275.htm>.

110. *Id.*



the PKK is alive and well in northern Iraq,<sup>111</sup> Hezbollah thrives in Lebanon,<sup>112</sup> Ittihad al Islami hides in Somalia,<sup>113</sup> Hamas owns the Palestinian Territories,<sup>114</sup> the Sadrists train in Iraq,<sup>115</sup> the IMU and Hizb ut-Tahrir continue to operate in the Tajik, Uzbek, and Kyrgyz part of the Ferghana Valley,<sup>116</sup> and a significant amount of al-Qaeda senior leadership now lives in the tribal areas of Pakistan and Afghanistan.<sup>117</sup> I digress.

Special Recommendation 6 calls for the licensing or registration of all formal and informal money/value transfer services. According to the Interpretive Note to Special Recommendation 6, ‘licensing’ means “a requirement to obtain permission from a designated competent authority in order to operate . . . .”<sup>118</sup> ‘Registration’, on the other hand, simply means “a requirement to . . . declare to a designated competent authority the existence of” a money/value transfer business.<sup>119</sup> Between the two approaches, registration, for obvious reasons, is far less intrusive.

It should be of little surprise then that the UAE opts for registration alone. In 2003, the Central Bank of the UAE issued “Regulation Concerning Hawaladars (Hawala Brokers) for Registration and Reporting.”<sup>120</sup> Through various announcements in local newspapers, hawaladars were “*invit[ed]* . . . to register with the Central Bank and obtain a free-of-charge certificate.”<sup>121</sup> By the end of this registration drive only 184 hawaladars applied for certification.<sup>122</sup> Perspective: there are 600 plus Starbucks locations in Florida alone,<sup>123</sup> and yet in the hawala capital of the world only 184 hawaladars registered. Certainly there are more, and yet Special Recommendation 6 calls for the licensing or registration of *all* formal and informal money/value transfer services (more on UAE noncompliance later).

As with the Special Recommendations collectively, Special Recommendation 6 and 7 suffer from a simple lack of follow-through. If wire transfers are not scrutinized or altogether refused for containing insufficient originator information, what exactly is the penalty? All too often, the answer is nothing. In fact, even here at home, it’s readily admitted that “most money service businesses do not comply with . . . requirements and there is little enforcement of the regulations.”<sup>124</sup>

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. CIA, *supra* note 32.

116. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *supra* note 110.

117. *Id.*

118. SCHOTT, *supra* note 73, at Annex VI-15.

119. *Id.* at Annex VI-16.

120. CENTRAL BANK OF THE UNITED ARAB EMIRATES, LAWS REGULATIONS AND PROCEDURES IMPLEMENTED IN THE UNITED ARAB EMIRATES FOR ANTI-MONEY LAUNDERING AND COMBATING TERRORISM 9 (2005), available at <http://centralbank.ae/pdf/AMLSU/RegulationSummary-2005.pdf>.

121. *Id.* at 9-10 (emphasis added) (reference ANNEX for original U.A.E. registration documents).

122. *Id.* at 10.

123. Starbucks, <http://www.starbucks.com/retail/locator/ViewAll.aspx?a=1&CountryID=244&StateID=5&FC=RETAIL&City> (last visited Feb. 6, 2009).

124. DEP’T OF STATE, *supra* note 11, at 13.

For a variety of reasons (discussed in detail in the Disincentivized Cooperation section), enforcement efforts behind Recommendation 8 are not, and I believe never will be, complied with in the Middle East and in parts of Asia. The Pakistan-based al-Rashid Trust – a group which provided funding for both the Taliban and al-Qaeda via the Global Jihad Fund, supported the Jaish Mohammed terrorist group, and was directly linked to the kidnapping and subsequent murder of Wall Street Journal reporter Daniel Pearl<sup>125</sup> - for example, was designated as a terrorist facilitator/financier by the UN in October of 2001.<sup>126</sup> Initially, and in facial compliance with UNSCR 1267, the Pakistani Interior Ministry banned al-Rashid and ordered the freezing of its assets.<sup>127</sup> Two points: (1) the ban did not take effect until well after the designation,<sup>128</sup> thus allowing the terrorists precious time in which to drain their accounts; and (2) the Sindh High Court (SHT) has since ordered the government to lift the ban on the charity.<sup>129</sup> Lastly, in an article by Naveed Siddiqui of Pakistan's Daily Times, Rashid Trust organizers - free from arrest or prosecution - stated that they would continue their work by simply renaming their charity the Al Amin Welfare Trust.<sup>130</sup>

Little that has been done with respect to Recommendation 9 has been effective in stopping money laundering, generally, and terrorism finance, in particular. Volume II of the 2008 International Narcotics Control Strategy Report states that bulk cash (and I would add gold) smuggling continues to be one the most utilized money laundering techniques in the world.<sup>131</sup> This is due, in part, to the high levels of currency required to trigger the international equivalents of Reports of International Transactions of Currency or Monetary Instruments (CMIRs). In the US, one has to declare cash only when in excess of \$10,000, in South Africa 175,000 rand (approximately \$24,600),<sup>132</sup> and in Moldova 10,000 euros (approximately \$14,160).<sup>133</sup> Given that terrorists regularly utilize cash couriers to transit funds, and given that attacks cost so little in relative terms, I would argue that these figures are too high.

In addition, I would suggest that bulk cash smuggling provisions are circumvented by smuggling more compact, and less overt, forms of value (e.g., jewelry). However, even in countries where one must declare the value of precious stones and metals being carried, the trigger value amounts are still much too large. In Saudi Arabia, for example, one must only report the carrying of gold

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125. Press Release, U.S. Dep't of Treasury Office of Terrorism and Fin. Intelligence, Al Rashid Trust (Sept. 23, 2001), *available at* [http://www.treas.gov/offices/enforcement/keyissues/protecting/charities\\_execorder\\_13224-a.shtml](http://www.treas.gov/offices/enforcement/keyissues/protecting/charities_execorder_13224-a.shtml).

126. *Id.*

127. Naveed Siddiqui, *Al-Rashid Trust Plans to Work Under New Name*, DAILY TIMES (Pak.), Apr. 29, 2007, *available at* [http://www.dailytimes.com.pk/default.asp?page=2007\04\29\story\\_29-4-2007\\_pg7\\_3](http://www.dailytimes.com.pk/default.asp?page=2007\04\29\story_29-4-2007_pg7_3).

128. *Id.*

129. *Id.*

130. *Id.*

131. U.S. DEP'T OF STATE, *supra* note 11, at 5.

132. *Id.* at 419.

133. *Id.* at 334.

and jewels if the value amount exceeds 60,000 Saudi riyals (\$16,000 approx.).<sup>134</sup> As such, a large family could simply walk across the border with nearly \$100,000 in unreported, untraceable value.

In his book *Hide & Seek*, John Cassara provides a brief illustration of the tracing complications that gold presents in what is known as ‘The Gold Cycle.’<sup>135</sup> Switzerland, for its infamous secrecy in banking and the glut of cash accumulated thereby, has emerged as one of the top manufacturers of gold bars.<sup>136</sup> From Switzerland, the gold is shipped to Italy. The gold is then transformed, for resale, into what amounts to hundreds of tons of gold rope and chain each year, thus making Italy “the largest exporter of worked gold in the world.”<sup>137</sup> From Italy, with the gold now in a form that is more readily transported without question, it is taken by couriers – under falsified shippers export documents – or by smugglers (posing as casual tourists) into other countries.

The amount gained by avoiding taxation on export/import is the laundered value. Any gold that is not resold can be melted back into ingot form and used as currency that escapes account freezes and Bank Secrecy Act (more on this later) detection. The proceeds from sale, however, can be divided up into multiple currencies and sent either to offshore bank accounts or back to Switzerland to purchase more gold to start the cycle again.

#### D. The Egmont Group of FIUs

In 1995, at the Egmont-Arenberg Palace in Brussels, various Financial Intelligence Units (FIUs) met to discuss the strengthening of national AML/CFT programs.<sup>138</sup> Thereafter, the group became known as the Egmont Group of FIUs.<sup>139</sup> The group’s official definition of an FIU serves both as an explanatory and as a barrier to entry; in order to become a member, a country must first be able to satisfy the definition below.

[A] central, national agency responsible for receiving (and, as permitted, requesting), analyzing and disseminating to the competent authorities, disclosures of financial information:

- (i) concerning suspected proceeds of crime and potential financing of terrorism, or
- (ii) required by national regulation, in order to counter money laundering and terrorist financing.<sup>140</sup>

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134. *Id.* at 6.

135. CASSARA, *supra* note 4, at 73-74.

136. *Id.* at 74.

137. *Id.*

138. Press Release, Egmont Group, Major Meeting of FIU’s in Korea Progresses the Fight Against Money Laundering and Terrorist Fin. (May 29, 2008), available at [http://www.egmontgroup.org/PRESS\\_RELEASE\\_version\\_27\\_MAY\\_2008\\_G.pdf](http://www.egmontgroup.org/PRESS_RELEASE_version_27_MAY_2008_G.pdf).

139. The Egmont Group, Financial Intelligence Units (FIUs), [http://www.egmontgroup.org/about\\_egmont.pdf](http://www.egmontgroup.org/about_egmont.pdf) (last visited Feb.5, 2009).

140. The Egmont Group, Interpretive Note Concerning the Egmont Definition of a Financial Intelligence Unit, [http://www.egmontgroup.org/files/library\\_egmont\\_docs/egmont\\_final\\_](http://www.egmontgroup.org/files/library_egmont_docs/egmont_final_)

FIUs serve as repositories of suspect financial information.<sup>141</sup> This information is analyzed and shared through a secured web server – the Egmont Secure Web (ESW) –and through multiple working group meetings held throughout the year.<sup>142</sup> FIUs pride themselves in this ability to rapidly disseminate financial intelligence both to their peers and to nonmember states. I, however, question the wisdom of information sharing with countries that appear to be more a part of the problem than the solution. The US State Department admits that “far too many countries that boast solid AML/CFT standards and infrastructures are still simply not enforcing their laws.”<sup>143</sup> The statement continues, “In some cases the lack of enforcement is due to a lack of capacity, but in far too many others it is due to a lack of political will.”<sup>144</sup>

My concern is twofold. First, I worry that problem states can hide beneath a patina of legitimacy while doing nothing substantive in the line of enforcement. By having AML/CFT legislation on the books, regimes can claim that they are in full compliance with international standards (e.g. the Egmont criteria), regardless of follow-through. The Nigerians, for example, were placed on the FATF’s list of non-cooperative countries and territories (NCCT) in 2001.<sup>145</sup> However, within one year the FATF claimed that “Nigeria enacted two pieces of legislation to remedy the deficiencies.”<sup>146</sup> How can the passage of legislation without any enforcement intent remedy deficiencies? As a result, and without any genuine effort, Nigeria, an Egmont member despite ranking 147 out of 180 – 180 being the worst – on Transparency International’s 2007 Corruption Perceptions Index,<sup>147</sup> now has leverage to fend off its critics that push for verifiable reform.

This leverage also enables individuals to broadcast questionable assurances to the financial community-at-large. In a 2008 article in the *Khaleej Times*, Abdulrahim Mohamed al-Awadi - Assistant Executive Director and Head of the Anti-Money Laundering and Suspicious Cases Unit (AMLSCU) at the Central Bank of the UAE - stated that “[t]he U.A.E. has a very robust AML/CFT regime,”<sup>148</sup> therefore, banks should not hesitate in allowing money exchanges to open “Nostro Accounts.”<sup>149</sup> I am not saying that Mr. al-Awadi is a liar, nor am I

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interpretive.pdf (last visited Feb. 5, 2009).

141. See INT’L MONETARY FUND, FIN. INTELLIGENCE UNITS: AN OVERVIEW 2 (2004), available at <http://www.imf.org/external/pubs/ft/fiu/fiu.pdf>.

142. The Egmont Group, Information Paper on Financial Intelligence Units and the Egmont Group 6, [http://www.egmontgroup.org/info\\_paper\\_final\\_oct\\_2004.pdf](http://www.egmontgroup.org/info_paper_final_oct_2004.pdf) (last visited Feb. 5, 2009).

143. DEP’T OF STATE, *supra* note 11, at 9.

144. *Id.* at 10.

145. FATF, *Review to Identify, Non-Cooperative Country Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (June 22, 2001), available at <http://www.fatf-gafi.org/dataoecd/56/41/33922055.pdf>.

146. DEP’T OF STATE, *supra* note 11, at 351.

147. Transparency International, Corruption Perceptions Index 2007, [http://transparency.org/policy\\_research/surveys\\_indices/cpi/2007](http://transparency.org/policy_research/surveys_indices/cpi/2007) (last visited Feb. 5, 2009).

148. Issac John, *Remove Curbs on Nostro Accounts, Central Bank Tells Overseas Banks*, *KHALEEJ TIMES* Apr. 29, 2008, available at [http://www.khaleejtimes.com/DisplayArticleNew.asp?section=business&xfile=data/business/2008/april/business\\_april875.xml](http://www.khaleejtimes.com/DisplayArticleNew.asp?section=business&xfile=data/business/2008/april/business_april875.xml).

149. Nostro accounts enable foreign entities to hold, abroad, large amounts of a particular country’s

suggesting that the UAE lacks AML/CFT standards (of some sort). What I am saying, however, is that the existence of an AML/CFT regime, that may or may not ever be enforced, should not be the sole basis by which banks decide to do business.

By touting compliance at some level, countries also argue that they are entitled to training and information sharing. This brings me to my second concern. By training some of the most corrupt governments on the planet, are we not simply making them more sophisticated transgressors? Moldova, for example, recently received advanced financial investigative techniques training by the IRS's Criminal Investigation Division.<sup>150</sup> This, despite a move towards establishing an Offshore Financial Center (OFC) in the face of US opposition,<sup>151</sup> despite the fact that out of 165,199 suspicious activity reports only 4 criminal cases bearing money laundering charges were initiated (up from 0 in 2006),<sup>152</sup> and despite 0 arrests and/or prosecutions involving terrorist financing.<sup>153</sup>

Access to resources and sensitive information continues to be granted to the Romanian FIU – *Oficiul National de Prevenire si Combatere a Spalarii Banilor* (ONPCSB)<sup>154</sup> – despite the fact that “investigations have resulted in only a handful of successful prosecutions to date.”<sup>155</sup> Training was extended to Azerbaijan and Congo, who rank 150 and 168 out of 180, respectively, on Transparency International's Corruption Perceptions Index.<sup>156</sup> And, Pakistan continues to receive support despite a 2007 Asia/Pacific Group threat to suspend membership for noncompliance,<sup>157</sup> and despite the fact that the current president, Mr. Asif Ali Zardari (a.k.a. “Mr. 10%”), has himself served an 11 year jail term on corruption charges.<sup>158</sup>

Lastly, the South African Financial Intelligence Centre (FIC),<sup>159</sup> an Egmont member amazingly enough, continues to have access to the secure server. I say “amazingly enough” because despite a high density of Nigerian, Pakistani, and Indian drug traffickers, and Russian, Israeli, Lebanese, Chinese, and Taiwanese organized crime syndicates, “the number of money laundering and terrorist finance investigations, prosecutions, and convictions is . . . very low.”<sup>160</sup> Further still,

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currency. *See id.*

150. U.S. DEP'T OF STATE, INT'L NARCOTICS CONTROL STRATEGY REPORT (2006), available at <http://www.state.gov/p/inl/rls/nrcrpt/2006/vol2/html/62136.htm>.

151. DEP'T OF STATE, *supra* note 11, at 7.

152. *Id.* at 332.

153. *Id.* at 333.

154. The Egmont Group, Financial Intelligence Units of the World (May 2008), [http://www.egmontgroup.org/files/library\\_egmont\\_docs/list\\_current\\_egmont\\_members.pdf](http://www.egmontgroup.org/files/library_egmont_docs/list_current_egmont_members.pdf) [hereinafter Egmont].

155. DEP'T OF STATE, *supra* note 11, at 398.

156. Transparency, *supra* note 148.

157. DEP'T OF STATE, *supra* note 11, at 356.

158. Jane Perlez, *From Prison to Zenith of Politics in Pakistan*, N.Y. TIMES, Mar. 11, 2008, available at <http://www.nytimes.com/2008/03/11/world/asia/11pstan.html?pagewanted=print>.

159. Egmont, *supra* note 155.

160. DEP'T OF STATE, *supra* note 11, at 417-18.

despite country-specific FATF recommendations made in 2003, to this day South Africa has all but ignored implementation – including the requirement to report its significant volume of internal hawala-type transactions.<sup>161</sup>

*E. United States Regulation: Formal Sector*

Less than one month after the September 11, 2001 attacks on the United States, the domestic machinery of the intelligence, law enforcement, and financial communities began scrambling a counterattack. Then-Treasury Secretary Paul O'Neill, on September the 24, 2001 voiced this aggressive urgency as follows:

If you have any involvement in the financing of the al Qaida organization, you have two choices: cooperate in this fight, or we will freeze your US assets; we will punish you for providing the resources that make these evil acts possible. We will succeed in starving the terrorists of funding and shutting down the institutions that support or facilitate terrorism.<sup>162</sup>

On the same day, President Bush announced Executive Order 13224 which authorizes both the freezing of assets within the US and the denial of access to US financial markets.<sup>163</sup> When coupled with UNSCRs 1267, 1373, and 1390, the order, in theory, imposes AML/CFT and cooperative duties on our “partners” abroad.<sup>164</sup>

On October of the same year, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act was signed into law.<sup>165</sup> “The Patriot Act” calls for harsher penalties, an expansion of investigative and designation powers, and an enhancement of information sharing among law enforcement communities, between law enforcement and private financial institutions, and within the financial sector itself.<sup>166</sup> In addition, the Patriot Act calls for a retooling of Bank Secrecy Act (BSA) provisions.<sup>167</sup>

The BSA (31 USC §§ 5311-5330) was originally established in 1970 to fight tax evasion and organized crime.<sup>168</sup> Though there was a revamp in 1992 which expanded BSA application to financial institutions other than banks,<sup>169</sup> real ballooning of the regulatory regime did not occur until after 9/11. Section 358 of the Patriot Act expanded “the scope of BSA to include intelligence and counterintelligence to protect against international terrorism.”<sup>170</sup>

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161. DEP'T OF STATE, *supra* note 11, at 419.

162. TREASURY DEP'T, *supra* note 28, at 2.

163. *Id.* at 5.

164. *Id.* at 17.

165. *Id.* at 10.

166. *Id.*

167. THE SEC'Y. OF THE TREASURY, THE BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE SEC. AND EXCH. COMM'N, A REPORT TO CONGRESS IN ACCORDANCE WITH 356(C) OF THE USA PATRIOT ACT 2 n.2 (2002), available at <http://www.treasury.gov/press/releases/reports/356report.pdf>.

168. *Id.* at 2.

169. *Id.*

170. THE SEC'Y OF THE TREASURY, *supra* note 168.

This expanded mission is carried out by Treasury's Financial Crimes Enforcement Network (FinCEN), the US FIU. FinCEN is tasked with three principal service missions: (1) to analyze financial intelligence, (2) to control BSA implementation, and (3) to oversee international financial intelligence collection.<sup>171</sup> That said, the core of FinCEN's contribution stems from the collection, sorting, and analysis of BSA reports.

"BSA requires many financial institutions to create 'paper trails' by keeping records and filing reports on certain transactions."<sup>172</sup> These paper linkages allow law enforcement to trace illicit funds back to their source. Currency Transaction Reports (CTRs), for example, must be filed for any exchange with the same customer in the same day which exceeds \$10,000.<sup>173</sup> And, Currency and Monetary Instrument Reports (CMIRs) must be filed for cross-border movement of cash and bearer negotiable instruments of \$10,000 or more.<sup>174</sup>

Suspicious Activity Reports (SARs) are to be filed if the transaction involves \$2,000 (in individual or aggregate form) and appears to be "suspicious" in nature.<sup>175</sup> Suspicious activities include an attempt to structure (a.k.a. "smurf") transactions to avoid CTR reporting requirements.<sup>176</sup> Smurfing is accomplished by breaking a large transaction into multiple, smaller transactions which would fall below the \$10,000 CTR threshold. Another red flag might be a transaction(s) that appears to lack any business purpose: higher than normal levels of account activity, for example the cycling of funds between various accounts, and same-day deposits and withdrawals without any reasonable explanation might suggest illicit activity. Lastly, and obviously, any proceeds that are blatantly of criminal generation must be reported.<sup>177</sup>

With nearly 50 data fields, SARs are really the key to combating terrorism finance in the formal financial sector.<sup>178</sup> In fact, a former director of FinCEN is quoted as saying "With SARs, it is now like having a haystack full of needles."<sup>179</sup> The informational value that SARs forms provide stems not only from the breadth of detail solicited, but also from the breadth of institutions that are required to file.

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171. CASSARA, *supra* note 4, at 132.

172. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, BANK SECRECY ACT REQUIREMENTS, A QUICK REFERENCE GUIDE FOR MONEY SERVICES BUSINESSES 1, *available at* [http://www.msb.gov/materials/en/bank\\_reference.pdf](http://www.msb.gov/materials/en/bank_reference.pdf) [hereinafter BANK].

173. *Id.*

174. BANK, *supra* note 173.

175. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, REPORTING SUSPICIOUS ACTIVITY, A QUICK REFERENCE GUIDE FOR MONEY SERVICE BUSINESSES, *available at* [http://www.msb.gov/materials/en/report\\_reference.pdf](http://www.msb.gov/materials/en/report_reference.pdf) [hereinafter REPORTING].

176. *Id.*

177. *Id.*

178. *See* ANNEX, pp. 82-84.

179. CASSARA, *supra* note 4, at 136.

'Financial institutions' (a term which US Treasury uses to include banks, savings and loans, credit unions, and other depository institutions)<sup>180</sup> are, of course, under BSA purview, but so too are nontraditional financial institutions (e.g. casinos and brokers and dealers in securities). Money Service Businesses (MSBs) are also grouped under this latter category. Money Service Businesses are defined as:

Any person doing business, whether or not on a regular basis or as an organized business concern, providing one or more of the following services:

money orders, traveler's checks, check cashing, currency dealing or exchange, stored value, AND

Conducts more than \$1,000 in money service business activity:

with one person, in one or more transactions (in one type of activity), on any one day, OR

Provides money transfers [a Money Transmitter] in any amount.<sup>181</sup>

Money Transmitters are defined as:

A person that engages as a business in the transfer of funds through a financial institution is a money transmitter and an MSB, regardless of the amount of transfer activity. Generally, the acceptance and transmission of funds as an integral part of a transaction other than the funds transmission itself (for example, in connection with the sale of securities or other property), will not cause a person to be a money transmitter.<sup>182</sup>

Generally, MSBs, in accordance with 31 CFR Part 103.41, must register with FinCEN within 180 days of establishment.<sup>183</sup> This brings us to what I call 'Loophole 1'. What would stop an individual from closing shop on day 179 and then reopening the following week? This is not simply your author playing devil's advocate. Our record for securing guilty verdicts when it comes to prosecution on terrorism finance charges is very poor.<sup>184</sup> Therefore, identifying and eliminating loopholes which allow these characters to flirt with criminality while technically following the letter of the law is quite important.

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180. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF TREASURY, MONEY LAUNDERING PREVENTION: A MONEY SERVICE BUSINESS GUIDE 4, available at [http://www.fincen.gov/statutes\\_regs/guidance/pdf/msb\\_prevention\\_guide.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/msb_prevention_guide.pdf) [hereinafter MONEY].

181. *Id.* at 45.

182. *Id.* at 45.

183. *Id.* at 6.

184. IBRAHIM WARDE, THE PRICE OF FEAR: THE TRUTH BEHIND THE FINANCIAL WAR ON TERROR 95-97 (University of California Press 2007); U.S. v. Benevolence Int'l. Found. No. 02 CR 414, 2002 WL 31050156 (N.D.III. Sept. 13, 2002).



Further, the weakness of this provision comes in the form of accountability, or rather the lack thereof. If confronted, what prevents a savvy, unregistered MSB that has been operating for years from claiming that they just opened for business last month? Are we really to believe that our monitoring efforts are so substantial today that we know, and more importantly can prove in a court of law, when exactly this 180 day period began? We simply cannot count on MSBs to report (or to report accurately) to FinCEN. We must police them better.

And, while I understand that the FBI may have the monopoly on terrorism finance investigations within the United States, the Bureau simply lacks the resources to tackle an issue of this magnitude alone. Our local law enforcement officials must be trained to spot suspect businesses. Whether this occurs within a specially designated branch or as part of a larger Counter-terrorism (CT) contingent under city or county jurisdiction, it must occur. At a minimum, numerical superiority puts officers/detectives in a unique position to provide quantitative tactical intelligence through contact. If at a later stage the FBI takes over the case, great, but the Bureau will never make that case without the assistance of these feeder-cells. There are some that would suggest that security would be compromised by an expansion of those 'in the circle'. This is simply not the case. There would be no 'circle' to speak of; information would flow in a unidirectional, linear fashion (i.e. towards the Bureau and FinCEN as end-users).

Loophole 2: While BSA requires MSBs to establish written Anti-Money Laundering (AML) procedures, such programs need not be reviewed by outside consultants. "Such review may be conducted by an officer or employee of the money service business . . . ."<sup>185</sup> This is quite troubling to say the least when the objective of the review is to "determine whether the business is operating in compliance with the requirements of the Bank Secrecy Act . . . ."<sup>186</sup> Why is a compliance determination, one with potential national security ramifications, not considered a nondelagable duty? Borrowing from Professors Prosser and Keeton, a nondelegable duty is defined as one in which "the responsibility is so important to the community that the employer [the US government] should not be permitted to transfer it to another."<sup>187</sup>

Perhaps this shocking approach stems from the 2004 Second International Conference on Hawala. The 'Conference Statement' from that session states the desire to "avoid over-regulation that might drive [Informal Funds Transfer systems] operations underground."<sup>188</sup> Two comments: (1) the criminal elements

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185. 31 C.F.R. § 103.125(d)(4) (2002).

186. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, FIN-2006-G012, FREQUENTLY ASKED QUESTIONS: CONDUCTING INDEPENDENT REVIEWS OF MONEY SERVICE BUSINESS ANTI-MONEY LAUNDERING PROGRAMS 1 (2006), available at [http://www.msb.gov/pdf/Guidance\\_MSB\\_Independent\\_Audits9-21.pdf](http://www.msb.gov/pdf/Guidance_MSB_Independent_Audits9-21.pdf).

187. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 512 (West Publ'g Co. 1984) (1941).

188. Int'l Monetary Fund, *Second Int'l. Conference on Hawala, Abu Dhabi* (Apr. 5, 2004), in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS at 97 (International Monetary Fund 2005).

that both own and use these MSBs/IFTs/IVTs already operate underground, and (2) when has it ever been the policy of law enforcement officials to allow criminal activity to continue in fear that a crackdown might force criminals to work harder at their craft? If anything, we need to ramp up enforcement efforts, thus exacting additional risks/costs on these services. Once those risks/costs eat into profit margins, those using these informal transmission services for mere economical reasons will go elsewhere when such costs are inevitably passed on the customer. The only clients remaining will be the malefactors that are willing to pay higher rates for the continued promise of secrecy. As such, analytical teams could then narrow their focus to these specific individuals. There is a very large caveat here: before such a crackdown there must be a place, a well regulated culturally sensitive place, for the affected to go.<sup>189</sup>

Bottom-line: agnostic to source (of such bad policy), if such delegation is truly the prevailing mentality of government today then why stop there? Why not disband the IRS and simply have taxpayers audit and then fine themselves? Why not get rid of all corporate and securities statutes and have companies like Enron and Lehman decide what's best to report? The answer to all the above is, of course, because: (1) people (both natural and juridical) are rational actors that will take advantage of any given system if allowed to do so, and (2) the core function of government is to govern.

I am not calling for larger government or for more legislation, I am simply calling for enforcement of the laws and policies that we already have. For example, in a commissioned study done in the mid-1990's MSBs in the US were estimated to number nearly 200,000, and yet despite our registration requirement, by the end of 2004 only 22,000 had registered.<sup>190</sup> More recently, in a 2006 report by the World Bank's Ole Andreassen, competition from the informal sector (i.e. unregistered MSBs) is cited as a chief obstacle to those running legitimate remittances businesses in the US.<sup>191</sup> If we *don't* do better, we risk sending a signal that reads we *can't* do better. As such, it is only logical for MSBs to join their informal peers.

With examples like these, and there are more, how can we be so involved in training and in funding AML/CFT programs abroad - in nations that refuse anything beyond superficial institution of policy - while so poorly performing at home? If the difficulty is in the identification of illegal remitters, perhaps we could take notice of how the formal remitters garner business. In the same Andreassen article, the following data was presented: "[m]ost firms market their service through newspaper advertisements (47.83 percent), radio (37.88 percent),

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189. See Int'l Monetary Fund, *Combating the Abuse of Alternative Remittance Systems: International Best Practices Annex 4*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 102, 105 (International Monetary Fund 2005).

190. CASSARA, *supra* note 4, at 201.

191. Ole E. Andreassen, Fin. Sector, The World Bank, *Remittance Service Providers in the United States: How Remittance Firms Operate and How They Perceive Their Business Environment*, at i., (June 2006).

and community events (40.91 percent) [and word of mouth (19.4 percent)].<sup>192</sup> I am willing to bet that illegal remitters use the very same methodologies as their legal counterparts. As such, to find these individuals we need to listen to the local AM radio stations, read ethnic newspapers, and get out into the community. All of the above, however, requires personnel, which in turn requires funding. And, to be frank, I'm not sure that we are that dedicated to this mission.

I don't mean to suggest that the US government has failed since 9/11. Any attempt to paint the situation as such would be a blatant mischaracterization. In fact, just 3 years ago, in the "Final Report on 9/11 Commission Recommendations," the war against terrorist financing was the only category to receive an 'A' grade.<sup>193</sup> Despite these accomplishments, however, what worries me now is the level to which this once urgent push to stamp out terrorism finance has been both tempered by initial successes and sidetracked by disconnects between senior level managers and agents. As George Friedman – the founder of Strategic Forecasting Inc. (better known as Stratfor) – once said "The weakness of the US is not our soldiers, nor their numbers, but the vast distance that separates American leaders from those who fight."<sup>194</sup>

In 2002, for example, then-Treasury Secretary Paul O'Neill flew halfway across the world to visit a Citibank branch in Bahrain that specialized in Islamic finance.<sup>195</sup> As an aside, this is not an industry that needs our promotional assistance given that (1) by 2004, Islamic banks boasted \$260 billion in assets and another \$400 billion in investments,<sup>196</sup> and (2) lax sectoral regulation continues to be a major security gap globally. Regardless, in the words of then-Treasury Under Secretary for International Affairs, John Taylor, "The *fanfare* of a cabinet member's visit helped us publicize . . . what Islamic finance was all about."<sup>197</sup> While I'm sure at the policy-level this fanfare - along with the establishment of a "visiting scholar in Islamic Finance" chair and the institution of an "Islamic Finance 101" class at Treasury to promote understanding - was trumpeted in the name of political correctness, at the agent-level these things are seen for what they really are, distractions to enforcement objectives.

Also at the senior management level, and with more damning consequence, I again point to the disappearance of initiative once FATF Special Recommendations were purportedly adopted abroad. Particular leaders have apparently formed the view that good legislation is equivalent to good result so long as specious public efforts are demonstrated. Problem states that "aspire" to adopt the recommendations are forgiven for failure of implementation as long as they agree to host a hawala conference, or chair an event on Islamic finance, or promote "outreach." Shaukat Aziz, both former Pakistani finance minister and

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192. *Id.* at 29.

193. TAYLOR, *supra* note 49, at 27.

194. GEORGE FRIEDMAN, AMERICA'S SECRET WAR: INSIDE THE HIDDEN WORLDWIDE STRUGGLE BETWEEN AMERICA AND ITS ENEMIES 339 (Doubleday 2004).

195. TAYLOR, *supra* note 49, at 25.

196. CASSARA, *supra* note 4, at 205.

197. TAYLOR, *supra* note 49, at 25 (emphasis added).

prime minister, was lauded for chairing just such an outreach event in Washington in April 2002;<sup>198</sup> clearly the Pakistanis have cracked down on hawala since that day, right? Sultan Bin Nasser al-Suwaidi, governor of the Central Bank of the United Arab Emirates, was praised for his willingness to host regional initiatives to talk about illicit remittance;<sup>199</sup> clearly the UAE is no longer a corridor for terrorist funds, right? The Saudi government in June 2004 promised to shut down all charities abroad and to establish a “Charity Commission” to regulate the export of all funds;<sup>200</sup> surely, four years after that announcement, that Commission is up and running, right?

With regard to our initial successes, many millions of dollars have indeed been frozen in the formal financial system since 9/11.<sup>201</sup> True, some of those funds can be considered the low-hanging fruit of the financial underworld, but many of those dollars – the hard targets – were captured by creative, groundbreaking efforts by Treasury and others. One such program was the SWIFT operation. SWIFT: the Society for Worldwide Interbank Financial Telecommunication, is a Brussels-based banking consortium that routes 11 million transactions a day between banks, brokerage houses, and stock exchanges.<sup>202</sup> By monitoring the \$6 trillion a day and the more than 7,800 financial institutions that use this service, the Treasury Department, the FBI, and the CIA were able to identify multiple terrorist cells both in the US and abroad.<sup>203</sup>

Unfortunately, the *New York Times*, in 2006, chose to publish a story exposing this ongoing, highly classified program.<sup>204</sup> Believe it or not, the bad guys read *The Times* too. As such, the program was effectively hamstrung by this irresponsible decision to go to print. And, if this disclosure was not demoralizing enough, we acquiesced in the establishment of an external audit to ensure that collection programs were not “inappropriate.”<sup>205</sup> Perspective: we place external audit requirements on ourselves and yet we allow MSBs to self-regulate.

#### F. U.S. Regulation: Informal Sector

Despite unavoidable overlap, thus far we have focused on formal sector regulation. However, Section 359 of the Patriot Act also includes informal value transfer systems (IVTSs).<sup>206</sup> IVTSs operate either in parallel to the formal sector – through underground banking and money transmission services or in tandem with the formal sector - through the holding of “settling accounts” in traditional financial institutions. The latter form offers tremendous insight into the

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198. *Id.* at 17.

199. *Id.* at 60.

200. Dan Murphy, *Saudi Crackdown on Charities Seen as Incomplete*, CHRISTIAN SCI. MONITOR, June 9, 2004.

201. See Eric Lichtblau & James Risen, *Bank Data is Sifted by U.S. in Secret to Block Terror*, N.Y. TIMES, June 23, 2006.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. 31 U.S.C.A. § 5312 (2001).

complacency and, at times, overt criminality of the formal financial sector, e.g. BCCI and Banco Delta Asia (more on this later). The former, which include alternative remittance systems like hawala, are much more difficult to deal with, for by avoiding the formal sector altogether they avoid BSA freezing, despite the fact that BSA requirements are still applicable. In fact, Osama bin Laden, in a Pakistani press interview, is quoted as saying, "Al Qaeda is comprised of modern, educated young people who are as aware of the cracks in the Western financial system as they are of the lines in their own hands. These are the very flaws in the Western financial system which is becoming a noose for it."<sup>207</sup>

Recently, we have begun to adopt more creative monitoring programs to cement these "cracks" (e.g. trade-based money laundering). Trade Transparency Unities (TTUs), for example, now analyze import/export data in search of discrepancies in documentation and actual trade volumes.<sup>208</sup> "By comparing specific declared imports and exports from both sides, determining indications of possible overinvoicing, underinvoicing, fraudulent trading practices, export incentive fraud, and other illegal techniques is a relatively simple process."<sup>209</sup> This is particularly helpful in a world in which spot checks from customs agents have to compete with "rush delivery" services from FedEx to UPS to freight forwarders to free trade zone (FTZ) expeditors. Analysis after-the-fact thus enables the discovery of discrepancies that were not made patent to customs agents in real-time.

TTUs are indeed likely to help in the tracking of everything from textiles to diamonds to gold. However, even here efficacy is premised upon cooperation by foreign customs agencies and assumptions that diamonds and gold, for example, are traded, rather than smuggled, across borders. Further, the effectiveness of TTUs depends not only upon the willingness of foreign governments to share information, but on their ability to accurately collect and communicate that data. In poorer countries, countries that are disproportionately using underground banking and trade-based value manipulation, limitations with regard to both technology and personnel are very real obstacles. Lastly, import/export data obfuscation, willfully or accidentally, through comingling and/or mislabeling in FTZs, for example, furthers potential inaccuracies.

With regards to cash couriers, little has changed for the better. Yes, technology has been employed at entrance and exit points to detect large quantities of currency. And, yes, CMIRs provide hefty penalties for not reporting the cross-border movement of cash or bearer negotiable instruments (e.g. stocks, bonds, etc.), but only if such amounts are greater than \$10,000.<sup>210</sup> As stated above, I feel this amount is far too high for a blanket approach.

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207. CASSARA, *supra* note 4, at 179.

208. *Id.* at 226.

209. *Id.* at 225.

210. 31 C.F.R. §103.30 (2009).

At a minimum, risk modeling needs to be incorporated with regards to the end-destination of each voyage. The amount of money that a private individual can carry on his/her person from the US to Singapore should not be the same allowable amount for travel to Sudan, for example. The money, which is badly needed in many of these regions I concede, can still reach these countries, but through the financial system. Further, I was careful to distinguish private individuals from not-for-profit workers and other governmental and quasi-governmental groups.

Ultimately, yes, a criminal/terrorist could fly to a "safe" country with \$10,000 in tow only to then hop on another plane headed to Syria or Iran. But, that criminal/terrorist now has to purchase two plane tickets (a layover would not suffice, for the focus would be on the end-destination), thus doubling both his/her operational cost and paper-trail. Doubling the paperwork alone increases the chance of eventual detection and apprehension.

With regard to the abuse of charities, the IRS and the FBI are making very real progress.<sup>211</sup> Their efforts, however, are hampered by both noncooperation abroad (as mentioned *supra*) and by the complexities involved. For example, in a case coming out of Russia, a foreign national gave money to a charity, a company (receiving money from other charities) also gave money to that same charity, that charity then gave money to other charities (both legitimate and illegitimate), and one of those recipient charities then finally distributed the money to individuals in cash, wire transfer, courier, and goods form.<sup>212</sup>

With this level of intentional confusion, one can imagine just how tough of a task investigation really is, much less prosecution. Add to this, the cross-border transmissions of funds. Sophisticated criminals utilize nation-states, failed states, and even Indian (Native American) reservations to take advantage of any perceived jurisdictional tolerance. Any international dimension then increases tracking difficulties in orders of magnitude. This holds true even when dealing with cooperative, technically capable countries.

## V. CONCLUSION

### A. *Disincentivized Cooperation*

There is a section in FinCEN's Money Laundering Prevention: A Money Services Business Guide entitled "MSBs Can Help Fight Money Laundering."<sup>213</sup> This section title, in my opinion, is a perfect summation of US/Jeffersonian dogma. We assume that MSBs *want* to help fight money laundering when it is, in fact, in their financial interest not to. Given an absence of enforcement, this holds true even in the face of hefty civil and criminal penalties for noncompliance. Regulatory hurdles cost time and money (e.g. registration in the UK costs £60

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211. Paul O'Neill, Secretary, U.S. Dep't of the Treasury, Remarks on Next Terrorist Asset List (Jan. 9, 2002), <http://www.treas.gov/press/releases/po910.htm>.

212. FATF, TERRORIST FINANCING 26 (Financial Action Task Force/Organization for Economic Cooperation and Development 2008), <http://www.fatf-gafi.org/dataoecd/28/43/40285899.pdf>.

213. MONEY, *supra* note 181, at 10.

pounds – approximately \$113 – per premises),<sup>214</sup> and auditors bring unwanted attention. This attention then scares off clients that seek anonymity both for cultural and criminal reasons.

In a similar vein we assume that countries in the Persian Gulf, for example, *want* to cooperate on AML/CFT initiatives when, in fact, it is in their political (domestic and regional), religious, and financial interests not to. In Saudi Arabia, for example, “the financial sinews of al-Qaeda [flow] from numerous supporters in the Kingdom, and the Saudi government [is] loath to trigger the consequences of restraining these supporters.”<sup>215</sup> This is true both in the context of direct support and in terms of more peripheral contributions via charitable giving. In fact, the fragility of Saudi desire/ability to manage the latter is particularly vacant for a variety of religious and historical reasons.

In 1744, Muhammad Abd al-Wahhab and Ibn Sa’ud formed a ruling coalition.<sup>216</sup> The Saudi royal family, for its part, agreed to uphold a particularly virulent, uber-conservative Wahhabi jurisprudence. The Wahhabis, also known as “the asserters of the divine unity (*al-Muwahhidun* or *Ahl al-Tawhid*),”<sup>217</sup> in upholding their portion of the bargain, agreed to provide religious legitimacy to the crown so long as *shari’a* - Islamic law - remained supreme.<sup>218</sup>

Under Saudi law, the Nizam Asasi (“Basic Regulation”), a constitutional equivalent – actual constitutions are avoided so as not to offend the Wahhabi ban on manmade legislation,<sup>219</sup> governs, not UNSCRs not FATF recommendations and not even Saudi royal decrees in many instances. Article 7 explicitly states as much: “[T]he Prophet’s tradition and the Qur’an and Sunnah reign supreme over *all* other state regulations.”<sup>220</sup> While Article 48 later cedes some discretionary authority to the ruler, it too is qualified, “The system of judges which is applied to all cases presented before it is shari’a rules according to the teachings of the Holy Qur’an, the Sunnah, and the regulations set by the ruler, *provided they do not contradict the Holy Qur’an and the Sunnah* (alteration in original).”<sup>221</sup>

214. See David Faulkner, *U.K. Regulation of Money Service Businesses*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 42, 44 (International Monetary Fund 2005).

215. See CASSARA, *supra* note 4, at 233.

216. NATANA J. DELONG-BAS, WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD 34 (Oxford University Press 2004).

217. SHAYKH JAMAAL AL DIN ZARABOZO, THE LIFE, TEACHINGS AND INFLUENCE OF MUHAMMAD IBN ABDUL-WAHHAAB 280 (Ministry of Islamic Affairs 2005), available at <http://www.sultan.org/books/wahhabism.pdf>.

218. See generally DELONG-BAS, *supra* note 217.

219. LIAM GEARON, HUMAN RIGHTS & RELIGION: A READER 139 (Sussex Academic Press 2002).

220. FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 3 (Ruud Peters & Bernard Weiss eds., Brill 2000).

221. *Id.*

Charitable giving (*zakat*) is not only encouraged under shari'a, it is mandated as one of the five pillars of Islam.<sup>222</sup> This, as previously mentioned, is exactly what makes regulation so contentious in the eyes of the proletariat – those especially susceptible to radical Islamic messages and, more importantly, to the powerful Wahhabi leadership - the authors of those extremist messages. This is particularly true when the US - seen as a Christian (rather than secular) country in the Middle East - is painted as targeting Saudi charities with religious connotations (e.g. *Al Haramain*, meaning “the two holy places,”<sup>223</sup> i.e. Mecca and Medina).

As such, and as made frighteningly clear by the May 2003 al-Qaeda attack in Riyadh, the Saudi royal family is in no position to impose regulations that may be deemed a violation of Qur'anic teachings. Lastly, even if the Saudis established the long-promised Charity Commission, thus moving beyond superficial condemnation of charitable exploitation, two obstacles remain. The first: citizens would be free to ignore such attempts at regulation under Article 48 of the Nizam Asasi, upon direction from their religious leaders.<sup>224</sup> The second: no amount of hypothetical regulation would keep a wealthy Saudi businessman from personally writing checks, so to speak, to individuals or organizations of his choosing.

The Emirates, on the other hand, appear to fight full compliance in the name of profit margins and regional sensitivities rather than religious fervor. As an example, at a soi-disant Islamic bank I was told that I could not open an account without a residence permit. A permit, however, as it was made clear to me, could materialize for a small fee. From May 15 to 16, 2002, the UAE hosted the Abu Dhabi Declaration on Hawala.<sup>225</sup> That meeting was followed by the Second International Conference on Hawala in April of 2004.<sup>226</sup> In both instances the UAE was applauded for their “efforts.”<sup>227</sup> Upon the June 2008 announcement of the addition of 13 new AML/CFT regulations, the following appeared in the *Financial Times*: “Western officials have lauded the UAE’s move to regulate hawala . . . .”<sup>228</sup> Unconditional praise continued even after a curiously timed - the day before the World Customs Organization (WCO) was to meet – declaration by the director general of the UAE’s Federal Customs Authority which voiced an “urgent need” for regional ports to combat smugglers.<sup>229</sup>

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222. DELONG-BAS, *supra* note 217, at 247; *see also Five Pillars of Islam*, BBC Religion & Ethics (2002), <http://www.bbc.co.uk/religion/religions/islam/practices/fivepillars.shtml>.

223. *See* Saudi-US-Relations.org, Saudi-US Relations Information Service, The Hajj in Perspective: A Conversation with David Long (Jan. 23, 2005), <http://www.saudi-us-relations.org/newsletter2005/saudi-relations-interest-01-23.html> (last visited Feb. 5, 2009); *see also* OXFORD DICTIONARY OF ISLAM (2007-08), *available at* [http://www.oxfordislamicstudies.com/article/opr/t125/e810?\\_hi=1&\\_pos=13](http://www.oxfordislamicstudies.com/article/opr/t125/e810?_hi=1&_pos=13).

224. GEARON, *supra* note 220.

225. *See* Faulkner, *supra* note 215, at 94.

226. *Id.* at 96.

227. *See id.*

228. Simeon Kerr, *UAE Brings in New Rules to Fight Money Laundering*, FIN. TIMES, June 23, 2008, at 8, *available at* <http://www.ft.com/cms/s/0/bdbfd4dc-40bb-11dd-bd48-0000779fd2ac.html>.

229. Gregor McClenaghan, *Customs Combine to Fight Crime and Facilitate Trade*, THE NAT'L, June 25, 2008, <http://thenational.ae/article/20080624/NATIONAL/680171428>.



And yet, Dubai was the transit route of much of the funding for the September 11, 2001 attacks, and served as both A.Q. Khan's – the "godfather" of the Pakistani nuclear bomb – equipment source and cubbyhole for illicit profits.<sup>230</sup> The infamous al-Barakaat remittance service was headquartered in Dubai,<sup>231</sup> and Dubai's Gold Souq – the largest in Arabia<sup>232</sup> – is widely known for its use in money laundering.<sup>233</sup> The Petrolina FZC company – used to pay the Iraqi government millions of dollars in bribes to secure "oil for food contracts," thus circumventing UN sanctions – was based in the UAE.<sup>234</sup> So too were the backers of the Bank of Credit and Commerce International (BCCI): Sheik Zayed bin Sultan al-Nahyan (Ruler of Abu Dhabi and 77 percent owner of the bank), Sheik Khalifa bin Zayed al-Nahyan (son of Sheik Zayed), Sheik Mohammed bin Zayed al-Nahyan (son of Sheik Zayed), and Kemal Adham (former head of Saudi intelligence).<sup>235</sup>

BCCI, the largest Muslim bank in the world at the time, essentially institutionalized hawala; "the bank arranged for a deposit in the local currency at one end and a withdrawal in a different currency at the other, without an audit trail or paperwork – a basic form of money laundering."<sup>236</sup> As lax regulation began attracting the money of more sophisticated criminals like Abu Nidal, Manuel Noriega, Munther Bilbeisi, and intelligence operatives, BCCI added more layers and shells to accommodate. To illustrate:

[A] subsidiary called BCCI Overseas, based in the Cayman Islands, was 100 percent owned by BCCI Holdings in Luxembourg. The senior Cayman company was a British charity, called ICIC Foundation, which owned an investment company, ICIC Foundation Cayman, which owned 35 percent of BCCI's Geneva-based bank, Banque de Commerce et Placements (the rest was owned by BCCI Holdings S.A. – the main Luxembourg company – and Union Bank of Switzerland). The ICIC Foundation also was an investor in BCCI; it borrowed \$74 million from an affiliated company, ICIC Overseas, to acquire 9 percent of BCCI shares. Other Cayman investors in BCCI Holdings were the ICIC Staff Benefit Trust and the ICIC Staff Benefit Fund – pension funds for BCCI . . . .<sup>237</sup>

In 2008, the US Commodity Futures Trading Commission (CFTC) warned the Dubai Mercantile Exchange for its lack of adequate reporting and transparency.<sup>238</sup> Many authors have written about the abuse of FTZs in the UAE

230. See CASSARA, *supra* note 4, at 123.

231. WARDE, *supra* note 185, at 97.

232. TERRY CARTER & LARA DUNSTON, DUBAI 17 (Lonely Planet 2007).

233. See generally Dubai: Hawala's Law Hooray?, World Money Laundering Report Online (Feb. 26, 2007), [http://bankinginsurancesecurities.com/WMLRO.Com/Articles/world\\_money\\_laundering\\_report\\_online\\_news/Dubai-hawala-s-last-hooray](http://bankinginsurancesecurities.com/WMLRO.Com/Articles/world_money_laundering_report_online_news/Dubai-hawala-s-last-hooray) (last visited Feb. 5, 2009).

234. Richard Lawson, Foreign Cases that Could Haunt Bhutto, BBC News (Oct. 29, 2007), [http://news.bbc.co.uk/2/hi/south\\_asia/7064052.stm](http://news.bbc.co.uk/2/hi/south_asia/7064052.stm) (last visited Feb. 5, 2009).

235. MARK POTTS ET AL., DIRTY MONEY 10-11 (National Press Books 1992).

236. *Id.* at 57.

237. *Id.* at 61.

238. See CFTC Limits, FIN. TIMES, July 8, 2008, at 2, available at <http://www.ft.com/cms/s/0/>

generally, and Dubai's Jebel Ali in particular.<sup>239</sup> And, as best illustrated in a recent *Portfolio* article by Christopher Stewart, smuggling, with government acquiescence, continues unabated despite the UAE Federal Customs Authority director general's "urgent" call for action.<sup>240</sup>

According to the article, 30 to 40 percent of the \$11 billion in goods sent from the US to the UAE make their way to Iran – in violation of both US and UN sanctions.<sup>241</sup> "Some exports are innocuous, like refrigerators and stoves; others, such as high-speed computer chips, military hardware, and nuclear components, are more ominous."<sup>242</sup> As Michael Jacobson, senior fellow at the Washington Institute's Stein Program on Counterterrorism and Intelligence, puts it "[t]hey're reluctant to go too far, in part out of fear of antagonizing Iran, but mainly because of the bottom line."<sup>243</sup>

The Stewart article is important here beyond simply chronicling just how little meaning sanctions have to our allies. It also illustrates, yet again, this disjuncture between the efficacy of freezes and designations in the formal sector compared with that of the informal sector. For example, the Treasury Department designated Bank Saderat and Bank Sepah for funding Hezbollah and facilitating Iranian missile procurement, respectively.<sup>244</sup> One might assume that this pair of designations would cripple these institutions, as such a designation did to Banco Delta Asia, thereby precipitating a crisis of sorts in Iran. That assumption, however, would be wrong. Such designations, while painful, are blunted by informal "solutions" (e.g. the smuggling of goods and the usage of hawala).

In a 2008 *Financial Times* (Tehran) article, Daniel Glaser, the deputy assistant secretary of terrorist financing at US Treasury, claimed that the fact that hawala business is booming is proof positive that sanctions are working.<sup>245</sup> This is a bit like bragging about how sturdy your three-sided fortress is; what about the back door? Secretary Glaser continued: "[i]f what our sanctions and the international sanctions have done is to push organizations like the Quds force [an elite, self-funded Iranian unit that perpetuates terrorist movements abroad] out of the international financial system and into costlier, riskier and less efficient systems, then that is a good thing."<sup>246</sup> I would counter that statement by asking if that's what our sanctions have in fact done. Arguably, hawala is cheaper (not costlier), just as safe, and more efficient in terms of time and paperwork.

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9d7ab8ea-4c87-11dd-96bb-000077b07658.html.

239. See generally Christopher S. Stewart, *The Axis of Commerce*, PORTFOLIO MAG., Sept. 2008, available at <http://www.portfolio.com/news-markets/international-news/portfolio/2008/08/13/US-Trades-With-Iran-Via-Dubai>.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. Andrew Davenport, *Draining the Financial Swamp*, 12 THE J. OF INT'L SECURITY AFF. 27 (2007), available at <http://www.securityaffairs.org/issues/2007/12/davenport.php>.

245. Anna Fifield, *How Iranians are Avoiding Sanctions*, FIN. TIMES, Apr. 14, 2008, available at <http://www.ft.com/cms/s/0/6ca69788-0a48-11dd-b5b1-0000779fd2ac.html>.

246. *Id.*

Note: my intention in this section was not to single out Saudi Arabia and the UAE for reproach. In fact, if not for page limitations, I could write volumes on the current apathy and duplicity of our “allies” abroad. Doing so, however, would be redundant with regard to this central premise: the system, as-is and as presented, is broken. Otherwise-friendly nations in the Middle East and in Asia have very little incentive to cooperate with our AML/CFT programs, period.

*B. Incentivized Cooperation*

The US and European partners must find alternatives to financially contentious AML/CFT program implementation. In theory, while individuals in poorer nations benefit from informal flows (in cash, courier, or trade form), the governments of those nations do not. In fact, hawala-type systems were developed, in part, to avoid perceived corruption by circumventing officialdom. As such, one would imagine that these governments are eager to recapture this lost revenue by cracking down on the informal sector, but this does not appear to be the case. Perhaps the problem is that governments fail to see just how profitable regulation could be.

As a first step, one might point out the extent of lost revenue, thus motivating cash-strapped governments to commit to often substantial enforcement expenditures. In Bangladesh, for example, 40-50 percent of annual government revenues are generated through customs duties.<sup>247</sup> In dollar terms, that’s approximately \$3.4 billion.<sup>248</sup> One would assume that these kinds of figures would demonstrate to the Bangladeshi government, for example, that by allowing duty manipulation/avoidance (commonly used in the settling stage of the hawala process) a primary source of their funding is threatened.

On the other hand, governments may very well be aware of the extent to which informal financial systems thrive in their countries. There is even evidence to suggest that they may be encouraging, for a price, such sub-rosa activity. In a 2005 survey of 73 official remittance firms (i.e. those that have registered and presumably comply with all additional MSB regulations) in the US, nearly half of those operators cite recipient country corruption as a major obstacle to business.<sup>249</sup> By extension, if corruption is that prevalent in official circles, the “hush money” required of illegal operators must be greater in both occurrence and amount.

In the same 2005 survey, the median firm processed \$5 million in transactions per month.<sup>250</sup> In strictly financial terms, with numbers this large it’s obvious just how profitable graft, even in small percentages, could be for non-cooperative governments. Further, and in the social policy context, by allowing injections of unregulated, untaxed dollars to reach their populations, regimes feel freed, to some extent, from having to provide public services to their people. This is particularly

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247. DEP’T OF STATE, *supra* note 11, at 6.

248. See CIA, *supra* note 32.

249. Andreassen, *supra* note 192, at 5, 11.

250. *Id.* at 15.

true when, as in the case of Afghanistan, 80 percent of all healthcare and educational services are provided by NGOs.<sup>251</sup>

A second way to entice non-cooperative governments to enforce AML/CFT policy is to have them partner with formal financial institutions in the private sector. This is precisely what occurred between the United States and Mexico. I argue, however, that the institutionalization of the MEX/US remittance corridor, this formalizing the informal, isn't replicable. This is principally so because the sheer volume of money, and thus the incentive for the private sector to participate, doesn't exist in any other bilateral relationship.

"In 2002, Mexico was the largest recipient of formal remittances flows in the world."<sup>252</sup> By 2003, remittance flows reached \$13 billion, thus surpassing both foreign direct investment (FDI) to Mexico and tourism-related revenues.<sup>253</sup> This was made possible because policymakers at the highest levels insisted on regulatory harmonization. This coordination was so involved that an FDIC-Consulate General of Mexico joint task force was even established to educate migrant workers on their remittance options.<sup>254</sup>

At the individual level, on the US side, the Treasury Department "asked the Federal Reserve to work with Mexico to improve the payments system between the countries, which it did. At [Treasury's] suggestion the World Bank also got involved . . . ."<sup>255</sup> The Mexicans, for their part, simultaneously strengthened the security of, and access to, Mexican Consular I.D. Cards (*Matricula Consular de Alta Seguridad*). With Treasury and the Fed on board, and with the Mexican government guaranteeing the fidelity of new security features on the cards, Wells Fargo, Citibank, Bank of America, US Bank, HSBC, Washington Mutual, Banco Popular, and others all facilitated remittance senders.<sup>256</sup> Ultimately, remittance volumes encouraged harmonization which encouraged broad competition for business which sent the prices for such services plummeting. As a result, workers stopped using the informal sector in droves.<sup>257</sup>

This corridor formalization is exactly what the World Bank's Sam Maimbo has called for: "an effective strategy for isolating illicit funds being transferred through the hawala system is to encourage legal transfers to migrate to conventional financial instruments."<sup>258</sup> That said, Mr. Maimbo admits the following: "[t]he effectiveness of this strategy depends on the ability of formal

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251. Michael A. Cohen, Maria Figueroa Küpcü & Parag Khanna, *The New Colonialists*, 167 FOREIGN POL'Y 74, 74 (2008).

252. Raul Hernandez-Coss, *Comparing Mature and Nascent Remittance Corridors*, in REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 17, 18 (International Monetary Fund 2005).

253. Raul Hernandez-Coss, *Lessons from the US-Mexico Remittance Corridor on Shifting from Informal to Formal Transfer Systems* 5 (World Bank Publications 2005) [hereinafter *Lessons*].

254. *Id.* at 14.

255. TAYLOR, *supra* note 49, at 27.

256. *Lessons*, *supra* note 254, at 11.

257. *Id.* at 21.

258. Maimbo, *supra* note 35, at 62.

financial instruments to compete with the hawala dealers with respect to exchange rates, speedy service, and coverage of areas that now lack banking services.”<sup>259</sup> As stated earlier, trade volumes are simply too low elsewhere to create this kind of extraordinary bilateral facilitation. And, without such governmental support, traditional financial institutions are unlikely to invest the time and money to induce the kind of migration to conventional financial instruments that Maimbo is calling for. Further, even where substantial flows might exist, the security challenges involved automatically rule out involvement by the likes of HSBC, Bank of America, and other majors.

It must be noted that even in the case of the US/MEX corridor, coverage areas are still limited principally to urban centers. Thus, the draw of door-to-door hawala delivery still remains for underserved rural communities even where there is extraordinary governmental cooperation. It must also be noted that any US, World Bank, and IMF involvement automatically complicates program acceptance in the Middle East and in South Asia.

Dr. Hamed El-Said and Dr. Jane Harrigan summarize the reasons for this in their 2006 Middle East Journal article “Globalization, International Finance, and Political Islam in the Arab World.”<sup>260</sup> Point one: the conditions attached to international aid stemming from “official organizations, particularly those based in Washington” often demand a decline in social welfare spending.<sup>261</sup> Point two: Islamist groups are eager to fill the gap by providing their own support through religious charities.<sup>262</sup> Point three: Islamist groups then exploit the withdrawal of the state from the welfare sphere, thus calling into question the political legitimacy of the regime.<sup>263</sup> As an aside, this is particularly troubling given that US foreign policy promotes democracy worldwide. As such, the results of those democratic elections, if/when held, are sure to reflect such charitable giving – or lack thereof.

In sum, NGOs are not the answer because “none . . . is anxious to perform so well that it works itself out of a job.”<sup>264</sup> Traditional financial institutions in the private sector are not the answer for the dearth of incentives and plethora of security challenges aforementioned. And, perhaps the World Bank and the IMF are excludable for the way in which they are allegedly perceived in the Muslim world. All of that being said, what alternatives then remain to incentivize (financially, culturally, religiously, politically) governments to push business away from hawaladars? Answer: micro-lenders.

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259. *Id.*

260. Hamed El-Said & Jane Harrigan, *Globalization, International Finance, and Political Islam in the Arab World*, 60 THE MIDDLE E. J. 444, 446-47 (2006).

261. *Id.* at 446.

262. *Id.*

263. *Id.* at 446-47.

264. Cohen, *supra* note 252, at 74.

### C. *Micro-Lenders as an Alternative*

In 1983, Muhammad Yunus, with the support of the Bangladeshi government, founded Grameen Bank.<sup>265</sup> Grameen, as a micro-credit institution, lent very small, uncollateralized sums to the poorest of individuals – to women in particular – in rural communities.<sup>266</sup> Distributions were hand-delivered by bankers that lived in the surrounding areas, spoke the local dialects, and lived by the same cultural norms.<sup>267</sup> Dispersals were not contingent upon skills training and nor were they hampered by superfluous administration and consultancy.<sup>268</sup> In fact, micromanagement enmity led young Grameen to butt heads with the World Bank on more than one occasion. There was even a public rebuke of then-World Bank president Barber Conable during a televised conference in 1986.<sup>269</sup>

While the World Bank did end up funding the Grameen Replicator Trust – a fund to establish Grameen-type programs globally, the Polli Karma Sahayak Foundation – a micro-credit wholesaler, and Consultative Group to Assist the Poor (CGAP) and other Grameen initiatives,<sup>270</sup> this initial confrontation actually bought Grameen a bit of “street credit” with poorer nations that may or may not have shared the concerns listed in the Said-Harrigan article. And, while US officials like Jimmy Carter and Hillary Clinton did eventually visit Grameen branches, only Bengali officials were in attendance at the opening ceremony. Further, the ceremony, held in Jamurki, Tangail, was begun with recitations from the Qu’ran.<sup>271</sup>

A note on sharia compliance. With an ultraconservative Iranian regime now in power, it is of particular interest that an adviser to Ahmadinejad on women’s affairs said the following: “There is nothing in shariah law or the Qu’ran against what [Grameen is] doing.”<sup>272</sup> Many Islamic scholars feel that Grameen is exempted from the religious injunction on charging interest (*riba*) because those being charged interest also own stakes in the bank.<sup>273</sup> “The purpose of the religious injunction against interest is to protect the poor from usury, but where the poor own their own bank, the interest is in effect paid to the company they own, and therefore to themselves.”<sup>274</sup>

This theatre, whether by design or not, earned our Nobel Laureate vast cultural and religious dividends. Yunus was able to neutralize the concerns of Drs. El-Said and Harrigan with nothing more than a low key opening ceremony and a superficial tiff with a World Bank official. By allying with the government of Bangladesh – the government at one point owned 60 percent of the bank – Grameen was able to ensure its political survival. With an equity position, the

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265. Muhammad Yunus, *BANKER TO THE POOR* 119 (Public Affairs 2003) (1999).

266. *Id.* at 57-58, 71

267. *See id.* at 100-01, 106.

268. *Id.* at 140-41

269. *Id.* at 142-43.

270. *Id.* at 164, 166, 168.

271. *Id.* at 123.

272. *Id.* at 110.

273. *Id.*

274. *Id.*

government was incentivized to make the project work, to ensure economic success. Simultaneously, by underwriting the project, the government reaps the benefit of appearing empathetic and effectual.

With a proven track record in not only Bangladesh, but in India, Nepal, Vietnam, China, Latin America, and Africa, I suggest that we encourage micro-credit organizations to expand into the remittance field. We can promote these groups as official alternatives to hawala. Micro-lenders, as with hawaladars, are in a unique position to address all four informal sector incentives: (1) the absence of formal sector alternatives, (2) cultural familiarity, (3) affordability, and (4) anonymity. Further, as these micro-lender-MSB hybrids (MLMSBs) pair up with their respective government partners, thus linking their financial fates, one would expect to see a crackdown on market competitors (i.e. the informal sector). Market dominance would replace any revenue (think bribes) that would be lost in AML/CFT enforcement, and would bolster the credibility of these regimes with their own people.

### **1. Formal Sector Alternatives**

By their nature, micro-lenders are located in rural areas that are isolated from capital and professional services.<sup>275</sup> These are the very communities over which hawaladars now hold a monopoly. Remember that even with the US/MEX corridor, the formal sector was unable to reach beyond urban centers. Micro-lenders are able to thrive in these regions where traditional institutions cannot, and do not want to, operate.

### **2. Cultural Familiarity**

Micro-credit staffers embody the trust element that is so essential to the success of hawala, for they too are from the communities which they serve. Language proficiency and cultural understanding provide access to these outlier villages and inspires trust and, thereafter, community participation. In addition, in many micro-lending models borrowers are simultaneously shareholders. By owning the organization, or branch of that organization, it's no longer viewed as an intrusion, but as an addition to the community.

### **3. Affordability**

Micro-lending institutions are able to keep their costs down by utilizing local resources and by conducting no-frills operations. With local staffers and Spartan offices, these organizations can operate at a fraction of the budgetary and infrastructural requirements of their more traditional peers. And, with government partners, MLMSBs should receive preferential lending and tax incentives.

Further, the availability of turnkey technologies now allows these businesses to operate more efficiently, without duplication of process or personnel. This would also help in keeping track of AML/CFT due diligence and security features. Yes, regulation –much of which micro-credit institutions now manage to avoid – costs money. But, an expansion in services would offset an expansion in the cost

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275. *See id.* at 121, 141

of compliance via cross-selling. For example, many recipients of micro-credit are simultaneously recipients of remittances. Further, many recipients of remittances need to exchange those monies into local currency. Lastly, the adoption of risk-based-modeling with regards to transfer amounts<sup>276</sup> would exclude many of the transactions that now occur, thus limiting the amount of actual AML/CFT reporting required.

Without doubt, the initial period of service expansion would be difficult both in terms of money and personnel. But, USAID and World Council of Credit Unions (WOCCO) provide capacity-building support.<sup>277</sup> WOCCO further provides, via its International Remittance Network (IRnet), “a vehicle by which to send and distribute remittances at low cost,”<sup>278</sup> thus blunting an inevitable increase in marketing costs that MLMSBs would incur on the sending side. In addition, SWIFT can provide direct funds transfer, and commercial bank and transmitter partnerships can supply “access to international payment networks, foreign exchange access, and risk management expertise.”<sup>279</sup>

The bottom-line, however, is that none of the above can occur without one of a few things occurring, the first being a radical change in policy and regulation that would allow the creation of MLMSBs. The second would be a change of legal status, thus morphing micro-lenders into versions of full-fledged financial institutions. The third would be a series of micro-lender-private-sector partnerships with those that already have the appropriate legal status and licensure to conduct expanded financial services. With a dearth of research in this area, I am not in a position to recommend one action above another. I would only add that, as Pankaj Ghemawat writes in his latest book,<sup>280</sup> contrary to Thomas Friedman’s assertions, the world is not flat.<sup>281</sup> As such, what might work well in India might not work at all in Pakistan or Bangladesh or Malaysia.

#### 4. Anonymity

With government partners, MLMSBs would escape much of the desire for anonymity that illegal hawaladars (and by extension, their customers) now seek.

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276. Transactions that are below ‘X’ amount do not match criminal/money laundering transmission profiles and thus should be excluded from many of the AML/CFT reporting requirements. CHINYERE EGWUAGU ET AL., *AML/CFT Regulation: Implications for Financial Service Providers that Serve Low-income People 5* (Consultative Group to Assist the Poor & World Bank 2005), [http://siteresources.worldbank.org/EXTAML/Resources/396511-1146581427871/AML\\_implications\\_complete.pdf](http://siteresources.worldbank.org/EXTAML/Resources/396511-1146581427871/AML_implications_complete.pdf).

277. Anne Hastings, *Address at the Global Microcredit Summit in Halifax, Nova Scotia: Entry of MFIs into the Remittance Market: Opportunities and Challenges* (Nov. 13, 2006), [http://www.microcreditsummit.org/papers/Workshops/23\\_Hastings.pdf](http://www.microcreditsummit.org/papers/Workshops/23_Hastings.pdf).

278. *Id.* at 29.

279. *Id.* at 31; see Jennifer Isern, Rani Deshpande & Judith van Doorn, *Crafting a Money Transfers Strategy: Guidance For Pro-Poor Financial Service Providers*, 10 OCCASIONAL PAPER 20 (Consultative Group to Assist the Poor 2005), available at [http://www.cgap.org/gm/document-1.9.2704/OccasionalPaper\\_10.pdf](http://www.cgap.org/gm/document-1.9.2704/OccasionalPaper_10.pdf).

280. See PANKAJ GHEMAWAT, *REDEFINING GLOBAL STRATEGY: CROSSING BORDERS IN A WORLD WHERE DIFFERENCES STILL MATTER* (Harvard Business School Press 2007).

281. *Id.* at 10.



Illegal immigrants will continue to associate formal financial institutions with governmental organs, but MLMSB alliances with receiving countries are unlikely to invoke this same trepidation. Pakistan, for example, is unlikely to report the legal status of a U.K. remitter to authorities in England; Pakistan, after all, benefits from the money being sent home. Further, the receiving government would be in no position to adjudge the legality of a remitter living abroad. Lastly, “anonymity by default” becomes a lesser obstacle because micro-lenders, by training and by practice, are accustomed to dealing with, and putting at ease, individuals with lower levels of formal education.

*D. Conclusion*

Nothing, including the creation of MLMSBs, will prove to be a panacea if enforcement does not follow. While our country develops cutting-edge national security programs, far too often the production stage is both where policy begins and ends. Granted, enforcement dollars are finite, but I fear that inaction is regarded as safer (politically) and has, therefore become the bureaucratic default.

Further, I have decided that lack of execution in this particular area either stems from a loss of interest, or from deliberate misdirection regarding the recent implementation of a secret program that is many, many times more effective than was SWIFT. I am a cynic by nature, and unfortunately that means that I believe the former to be true. Sexier topics naturally prevail in an election season, however, given that terrorists tend to stage attacks around election cycles (e.g. Spain and Pakistan), let’s hope that I’m wrong.