Fighting International Crime and Its Financing: The Importance of following a Coherent Global Strategy Based on the Rule of Law

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One of the starkest contrasts in our world today is the gulf that exists between the civil and the uncivil. By civil I mean civilization: the accumulated centuries of learning that form our foundation for progress. By civil I also mean tolerance: the pluralism and respect with which we accept and draw strength from the world’s diverse peoples. And finally I mean civil society: the citizens, groups, businesses, unions, professors, journalists, political parties and others who have an essential role to play in the running of any society. Arrayed against these constructive forces, however, in ever greater numbers and with ever stronger weapons, are the forces of what I call uncivil society. They are terrorists, criminals, drug dealers, traffickers in people, and others who undo the good works of civil society. They take advantage of the open borders, free markets and technological advances that bring so many benefits to the world’s people. They thrive in countries with weak laws and institutions. And they show no scruple about resorting to intimidation or violence. Their ruthlessness is the very antithesis of all we regard as civil. They are powerful, representing entrenched interests and the clout of a global enterprise worth billions of dollars. But they are not invincible.1


While the overarching theme of this Symposium is “U.S. Responses to the Rise in International Crime,” my Article addresses the narrower issue of “Combating the Financing of International Crime.” At the outset, I would like to make the point that it is difficult to discuss measures to combat the financing of international crime in isolation, that is, without

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at the same time addressing some of the underlying issues related to combating the primary crimes being financed. It is important to remember that the larger war is to eliminate or reduce the commission of the primary crimes, while one of the battles of that war is to disrupt the channels of financing for such crimes. Therefore, this Article will address the topic of combating the financing of international crime in this broader context.

I. INTRODUCTION

The term "international crime" is generally used to refer to all crime that crosses international borders, for example, through the occurrence of criminal activity in more than one jurisdiction or because the criminal or the proceeds of the crime have moved from one jurisdiction to another. The term is also used to describe crimes against international law, that is, conduct that has been criminalized under an international treaty, convention or customary international law.

A half century ago, the term "international crime" was understood to include a very limited category of crimes, such as piracy on the high seas, smuggling, war crimes, crimes against humanity and genocide. It is a sorry testament to the state of affairs in the world today that the term now encompasses a much wider range of international crimes such as drug trafficking, money laundering, terrorism, the financing of terrorism, corruption, trafficking in women and children, tax evasion and cyber crime. The September 11, 2001 terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington, D.C. injected a frightening new dimension into the realm of international crime, thereby bringing a new sense of urgency to the war against international crime, especially international terrorism, money laundering and the financing of terrorism. Scholars, inquiry commissions and law enforcement officials have undertaken various investigations and analyses as to how and why such a horrendous act of terrorism could be perpetrated against innocent civilians and how to prevent such acts of terrorism in the future.

2. The focus of international legal and financial measures is against international terrorism. Acts of terrorism committed within national boundaries are normally covered by domestic criminal and/or anti-terrorism laws. Therefore, the term "terrorism" as used in this Article refers to international terrorism.

3. See generally Herbert V. Morais, Behind the Lines in the War on Terrorist Funding, 20 INT' L FIN. L. REV. 34 (2001) (explaining challenges facing governments and financial institutions in war to combat terrorist funding); Herbert V. Morais, The War Against Money Laundering, Terrorism and the Financing of Terrorism, LAWASIA JOURNAL 1 (2002) (reviewing legal and financial measures that have been taken to combat money laundering, international terrorism and financing of terrorism).

Whatever their findings, it is generally agreed that this major terrorist event has posed new and unusual challenges for governments, financial institutions and civil societies everywhere in fighting international crime.

A number of factors have contributed, in varying degrees, to a significant growth in international crime. Globalization and regional integration have greatly facilitated the movement of people, goods and services across borders. The information superhighway has also made it easy and fast to execute business and financial transactions in cyberspace, often outside the purview of national regulators and law enforcement authorities, as there is at the present time no clearly established jurisdiction or governing law that applies to all such transactions. These dynamic developments have certainly brought great benefits for international commerce, trade and travel, but they have also facilitated the growth of international criminal activity.

This Article will examine some of the legal measures taken at the international level to fight international crime, beginning with a brief introduction to some of the historical antecedents. It will then focus in greater detail on the measures adopted by international agencies to combat such crime. The Article will argue that these measures have, in many cases, been inadequate, inappropriate or poorly implemented. In the case of terrorism, the problem has been compounded by the United States adopting questionable political and military strategies that are not generally supported by the international community. The resulting lack of an international consensus on a single, well-thought out strategy poses serious obstacles to winning the war against international crime, particularly against terrorism.

The views expressed in this Article reflect my practical experience from having served as a senior lawyer with three international financial institutions—the International Monetary Fund (IMF), the World Bank and the Asian Development Bank—which have been at the forefront of efforts to combat corruption, money laundering and the financing of terrorism. This experience included advising several governments in Asia and the Pacific, including the People’s Republic of China, Indonesia, Pakistan, the Philippines, Thailand and six Pacific islands in strengthening their legal and institutional regimes to combat money laundering and the financing of terrorism. 5

5. During 2001-02, I served as the leader of a nineteen-member international consulting team that executed an Asian Development Bank-financed regional technical assistance project to combat money laundering in the Asian and Pacific region. During 2003-04, I also served as the anti-money laundering expert on a team of the International Law Institute in Washington, D.C., executing another Asian Development Bank-financed technical assistance project advising the government of the People’s Republic of China (including the People’s Bank of China, its central bank) on a banking law reform project. I have also conducted training programs and prepared training manuals in anti-money laundering for government officials, bankers and staff of the Asian Development Bank.
II. THE EMERGING INTERNATIONAL LAW AGAINST CRIME

Historically, crime has been a matter primarily for national regulation and law enforcement. The significant growth, however, of international crime in recent years has given rise to increasing concerns among governments worldwide that more coordinated and effective international measures were called for to combat this scourge. As a result, a substantial body of international law and standards has gradually developed for the purpose of combating international crime.

The earliest antecedents of this development in international criminal law are the first conventions outlawing piracy, slavery, white slavery and narcotics production and trafficking. Following the Second World War, the Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed on August 15, 1945, set out the legal framework for the prosecution of individuals for crimes against peace, war crimes and crimes against humanity. This was then followed by United Nations action to sponsor the adoption of the Genocide Convention in 1948 and the Geneva Conventions in 1949.

More recently, international criminal tribunals have been established to prosecute persons who have committed serious violations of international humanitarian law. In 1998, the Rome Statute of the International Criminal Court (ICC) was adopted under the aegis of the United Nations. This Statute confers the ICC with jurisdiction to prosecute "the most serious crimes of concern to the international community as a


7. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 39 AM. J. INT'L L. SUP. 257, 258-60 (1945); see also IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 544-47 (3d. ed. 1979); LOUIS B. SOHN, CASES ON UNITED NATIONS LAW 904 (1956) (discussing similar material on charter of International Military Tribunal for Far East established in Tokyo).


whole" and identifies those crimes as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.11 This Statute has been signed by 139 States including the United States.12 Ad hoc international criminal tribunals have also been set up to prosecute persons for similar crimes committed in the former Yugoslavia13 and Rwanda.14

In 1966, the United Nations adopted two landmark human rights covenants—the International Covenant on Civil and Political Rights15 and the International Covenant on Economic, Social and Cultural Rights.16 The first Covenant contains various provisions to protect the human dignity of persons, including those prohibiting slavery, servitude and forced or compulsory labor, torture and inhumane treatment of prisoners. Against the backdrop of the genocidal activities of Hitler and Stalin and the apartheid policies in South Africa, the adoption of these Covenants represented the international community's answer to the summons for action against crimes of violence and discrimination against all peoples, especially minorities, women and children.

In more recent years, a series of other international conventions have been adopted to firmly establish the foundations of a new international law framework against crime. The conventions include those that criminalize trafficking in drugs, various forms of terrorism and the financing of terrorism, transnational organized crime, money laundering and corruption. These conventions will be discussed in greater detail below. A final landmark convention that must also be mentioned is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), adopted by the United Nations in 1984.17

11. Id. art. 5.
12. The United States signed this treaty on December 31, 2000. For a discussion of the United States' withdrawal from this treaty on May 6, 2002, see infra notes 230-31.
Finally, over the past decade or so, a number of international organizations, regional organizations, professional and financial supervisory bodies have adopted additional conventions, standards, codes and best practices to combat criminal activity such as drug trafficking, money laundering, terrorism, the financing of terrorism and corruption. These will be discussed more fully in the sections following.

III. FRAMEWORK FOR ANALYSIS OF STRATEGIES TO COMBAT INTERNATIONAL CRIME, INCLUDING THE FINANCING OF CRIME

As noted at the outset, it is difficult to discuss the subject of combating the financing of international crime in isolation from the primary crimes being financed. There is an intimate link between the primary crimes and the financing being made available to finance the commission of such crimes.

A close analysis of the full range of international crimes makes it clear that it is not appropriate or meaningful to use a single strategy to combat all categories of international crime because the elements and motivations of the different international crimes vary significantly. In my opinion, there are at least two separate categories of international crime. The first category consists of conventional crimes such as drug trafficking, kidnapping, smuggling and white slavery. The commission of these crimes is motivated solely or primarily by financial greed. The second category, which will be labeled simply as "political crimes," consists of such crimes as terrorism, the financing of terrorism, hijackings and abductions and assassinations or cold-blooded murder of innocent civilians, such as the beheadings of foreign nationals in Iraq and of Wall Street Journal reporter Daniel Pearl in Pakistan. This second category of crimes is motivated by political, economic or social objectives, which will be discussed more fully later in this Article.

While conventional crimes may be solved more readily by the use of traditional law enforcement tools of prevention, police investigation, prosecution and punishment, "political crimes" clearly require additional and more sophisticated tools if governments and their law enforcement authorities are to be able to fight them effectively. In addition, the use of military strategies to fight international crime is inappropriate and likely to fail. The framework for analysis adopted in this Article will be to recognize the distinctions between these two categories of international crimes. In the case of "political crimes," the analysis will, therefore, invariably include some commentary on the political dimensions or root causes of such crimes.

This Article will also argue that there is a close linkage between the commission of several international crimes, including the financing of such crimes and corruption. This linkage is explicitly acknowledged in the new United Nations Convention Against Corruption ("Corruption
The widespread prevalence of corruption of public officials, including political leaders, government officials and law enforcement personnel, constitutes one of the most serious impediments to winning the war against international crime. Thus, any meaningful strategy to combat international crime must fully take into account and consider measures for combating corruption.

In light of the above comments and for the purposes of this Article, the analysis of strategies to combat international crime will focus on three major crimes: money laundering, the financing of terrorism and corruption. These three crimes will be considered as different ways in which financing is being provided for, or generated from, the commission of other crimes. These crimes feed into each other and thereby produce and grow funds for further criminal activities. The close linkage between these crimes is explicitly recognized in a number of international conventions against international crime, which will be discussed below. Finally, as a group, these crimes represent a good sampling of international crimes and will permit an analysis of some of the common issues involved in combating such crimes.

IV. MONEY LAUNDERING, FINANCING OF TERRORISM AND CORRUPTION

A. Money Laundering

It is best to begin with a discussion of money laundering because it provides an essential part of the backdrop to an understanding of the financing of terrorism and corruption. Money laundering is the processing of the proceeds of crime to disguise their illegal origin. More detailed definitions of the crime of money laundering can be found in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psycho-

18. Convention Against Corruption, G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/58/422 (2003) [hereinafter Corruption Convention]. The Convention was adopted by the United Nations General Assembly on October 31, 2003 and was initially signed in Meridia, Mexico from December 9-11, 2003. As of June 8, 2005, the Convention has been signed by 123 States and regional economic integration organizations, but only twenty-five have become parties. Article 68 of the Convention provides that it will enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession.


The need to launder funds arises because criminals such as organized crime syndicates, drug traffickers and corrupt politicians have to quickly transfer and transform their dirty money into clean funds. They do this for at least two reasons: first, to separate such funds from the crimes that generated them (generally referred to as the "predicate offences") and thereby to avoid detection and criminal prosecution; and second, to protect those funds from seizure and confiscation by the law enforcement authorities, thereby allowing them to enjoy the fruits of their crimes. The traditional pattern of money laundering essentially involved making deposits into banks and then arranging wire transfers of those funds to other financial institutions, usually in foreign jurisdictions.\(^{24}\)

Typically, under national anti-money laundering laws or general criminal laws, the crime of money laundering is defined by reference to the predicate offences. Predicate offences are usually defined by: (a) the enu-


\(^{23}\) Corruption Convention, supra note 18, arts. 14, 23.

\(^{24}\) The process of money laundering normally involves three stages: placement, layering and integration. The first stage, placement, is when the criminal introduces the proceeds of his crime into the financial system. This is usually done by breaking up large sums of cash into smaller, less conspicuous amounts that are then deposited into a bank account or used to purchase financial instruments such as checks, money orders or securities. The second stage, layering, involves a series of transactions to convert or transfer the funds, usually to other foreign jurisdictions and financial institutions, including offshore financial centres. Such conversion or transfer typically occurs through wire transfers and the purchase and sale of investment instruments. Often, such conversion or transfers are disguised as payments for goods or services through false invoicing so as to give them the appearance of legitimacy. In the third and final stage, integration, the funds re-enter the legitimate economy as "clean" money. The criminal then freely uses this money to invest in a variety of assets such as real estate including office buildings and houses, automobiles, yachts and jewelry, or to enter into new business ventures. See FATF, Basic Facts About Money Laundering, at http://www.fatf-gafi.org (last modified on Oct. 9, 2003).
meration of a list of serious offences under national laws, such as drug trafficking, smuggling, illegal arms sales, prostitution, corruption, tax evasion, terrorism, embezzlement and gambling; or (b) reference to all serious offences under national laws, which carry a specified penalty of imprisonment, or both. 25

Because of the clandestine nature of money laundering, it is very difficult to determine the precise magnitude of the money laundered globally on an annual basis. The IMF has placed the estimate at between two and five per cent of the world’s gross domestic product. 26 Using 1996 figures, this translates to between $600 billion and $1.5 trillion.

At the international level, several legal measures have been developed over the last sixteen years to fight money laundering. These measures consist of a mixture of “hard law” and “soft law.” 27 The “hard law” consists of international treaty obligations or international decisions, usually adopted under the aegis of the United Nations or regional organizations that are legally binding on sovereign member States. The “soft law” consists of various recommendations, guidelines, codes and best practices issued by different international organizations and financial supervisory bodies. 28 These latter prescriptions are not legally binding but have strong persuasive effect.

The first shots in the war against money laundering were fired in 1988 when—in the specific context of the war against drug trafficking—the United Nations sponsored the adoption of the Vienna Convention. 29 This was the first international treaty to call on States to criminalize the laundering of the proceeds of crimes.

In the Preamble to the Vienna Convention, the States Parties recorded their awareness:

[T]hat illicit [drug] traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels, [and, therefore, expressed their determination] to deprive persons engaged in illicit traffic of the proceeds of their criminal


28. For a discussion of international norms that consist of a mix of “hard” and “soft” law to fight international money laundering, see infra notes 29-100 and accompanying text.

29. For a discussion of the Vienna Convention, see supra note 21 and accompanying text.
activities and thereby eliminate their main incentive for so doing....

The provisions of the Convention deal primarily with measures to combat illicit traffic in narcotic drugs and psychotropic substances and related law enforcement issues. There is, however, one provision that deals directly with the laundering of the proceeds derived from the offences established by the Convention. Article 3, Section 1 "Offences and Sanctions" of the Convention sets out a number of provisions calling on States Parties to adopt such measures as may be necessary to establish certain acts, including money laundering, as criminal offences under their national laws.

Article 3, Section 1(b) of the Convention defines the crime of money laundering as follows:

(i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;....

Section 4 of the Convention then requires State Parties to establish sanctions for the offences set forth in Section 1 taking into account "the grave nature of these offences." Accordingly, punishment through "imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation" was stipulated as the appropriate sanction. The other provisions of the Convention deal with jurisdiction over the offences, confiscation, extradition, mutual legal assistance and other measures for international cooperation.

In June 1998, the United Nations General Assembly adopted a Political Declaration and Action Plan Against Money Laundering at its Twenty-

30. Id.
31. Id. art. 1.
32. Id. art. 4.
33. Id. art. 5.
34. Id. art. 6.
35. Id. art. 7.
36. Id. arts. 8-20.
The Special Session devoted to “countering the world drug problem together.” The General Assembly Resolution urged all states to implement the provisions of the Vienna Convention and “other relevant international instruments on money laundering” and then set out a list of guiding principles for national action.

In August 2000, the Palermo Convention was adopted in Palermo, Italy. Recognizing that, in the post-Cold War era, various forms of transnational organized crime posed a serious threat to security, democracy, the rule of law and political and financial stability, the Convention requires State Parties to outlaw some of the most common offences, such as involvement or participation in organized criminal groups, money laundering and corruption of public officials. It is particularly noteworthy that this Convention includes two articles dealing with the criminalization of the laundering of the proceeds of serious crimes and two other articles dealing with the criminalization of corruption. The definition of the money laundering offence incorporated in this Convention is substantially identical to that included in the Vienna Convention and other international conventions and regulations.

Finally, it should be noted that the Corruption Convention includes two comprehensive provisions calling on State Parties to criminalize all forms of money laundering under their national laws. In addition, it is particularly noteworthy that money laundering has been included as one of the major targets in the war against corruption.

The United Nations' efforts to combat money laundering are coordinated by the United Nations Office on Drugs and Crime (UNODC), by way of its Global Program Against Money Laundering (GPML). Through the GPML, the UNODC assists member countries with policy development, legislation, technical assistance, problem solving and training in combating money laundering.


38. Id. ¶ 15.

39. Palermo Convention, supra note 22.

40. Id. arts. 5-9.

41. Id. arts. 6, 7.

42. Id. arts. 8, 9.

43. See id. art. 6, § 1(a). Other Conventions have adopted similar definitions of money laundering. See Corruption Convention, supra note 18, arts. 14, 23 (discussing measures to prevent money laundering and defining money laundering respectively); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, art. 6, § 1(a), Europ. T.S. No. 141 [hereinafter Convention on Laundering] (providing definition of money laundering and proposed preventive measures).

44. For a detailed discussion on the Corruption Convention, see infra notes 144-59 and accompanying text.

A number of key regional organizations have also adopted legal measures to combat money laundering. The Council of Europe46 adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in 1990 in Strasbourg.47 This Convention contains both substantive law provisions to combat money laundering, as well as mechanisms for international cooperation and mutual assistance in criminal matters. An interesting feature of this Convention is that the Council may invite any non-member state to accede to the Convention. In 1991, the Council of the European Communities issued Council Directive 91/308/EEC on “Prevention of the Use of the Financial System for the Purpose of Money Laundering” (“Council Directive”).48 This Directive is legally binding on member States and deals largely with the prevention of money laundering through the abuse of the financial system. Finally, in 1999, the Organization of American States (OAS) adopted the Model Regulations Concerning Laundering Offences Connected to Illicit Drug Trafficking and Related Offences, prepared by the Inter-American Drug Abuse Control Commission (CICAD).49 These CICAD Model Regulations are intended to serve as a guide to OAS member countries in the adoption of national laws against money laundering.

Outside the framework of the United Nations and the regional organizations, the Financial Action Task Force (FATF), an intergovernmental

46. See Council of Europe, The Council of Europe’s Member States, at http://www.coe.int/T/e/com/about_coe/member_states/default.asp (listing Council of Europe’s forty-six member countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine and United Kingdom).

47. See Convention on Laundering, supra note 43.


group established by the Group of Seven (G-7)\textsuperscript{50} in Paris in 1989, has the primary responsibility for coordinating global efforts to combat money laundering. The FATF consists of thirty-one member jurisdictions and two international organizations, the European Commission and the Gulf Co-operation Council.\textsuperscript{51} The FATF maintains a small Secretariat at the offices of the Organization for Economic Cooperation and Development (OECD) and is assisted in its work by a number of regional FATF-style bodies such as: the Asia/Pacific Group on Money Laundering (APG),\textsuperscript{52} the Caribbean Financial Action Task Force (CFATF),\textsuperscript{53} the Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL, formerly PC-R-EV),\textsuperscript{54} the Eurasian Group (EAG),\textsuperscript{55} the Financial Action Task Force of South America Against Money Laundering (GAFISUD),\textsuperscript{56} the Eastern and Southern Africa Anti-

\textsuperscript{50} See A Guide to Committees, Groups, and Clubs, at http://www.imf.org/external/np/exr/facts/groups.htm#G7 (listing participants of G-7 Summit: Canada, France, Germany, Italy, Japan, United Kingdom and United States).

\textsuperscript{51} See FATF, Members and Observers, at http://www.fatf-gafi.org/document/52/0,2340,en_32250379_32237295_34027188_1_1_1_1,00.html (stating that FATF’s thirty-three member jurisdictions are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, European Commission, Finland, France, Germany, Greece, Gulf Co-operation Council, Hong Kong-China, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States) (last visited Apr. 22, 2005).

\textsuperscript{52} See The Asian Pacific Group on Money Laundering, Member Jurisdictions, at http://www.apgml.org/content/member_jurisdiction.jsp (stating that APG consists of twenty-eight member jurisdictions: Australia, Bangladesh, Brunei Darussalam, Cambodia, Chinese Taipei, Cook Islands, Fiji Islands, Hong Kong-China, India, Indonesia, Japan, Macau-China, Malaysia, Marshall Islands, Mongolia, Nepal, New Zealand, Niue, Pakistan, Palau, Philippines, Republic of Korea, Samoa, Singapore, Sri Lanka, Thailand, United States and Vanuatu) (last visited Apr. 22, 2005).

\textsuperscript{53} See Caribbean Financial Action Task Force, Membership, at http://www.cfatf.org/eng/ (stating that CFATF consists of twenty-five member jurisdictions: Anguilla, Antigua & Barbuda, Aruba, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Costa Rica, Dominica, Dominican Republic, Grenada, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, Panama, St Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad & Tobago, Turks & Caicos Islands and Venezuela) (last visited Apr. 22, 2005).

\textsuperscript{54} See Council of Europe, About MONEYVAL, at http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Combating_economic Crime/Money_laundering/General_information/About_MONEYVAL.asp#TopOfPage (stating that MONEYVAL consists of twenty-seven member jurisdictions: Albania, Andorra, Armenia, Azerbaijan, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Hungary, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Monaco, Poland, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, former Yugoslav Republic of Macedonia and Ukraine) (last visited Apr. 22, 2005).

\textsuperscript{55} See Eurasian Group, Members & Observers, at http://www.euroasiangroup.org/members.html (listing six member jurisdictions: Belarus, China, Kazakhstan, Kyrgyzstan, Russia and Tajikistan) (last visited Apr. 22, 2005).

\textsuperscript{56} See Financial Action Task Force of South America Against Money Laundering, at http://www1.oecd.org/fatf/Ctry-orgpages/og-gafisud_en.htm (stating...
Money Laundering Group (ESAAMLG)\(^57\) and the Middle East and North Africa FATF (MENAFATF).\(^58\)

In 1990, the FATF published the Forty Recommendations on Money Laundering ("FATF Forty")\(^59\) to provide detailed recommendations and guidelines to member and non-member countries and financial institutions on how to formulate and implement measures to combat money laundering. The FATF Forty were revised and reissued in 1996. In June 2003, the FATF Forty were substantially revised and reissued to reflect the accumulated experience, to take account of the new typologies of money laundering identified by the FATF's annual typologies exercises, and finally to cover the financing of terrorism. The FATF Forty has been aptly described as "the crown jewel of soft law" against money laundering.\(^60\) The recommendations set out in the FATF Forty, as revised, are divided into four major categories.

1. **Recommendations to Strengthen National Legal Systems**

These recommendations, addressed to countries, set out various legislative measures that should be taken to prevent, detect and punish money laundering. The most important of these measures is the criminalization of money laundering. Going well beyond the 1996 Recommendations,\(^61\)

that GAFISUD consists of nine member jurisdictions: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru and Uruguay) (last updated Nov. 4, 2003).\(^57\)


60. *Stessens, supra* note 19, at 17.

61. The 1996 version of FATF Forty contained a weak and limited provision on the criminalization of money laundering. See FATF Forty (1996), *supra* note 25, at Recommendation 4 ("Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences."). The result was that countries differed widely in their formulation of the money laundering offence, often listing only a few serious offences as predicate offences. Because only a few predicate offences are listed, many other forms of money laundering derived from other serious offences can go unpunished because they do not constitute the offence of money laundering under the limited definition used in the law.
the latest FATF Forty calls on countries to "apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences." To this end, each country "should at a minimum include a range of offences within each of the designated categories of offences." The term "designated categories of offences" is defined as twenty categories of crimes.

In addition, the FATF Forty includes a number of other recommendations calling on countries to ensure that predicate offences for money laundering "extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically." Countries are also asked to apply criminal liability and, where that is not possible, civil or administrative liability, to legal persons; adopt provisions for the freezing, seizure and confiscation of criminal assets; ensure that financial institution secrecy laws do not inhibit the implementation of FATF Forty; adopt "safe harbour" rules to protect financial institutions, their directors, officers and employees from criminal and civil liability if they report suspicious transactions; and to establish effective, proportionate and dissuasive sanctions (criminal, civil or administrative) for both natural and legal persons.

2. Recommendations to Strengthen Customer Due Diligence, Reporting of Suspicious Transactions, Regulation and Supervision

This second set of recommendations, previously limited in their application to banks and non-bank financial institutions, seeks to strengthen and broaden the standards for exercising customer due diligence, verifying the identity of customers and reporting suspicious transactions to the

63. Id.
64. Id. The definition of "designated categories of offences" in the Glossary attached to FATF Forty lists the following twenty categories of offences: organized crime and racketeering; terrorism, including terrorist financing; trafficking in human beings and migrant smuggling; sexual exploitation, including sexual exploitation of children; illicit trafficking in narcotics drugs and psychotropic substances; illicit arms trafficking; illicit trafficking in stolen and other goods; corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime; murder, grievous bodily injury; kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling; extortion; forgery; piracy; and insider trading and market manipulation. Id. at Glossary.
65. Id. at Recommendation 1.
66. See id. at Recommendation 2.
67. See id. at Recommendation 3.
68. See id. at Recommendation 4.
69. See id. at Recommendation 14 (noting that these officials are "[p]rohibited by law from disclosing the fact that a suspicious transaction report (STR) or related information is being reported to the [Financial Intelligence Unit]").
70. See id. at Recommendations 2, 17.
authorities. Most importantly, the definition of "financial institutions" was broadened to cover any person or entity who conducts, as a business, one or more of thirteen separate activities or operations for or on behalf of a customer. Particularly noteworthy is the inclusion of a new recommendation calling on countries to stipulate, at a minimum, that "businesses providing a service of money or value transfer should be licensed or registered, and subject to effective systems for monitoring and ensuring compliance with national requirements to combat money laundering and terrorist financing."

Next, two new recommendations were introduced to extend the application of these standards to certain "designated non-financial businesses and professions," which has been defined to mean casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries and other independent legal professionals and accountants and company service providers when they are involved with their clients or customers in preparing or executing financial or similar transactions. Countries are also urged to consider applying FATF Forty to businesses and professions other than designated non-financial businesses and professions that pose a money laundering or terrorist financing risk.

In addition, more elaborate standards have been specified for the verification of customer identity, particularly with respect to the identity of beneficial owners and the nature of intended business relationships and transactions. Of particular significance are the new recommendations calling on financial institutions to implement enhanced customer diligence measures in relation to "politically exposed persons" (PEPs) with

71. See id. at Glossary (defining financial institutions). The thirteen activities or operations listed in the definition are: acceptance of deposits and other repayable funds from the public; lending; financial leasing; the transfer of money or value; issuing and managing means of payment (e.g., credit and debit cards, checks, traveler's checks, money orders, bankers' drafts and electronic money); financial guarantees and commitments; trading in money market instruments—including checks, bills, CDs and derivatives—foreign exchange, exchange, interest rate and index instruments, transferable securities, commodity futures trading; participation in securities issues and the provision of financial services related to such issues; individual and collective portfolio management; safekeeping and administration of cash or liquid securities on behalf of other persons; otherwise investing, administering or managing funds or money on behalf of other persons; underwriting and placement of life insurance and other investment-related insurance; and money and currency changing.

72. Id. at Recommendation 23. For further discussion of this new provision and its impact on the financing of terrorism, see infra notes 73-89 and accompanying text.

73. See FATF Forty, supra note 25, at Recommendations 12, 16.

74. See id. at Recommendation 20.

75. See id. at Recommendation 5.

76. See id. at Recommendation 6. In the Glossary attached to FATF Forty, the term "politically exposed persons" is defined as, "individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or
a view to targeting corruption, one of the major sources of money laundering, and cross-border correspondent banking relationships. The recommendations also call on financial institutions to maintain records for at least five years and to establish appropriate training, compliance management and audit systems.

Finally, the recommendations call on countries to strengthen the regulation and supervision of financial institutions. Of particular significance are those calling on competent authorities to "take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a management function in a financial institution," sometimes referred to as the application of "fit and proper tests" or "integrity standards" for financial institution officials.

3. Recommendations to Strengthen Institutional and Other Measures

The third set of recommendations, addressed to countries, deals with strengthening institutional and other measures for the enforcement of laws to combat money laundering and the financing of terrorism. The first of these recommendations calls on countries to establish a Financial Intelligence Unit (FIU) to serve as a national center for receiving, requesting, analyzing and disseminating suspicious transaction reports for law enforcement purposes. The task of financial intelligence is a highly specialized one. It requires high technical and forensic skills as the typical money laundering case is complex, cross-border in nature and difficult to unravel. The FIU also serves as a focal point for coordination and cooperation with FIUs in other jurisdictions in the investigation of money laundering and financing of terrorism cases. The second series of recommendations calls on countries to properly equip their law enforcement authorities with the necessary powers of investigation, including the ability to obtain documents and information for their investigations and to furnish adequate financial, human and technical resources and effective mechanisms to these authorities to enable them to carry out their responsibilities effectively.

The next set of recommendations under this heading calls on countries to prevent the unlawful use of legal persons by money launderers, military officials, senior executives of state owned-corporations, important political party officials." See id. at Glossary.

77. See id. at Recommendation 7 (listing additional duties of financial institutions).
78. See id. at Recommendation 10 (explaining records would enable financial institutions "to comply swiftly with information requests from the competent authorities").
79. See id. at Recommendation 15.
80. Id. at Recommendation 23.
81. See id. at Recommendation 26.
82. See id. at Recommendations 27-32.
particularly by ensuring that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons and to prevent the unlawful use of legal arrangements (such as express trusts) by money launderers, through information requirements similar to those set forth in Recommendation 5.

4. Recommendations to Strengthen International Cooperation and Mutual Assistance Measures

The final set of recommendations asks countries to cooperate closely and effectively with, and extend mutual legal assistance to, other foreign judicial and law enforcement authorities in money laundering and terrorist financing investigations. Specifically, countries are asked to rapidly, constructively and effectively provide the widest possible range of mutual legal assistance and cooperation in investigations, prosecutions and related proceedings. Such cooperation and assistance should also extend to requests by foreign countries to identify, freeze, seize and confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences or property of corresponding value. Countries are encouraged to enter into arrangements for coordinating seizure and confiscation proceedings, which may include the sharing of confiscated assets. Finally, the recommendations call for cooperation in the extradition (or, where that is not possible, the prosecution) of criminals involved. There are several other related recommendations that space does not permit further discussion of in this Article.

As the FATF Forty belongs to the realm of recommendations, it represents the "soft law" against money laundering and the financing of terrorism. This raises an interesting issue as to its legal status or effect. In and of themselves, these recommendations are persuasive in nature and do not impose legal obligations on FATF members or non-member jurisdictions. On the other hand, I would strongly argue that, to the extent that

83. See id. at Recommendation 33.
84. See id. at Recommendation 34.
85. See id. at Recommendations 36, 40.
86. See id. at Recommendation 38.
87. See id. at Recommendation 39.
88. For further details of the FATF’s activities and additional commentary on FATF Forty, see the FATF website located at http://www.fatf-gafi.org. See FATF, THE FINANCIAL WAR ON TERRORISM: A GUIDE BY THE FINANCIAL ACTION TASK FORCE (2004) (containing full texts of FATF Forty and FATF Eight, including “Interpretative Notes and Best Practices”); COMMONWEALTH SECRETARIAT, A MODEL OF BEST PRACTICE FOR COMBATING MONEY LAUNDERING IN THE FINANCIAL SECTOR (2000). It should be noted that the Commonwealth Secretariat book was published before the issuance of the revised FATF Forty in June 2003. See also PAUL ALLEN SCHOTT, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM (World Bank/International Monetary Fund, 2d ed. 2004).
89. See Morais, supra note 27, at 780-82 (discussing issue).
these recommendations amplify or elaborate on general principles of law or legal obligations already set out in several international treaties, conventions and numerous national laws, they carry a strong expectation of adherence if not compliance. Furthermore, to the extent that these recommendations seek to proscribe an international crime, it could be argued that there should be little or no disagreement within the community of States as to the achievement of the objectives of these recommendations notwithstanding differences of opinion on the means to achieve them.

A number of other international financial supervisory bodies have also been active in combating money laundering through the adoption and issuance of recommendations, directives, guidelines and best practices. Notable among these is the Basel Committee on Banking Supervision (previously called the Basel Committee on Banking Regulation and Supervisory Practices), established by the central bank governors of the Group of Ten (G-10) countries in 1974. 90 This Committee issued a Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering in 1988. 91 In 1997, the Basel Committee issued the Core Principles of Banking Supervision. 92 The Committee also issued detailed guidelines on Customer Due Diligence for Banks in October 2001. 93 All of these prescriptions call on banking supervisors to ensure that banks have internal policies, practices and procedures, including “know your customer” procedures. These procedures are designed to prevent banks from being used, intentionally or unintentionally, by criminal elements. It is important to note that, while the Basel Committee essentially represents the G-10 industrial countries and its principles and recommendations are advisory in character, its recommendations are given great weight by national bank supervisory bodies throughout the world.

In 1992, the International Organization of Securities Commissions (IOSCO), whose members are national securities commissions, stock exchanges and regional and international organizations, adopted a Resolution on Money Laundering, which sets out anti-money laundering guidelines for its members. 94 In 1998, it issued the IOSCO Objectives and

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90. The G-10 is a misleading name because the Group’s membership now consists of eleven States: Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States. For more information on the functioning of G-10 or the Bank for International Settlements, see the Bank for International Settlements (BIS) website located at http://www.bis.org/about/functions.htm.


Principles, which outlines key measures for national securities supervisors to take to counter fraud and money laundering.\(^5\)

Similarly, in 2003, the International Association of Insurance Supervisors (IAIS), an association of national insurance supervisors established in 1994, issued the Insurance Core Principles and Methodology to guide insurance supervisors in countering fraud and money laundering.\(^6\) In 2004, the IAIS issued a very comprehensive Guidance Paper on Anti-Money Laundering and Combating the Financing of Terrorism.\(^7\)

At the private sector level, eleven major international private banks known as the Wolfsberg Group, in cooperation with Transparency International, adopted the Global Anti-Money Laundering Guidelines for Private Banking ("Wolfsberg AML Principles") in October 2000. In January 2002, the Wolfsberg Group issued the Statement on the Suppression of the Financing of Terrorism. The statement sets forth a number of guidelines for financial institutions to follow in order to prevent the flow of terrorist funds through the financial system.\(^8\) The International Federation of Accountants (IFAC), established in 1977, has issued guidance on the role of auditors in detecting fraud and errors in financial statements, in particular ISA 240.\(^9\)

To sum up the discussion of international legal measures adopted to combat money laundering, it is clear that there is currently a formidable body of international treaty law that criminalizes money laundering. This body of "hard law" is supported by a second hierarchy of "soft law"—recommendations, guidelines and international best practices—that have served to put flesh and bones on the general principles set out in the international treaties and conventions. It is left to individual countries to implement this body of law through the adoption and enforcement of national laws and regulations, the establishment of effective institutional arrangements and the extension of cooperation and mutual assistance to other jurisdictions. Likewise, financial institutions and other entities and


\(^{7}\) See IAIS, Guidance Paper on Anti-Money Laundering and Combating the Financing of Terrorism (Oct. 2004), at http://www.iaisweb.org/133_185_ENV.html.asp (explaining vulnerability of insurance sector with respect to money laundering and terrorist financing and providing guidance to insurance supervisors in monitoring compliance with international standards). This Guidance Paper replaces an earlier version that was first issued in January 2002.


persons involved are expected to implement such rules through their internal policies, operations and systems.

B. Financing of Terrorism

1. What Is Terrorism?

By way of background to the discussion of the financing of terrorism, it is useful to have a general understanding of what constitutes terrorism. Between 1982 and 2003, there have been close to 9,500 separate acts of terrorism throughout the world. In more recent years, one of the frightening features of these terrorist acts is that several were carried out by suicide bombers. Suicide attacks represent only about two to three percent of all terrorist attacks, but they have accounted for more than half the deaths. Suicide terrorism raises a number of intriguing questions

100. See FATF, supra note 88; INTERNATIONAL MONETARY FUND, SUPPRESSING THE FINANCING OF TERRORISM: A HANDBOOK FOR LEGISLATIVE DRAFTING (2003); SCHOTT, supra note 88.

101. See JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL 141-45 (2003) (discussing subject of terrorism, particularly so-called "religious terrorism"). This is an interesting book based upon the author's interviews with extremist members of three religions (Christianity, Judaism and Islam) around the world. A leading expert on terrorism, Stern is a lecturer at Harvard University's Kennedy School of Government. See CALEB CARR, THE LESSONS OF TERROR: A HISTORY OF WARFARE AGAINST CIVILIANS: WHY IT HAS ALWAYS FAILED AND WHY IT WILL FAIL AGAIN 5 (2001) (arguing that roots of modern international terrorism can be found "within discipline of military history"); JOHN L. ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 20-25 (2002) (discussing factors that give rise to acts of terrorism in the name of Islam); ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR 60-84 (2002) (recognizing that terrorist organizations have become increasingly sophisticated with financing, intelligence and training); PHILIP B. HEYMANN, TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY 9 (2001) (describing force of terrorism as its psychological rather than physical impact); BRUCE HOFFMAN, INSIDE TERRORISM (1998); MARK JUERGENSMEYER, TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE 4-15 (2000) (considering political/religious contexts that produce acts of so-called religious violence); WALTER LAQUER, TERRORISM 1 (1977) (addressing "the doctrine of systematic terrorism, the sociology of terrorist groups, current interpretations of terrorism, its common patterns, motive and aims, and the efficacy of terrorism").


103. See, e.g., Scott Atran, GENESIS OF SUICIDE TERRORISM, 299 SCI. 1534, 1535 (2003) (providing historical account of suicide terrorism); Scott Atran, MISHANDLING SUICIDE TERRORISM, WASH. Q., June 22, 2004, at 67, 70 (criticizing United States response to suicide terrorists); Riaz Hassan, TERRORISTS AND THEIR TOOLS—PART I, YALE GLOBAL ONLINE MAG. (Apr. 23, 2004), at http://yaleglobal.yale.edu/display.article?id=3749 (discussing underlying causes of and arguing for more thoughtful responses to suicide terrorism); Robert A. Pape, THE STRATEGIC LOGIC OF TERRORISM, 97 AM. POL. SCI. REV. 343 (2003) (explaining strategic rationale behind "growing phenomenon of suicide terrorism"). Mr. Pape teaches at the University of Chicago and Mr. Atran teaches at the University of Michigan. Professor Hassan,
and difficulties for law enforcement and poses unique challenges for the prevention of this form of terrorism.

Among the most notable recent terrorist acts, apart from the September 11, 2001 terrorist attacks, were the bombing of Pan Am flight 103, the bombing of the United States air base at Khobar Towers in Saudi Arabia, the bombing of the United States embassies in Nairobi and Dar-es-Salam, the bombing of the U.S.S. Cole in Yemen, the release of nerve gas in the Tokyo subway system, the bombing of the commuter train system in Madrid and the recent bombing of schools in Chechnya. The targets and methods of terrorism vary widely, and it is not easy to make any meaningful generalizations of these events or to develop any single strategy to prevent and punish such crimes.

So, what really is terrorism? The terms “terrorism” and “terrorist” are highly controversial, and considerable debate has raged over the meaning of these terms. Attempts to define and control “terrorism” go back as far as 1937 to the League of Nations, which failed to reach an agreement on its meaning and the measures to fight it. The United Nations has also worked on this subject for many years, but has not yet been able to reach an agreement on a single comprehensive convention against terrorism or a universally accepted meaning of terrorism. In 1997, Rosalyn Higgins highlighted this problem when she stated: “Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.”

Some argue that because of the absence of universal agreement on the meaning of “terrorism,” States have been unable to entrust international criminal tribunals such as the ICC with jurisdiction to prosecute and punish this type of crime.

On the other hand, the United Nations has been quite successful in developing a substantial body of international treaty law on terrorism consisting primarily of twelve separate multilateral conventions aimed at criminalizing several distinct types of terrorist acts. One of these con-
ventions, the International Convention for the Suppression of the Financing of Terrorism ("Terrorism Financing Convention")\textsuperscript{107} has adopted the following definition of terrorism in the context of criminalizing the financing of terrorism:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex;\textsuperscript{108} or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.\textsuperscript{109}

At the regional level, several other international and regional organizations have also adopted conventions to combat terrorism. These organizations include the Council of Europe, the OAS, the Organization of African Unity, the South Asian Association for Regional Cooperation, the League of Arab States, the Organization of the Islamic Conference and the Commonwealth of Independent States.\textsuperscript{110} These conventions generally seek to strengthen legal measures for mutual assistance and cooperation among member States in criminal investigations and proceedings related to terrorism offences.

This substantial development of international treaty law supported by national laws has led one leading international criminal law scholar, Antonio Cassese, to make the plausible argument that there is in fact broad agreement among States as to what terrorism means. Cassese ar-


\textsuperscript{108} The nine treaties listed in the annex are those specified in supra note 106, except for the following three: Terrorism Financing Convention, supra note 107; Aircraft Convention, supra note 106; Plastic Explosives Convention, supra note 106.

\textsuperscript{109} Terrorism Financing Convention, supra note 107, art. 2.1.

\textsuperscript{110} For a summary description and the texts of these regional conventions, see the United Nations Treaty Collection (Conventions on Terrorism) located at http://untreaty.un.org/.
The only real disagreement among States is whether the acts of national liberation movements or "freedom fighters" should be excluded from the definition of terrorism, as demanded by several developing countries. One international agreement already does this. Article 2(a) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism excludes the following acts from its general condemnation: "Peoples' struggles including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime."

Part of the reason for the continuing disagreement over the meaning of "terrorism" and "terrorist" is that these terms are multifaceted and carry legal, political and even religious overtones. History, politics and culture have also shaped the public's understanding and opinions as to what constitutes terrorism, who should properly be classified as terrorists and which entities should be classified as terrorist organizations. Similarly, there are differences of opinion at the political level depending on which side of the political spectrum one is on as to whether the Irish Republican Army, the Palestinian Liberation Organization, the African National Congress in South Africa during the apartheid era or the Tamil Tigers in Sri Lanka are or were terrorist organizations because they advocated the use of or actually used violence to advance their political agenda. Several leading political figures such as David Ben-Gurion, Menachem Begin, Nelson Mandela and Yasser Arafat were once called terrorists, but following the success of their political missions were rehabilitated and became leaders of their countries. It has been observed that "one man's terrorist is another man's freedom fighter."

To compound the problem, some terrorists who are Muslim have improperly used their Islamic religion to justify their acts of terrorism, calling this a holy war or jihad against the infidels. This too has caused considerable confusion, in addition to casting a slur on one of the great religions of the world and on the vast majority of law-abiding Muslims. Although

111. See Antonio Cassese, Terrorism as an International Crime, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 213-14 (Andrea Bianchi ed., 2004) (explaining that lack of agreement on definition of "terrorism" is actually rooted in lack of agreement on "freedom fighter" exception).


115. See, e.g., ESPOSITO, supra note 101; GILLES KEPEL, JIHAD: THE TRAIL OF POLITICAL ISLAM (2002); AHMAD RASHID, JIHAD: THE RISE OF MILITANT ISLAM IN CEN-
Muslims have committed several of the recent terrorist attacks, it is inappropriate and unfair to characterize these acts of terrorism as "Islamic terrorism" or "Islamist terrorism." Most unfortunately, some government officials, the media and even scholars in this country have repeatedly used these terms in a loose and insensitive way. The most recent example of such a misuse of this term is found in the bipartisan 9/11 Commission Report. This line of thinking may have been influenced, at least in part, by the unfortunate "clash of civilizations" theory posited by such leading scholars as Samuel Huntington and Bernard Lewis. Both scholars have argued that the growth of an intercivilizational war or conflict between Islam and the West poses one of the great threats to world peace and stability.

The more plausible explanation for recent terrorist attacks, including suicide bombings, is that they have been "used to achieve multiple ends"—personal, political and religious. In many incidents of terrorism, those groups or individuals who claimed responsibility for these attacks justified them based on their political or social agenda, as a means of attracting international attention to their cause and/or to intimidate the governments concerned to change their policies or make concessions. Jessica Stern, a leading expert on terrorism, confirmed this reading after conducting extensive interviews with religious extremists and terrorists. She suggests that various factors drive people to terrorism, including political grievances, feelings of alienation, humiliation, marginalization and exclusion arising from the impact of globalization and capitalism on Muslim societies. Some Muslims perceive these factors as threats to their Muslim identity and purity. In my view, terrorists have repeatedly invoked relig-

116. See Atran, Mishandling Suicide Terrorism, supra note 103; Hassan, supra note 103; Pape, supra note 103.
117. 9/11 Commission Report, supra note 4, at 362, 364, 374.
119. See Bernard Lewis, The Roots of Muslim Rage: Why So Many Muslims Deeply Resent the West and Why Their Bitterness Will Not Be Easily Mollified, ATL. MONTHLY, Sept. 1990, at 17. But see John L. Esposito, The Islamic Threat: Myth or Reality? 172-74 (1992) (providing balanced analysis). Esposito strongly criticizes Lewis's unduly provocative "roots of rage" analysis as reflecting "the stereotypical image of Islam and Muslims as menacing militant fundamentalists." Id. at 173. Esposito also argued that Lewis's analysis "predisposes the reader to view the relationship of Islam to the West in terms of rage, violence, hatred, and irrationality." Id. at 174. See generally Bernard Lewis, What Went Wrong: Western Impact and Middle Eastern Response (2002) (presenting general historical survey of developments that have gradually led to increasing conflict between Islam and West).
120. See Hassan, supra note 103, at 1.
121. See generally Stern, supra note 101, particularly 9-62, 281-96.
ion because history has shown that it is an effective way of rallying support, stirring up emotions and encouraging violent responses to perceived injustices.

To sum up, there now exists a substantial body of international law on combating terrorism. Nevertheless, the absence of universal agreement on the meaning of "terrorism" and the lack of effective international judicial institutions to prosecute and punish this crime have rendered such a body of law somewhat weak and thus difficult to implement in practice. Moreover, as I shall argue later in this Article, the problem of terrorism is not capable of solution by purely legal or military measures.\(^\text{122}\)

2. The Aftermath of September 11

The day after the terrorist attacks, the United Nations Security Council moved swiftly to adopt resolutions strongly condemning this act of terrorism as a "threat to international peace and security."\(^\text{123}\) In a subsequent resolution, Resolution 1373 of September 28, 2001, the Security Council reaffirmed its call to all States to sign, ratify and implement the relevant international conventions criminalizing terrorism and the financing of terrorism. It also stipulated various other legal and financial measures for urgent implementation by States.\(^\text{124}\) The Security Council decided that all States must prevent and suppress the financing of terrorist acts and criminalize the willful provision or collection of funds by their nationals to finance terrorist acts. States must also freeze funds and assets of persons or entities involved with terrorist acts immediately; prohibit nationals and other persons and entities from making funds, financial assets and economic resources available to those engaged in terrorist activities; deny safe haven to terrorists; and cooperate closely with other countries in criminal investigations and proceedings related to such crimes. Additionally, the Security Council also established a Counter Terrorism Committee to closely monitor implementation by member States of the decisions under Resolution 1373.

The United States government also took several immediate counter-terrorism measures in response to the severe threat posed by the brazen September 11, 2001 terrorist attacks in its territory. Bruce Zagaris dis-

122. See generally Cassese, supra note 111 (providing excellent discussion on subject of terrorism and international law); Guillaume, supra note 105 (same); Higgins, supra note 104 (same); Philip Heymann, Terrorism, Freedom and Security: Winning Without War (2004). A former Deputy Attorney General of the United States and a Professor of Law at Harvard Law School, Heymann is one of the leading legal scholars on terrorism. See also Heymann, Terrorism in America, supra note 101.


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cusses these measures in greater detail in his accompanying article125 and I will, therefore, only provide a brief outline of the initial measures taken. On September 23, 2001, President George W. Bush issued Executive Order 13,224 to freeze assets and block transactions in the United States of any person or institution associated with the terrorists or terrorist organizations designated in the Order.126 In this Order, the President determined that the “grave acts of terrorism and threats of terrorism posed by foreign terrorists,” including the September 11, 2001 terrorist attacks, “constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”127 President Bush further stated that, “because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists,” financial sanctions may be appropriate for those foreign persons that support or associate with foreign terrorists.128 The objective was to starve the terrorists of their support funds. Between September 23, 2001 and December 2004, hundreds of terrorist organizations, corporate entities, financial institutions, non-profit organizations, individuals and others have been listed pursuant to this Order and sanctions have subsequently been applied against many of them.129

On October 26, 2001, the President signed into law the USA Patriot Act of 2001.130 This law significantly expands and strengthens the powers of United States law enforcement agencies in investigating and prosecuting a variety of crimes related to terrorism, including acts of terrorism, money laundering and financing activities of terrorist organizations. The law provides a wider arsenal of weapons to effectively combat terrorism, including wire-tapping, electronic surveillance, enhanced anti-money laundering provisions, stronger arrest and detention powers, seizure and forfeiture powers and enhanced immigration provisions and border controls.

The United Nations Security Council compiled and issued its own consolidated list of terrorists and terrorist organizations pursuant to Secur-

127. Id.
128. Id.
129. See id. The United States list is available on the U.S. Treasury, Office of Foreign Assets Control (OFAC) website at http://www.ustreas.gov/offices/enforcement/ofac/sanctions/terrorism.html. For additional prohibited lists of terrorists and terrorist organizations prepared for such purposes as immigration control and security, see the U.S. Department of State website at http://www.state.gov.
ity Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), as have a number of other European States and the European Union. Several States have also established their own similar lists. The problem for international law enforcement is that there are significant variations between these various lists of terrorists and terrorist organizations, thereby creating practical barriers to facilitating international cooperation and mutual assistance between jurisdictions.

The FATF held an Extraordinary Plenary meeting in Washington, D.C. on October 29-30, 2001. At the meeting, the FATF adopted an international action plan consisting of eight Special Recommendations on Terrorist Financing ("FATF Eight"). The recommendations call on all States to take urgent action under the relevant international anti-terrorism conventions and their national laws to counter the financing of terrorism.

3. The Financing of Terrorism

International concern with the problem of the financing of terrorism was heightened after the September 11, 2001 terrorist attacks. While there had always been some suspicion that secret and fictitious bank accounts were being used to fund terrorist activities, investigations conducted after the attacks, primarily in the United States, Europe, the Middle East and Asia, revealed the existence of an extensive network of underground banking and other financing channels that have been used to finance terrorist activities. This foundation manifests itself in numerous accounts opened and operated using the fronts of business enterprises—such as honey centres and sweet bakeries—charities, religious groups, hospitals, orphanages, trusts, educational and research institutes, political associations and students' organizations. Many of these accounts are held in banks in the Middle East, Europe and the United States, but also in less conspicuous financial institutions such as offshore financial centres elsewhere.

As noted earlier, the international treaty criminalizing the financing of terrorism is the Terrorism Financing Convention. This Convention requires States Parties to take steps to criminalize the financing of ter-


132. See FATF, Special Recommendations on Terrorist Financing (Oct. 31, 2001), available at http://www1.oecd.org/fatf/pdf/SRecTF_en.pdf [hereinafter FATF Eight]. For further discussion of these recommendations, see infra note 139 and accompanying text.

133. See FATF Eight, supra note 132.


135. See Terrorism Financing Convention, supra note 107.
rorists, terrorist organizations and terrorist acts. To this end, Article 2.1 of the Convention defines the “financing of terrorism” as follows:

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 knowledge that they are to be used, in full or in part, in order to carry out [acts of terrorism as defined in the Convention].

State Parties are required to apply criminal, civil or administrative sanctions against those persons held liable for such acts. The Convention came into force on April 10, 2002.

As this Convention has yet to be ratified by many signatory States, Resolution 1373 provides the primary legal basis for requiring all member countries of the United Nations to take concrete steps immediately to suppress terrorism and terrorist financing. This is because a Security Council Resolution taken in response to a threat to international peace and security, pursuant to Chapter VII of the United Nations Charter, is a decision that is legally binding on all members.

In examining the financial foundation for terrorism as revealed in part by the investigations following the September 11, 2001 terrorist attacks, it is important to distinguish between two separate and distinct types of terrorist financing—financing through money laundering and financing through the use of legitimate funds.

With regard to the first type, money laundering, various published reports have suggested that a significant part of the financing for the terrorists operating in and outside Afghanistan came from plying the drug trade. In 2000, Afghanistan was the largest producer of opium poppy in the world with an estimated production of about 3,600 metric tons. Production decreased significantly in 2001 due to a ban on such production imposed by the Taliban regime, but the most recent international and United States surveys indicate that in 2003, opium production increased substantially and Afghanistan once again produced three-quarters of the world’s illicit opium. The proceeds from the sale of drugs have been laundered and used to finance the activities of terrorists. Such financing of terrorism using criminal proceeds would be caught by the provisions of most national anti-money laundering laws and by the FATF Forty.

The second type of financing for terrorism—the use of legitimate funds—appears to be a phenomenon of more recent vintage. This type of

136. Id. For the definition of acts of terrorism under this Convention, see supra footnote 109 and accompanying text.
137. For information on drug production, see the United States State Department website located at http://www.state.gov.
financing involves the use or abuse of seemingly legitimate bank accounts to finance criminal activities, including terrorism, with or without the knowledge of the donors or contributors of such funds. The most obvious example of this is the use of non-profit organizations such as charities. The issue has been highlighted most starkly by the September 11, 2001 terrorist attacks. The problem posed here was that the use of legitimate funds to finance crime did not fall within the original mandate of the FATF until October 2001 or the purview of most national anti-money laundering laws.

With the gradual decline (at least officially) of support from certain rogue States for terrorist activities, it has become increasingly clear that public or private financing is an important lifeline of support for terrorism. It is widely believed that much of the funding for terrorist activities has come from donations made by wealthy individuals and organizations to various Islamic causes or projects. Pinning down the culprits of terrorist financing is problematic, however, when viewed in the context of Middle East culture and Islamic values. This is true for at least two reasons. First, the Koran imposes an obligation on all Muslims to contribute a portion of their wealth, called *zakat*, to religious charities. Second, there is growing support for Islamic movements that promote political, social and cultural causes. The poor and those clamoring for political reforms in Middle East countries are among those who seek salvation through support for Islamic causes.

While many wealthy individuals and organizations in the Persian Gulf States have contributed generously to various non-profit organizations including charities, some have argued there was no way for them to know or ensure that such funds were actually used for the stated charitable purposes or were diverted to finance terrorism. A principal reason for this problem is obviously the lack of effective legal systems that impose strict rules of transparency, accounting and auditing requirements, including periodic statutory reporting on the actual use of such funds. Weak prudential or corporate supervisory regimes in some Middle East countries also contribute to the problem. In Afghanistan for example, there was no formal financial system to speak of, let alone prudential regulation.

At the FATF Emergency Plenary meeting on October 29-30, 2001, an international action plan was adopted to crack down immediately on terrorist financing. This action plan took the form of the FATF Eight, which called on all countries to:

(1) ratify and implement the Terrorism Financing Convention, and also to implement the relevant United Nations Resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly Security Council Resolution 1373;
(2) criminalize the financing of terrorism, terrorist acts and terrorist organizations, and designate such offences as predicate offences for money laundering;
(3) freeze without delay the funds or other assets of terrorists, financiers of terrorism and terrorist organizations, and also to adopt and implement measures to seize and confiscate terrorist assets;

(4) require financial institutions, or other businesses and entities subject to anti-money laundering obligations, to promptly report suspicious transactions related to terrorism;

(5) extend the greatest possible measure of assistance to other countries in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organizations;

(6) require that alternative remittance systems (i.e., persons or legal entities, including agents, that provide a service for the transmission of money or value) be licensed or registered as financial institutions and subject to FATF Forty that apply to banks and non-bank financial institutions;

(7) require financial institutions, including money remitters, to strengthen customer identification procedures for wire transfers by obtaining more accurate and meaningful originator information; and

(8) review the adequacy of laws and regulations that relate to non-profit organizations, which are particularly vulnerable, to ensure that they cannot be misused to finance terrorism. 139

As the FATF has a very limited membership and can only make recommendations to its members and invite non-members to adhere to these recommendations, FATF has relied explicitly on Resolution 1373 as the legal basis for FATF Eight.

Notably, most of the recommendations under FATF Eight actually mirror the recommendations on money laundering contained in FATF Forty. In April 2002, the FATF issued more detailed guidelines to assist financial institutions in detecting terrorist financing. The guidelines cover such matters as the risks posed to financial institutions, reinforcing existing requirements, determining when increased scrutiny is necessary and identifying some of the main characteristics of terrorist financing. These characteristics include the sources of such funds and the methods used to launder those funds. 140 In April 2002, the Basel Committee on Banking Supervision issued guidelines for banks regarding sharing financial records between jurisdictions to combat the financing of terrorism. 141

139. FATF Eight, supra note 132.


On October 20-22, 2004, the FATF added a ninth special recommendation to strengthen the international community's counter-terrorist financing defences. The new Special Recommendation Nine calls on countries to implement measures to detect and stop the physical cross-border transportation of currency and bearer negotiable instruments that are suspected to be related to terrorist financing and money laundering and to confiscate such currency or instruments.\footnote{See FAFT Eight, \textit{supra} note 132, at Recommendation IX.}

C. \textit{Corruption} \footnote{There are numerous books and articles on corruption but the following represent some of the best publications available. See \textit{John Noonan, Bribes} (1984) (early classic work on bribes); \textit{see also Robert Klitgaard, Controlling Corruption} (1988); and \textit{Robert Klitgaard, Corrupt Cities} (2002). The writings of Klitgaard are particularly interesting and valuable because they are leavened by his extensive field experience working in Africa and Latin America. Currently the Dean and Ford Distinguished Professor of International Development and Security at the RAND Graduate School in Santa Monica, California, he has served for many years as a consultant to the World Bank and several foreign governments in developing anti-corruption policies and strategies. \textit{See also Susan Rose-Ackerman, Corruption and Government: Causes, Consequences and Reform} (1999); \textit{Political Corruption: Concepts \\& Context} (Arnold J. Heidenheimer \\& Michael Johnston eds., 3d ed. 2000); OECD, \textit{No Longer Business As Usual: Fighting Bribery and Corruption} (2000); Cheryl Gray \\& Daniel Kaufman, \textit{Corruption and Development, Finance \\& Development}, Mar. 1998, at 7.}

Corruption is commonly defined as the misuse of public office or power for gain. For many years, the term "corruption" has been understood to refer to the promise, offering or giving to, or the solicitation or acceptance by, a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her officials duties.\footnote{See Corruption Convention, \textit{supra} note 18, (criminalizing bribery of national public officials, one of several corruption offences established by Convention); Palermo Convention, \textit{supra} note 22 (adopting similar language in narrower definition of corruption used in Article 8, paragraph 1 of Palermo Convention); OECD, \textit{Convention on Combating Bribery of Foreign Public Officials in International Business Transactions} (Nov. 21, 1997) [hereinafter Convention on Combating Bribery], at http://www.olis.oecd.org/olis/1997doc.nsf/43bb6130e5e86e5f1259f9fa005d004c/5005eebd0c0be05880256754005d2ba0/$FILE/04E81240.DOC (adopting similar language in Article 1); \textit{see also Klitgaard, Corrupt Cities, supra} note 143, at 1-4; \textit{The World Bank, Governance and Development} 16 (1992).}

Accordingly, the new Corruption Convention does not use a single definition of "corruption."\footnote{See Corruption Convention, \textit{supra} note 18 (avoiding adoption of single definition of corruption).} Instead, the Convention indirectly defines corruption by including detailed provisions that criminalize the following...
acts as corruption offences: (1) bribery of national public officials;\(^{146}\) (2) bribery of foreign public officials and officials of public international organizations;\(^{147}\) (3) embezzlement, misappropriation or other diversion of property by a public official;\(^{148}\) (4) trading in influence to obtain an undue advantage for any person;\(^{149}\) (5) abuse of functions to obtain an undue advantage;\(^{150}\) (6) illicit enrichment;\(^{151}\) (7) bribery in the private sector;\(^{152}\) (8) embezzlement of property in the private sector;\(^{153}\) (9) laundering of the proceeds of crime;\(^{154}\) (10) concealment or continued retention of proceeds from the commission of offences established by the Convention;\(^{155}\) and (11) obstruction of justice during law enforcement efforts to prosecute such offences.\(^{156}\) In light of this wider understanding of “corruption,” a broader definition, such as the one put forward by Nobel Prize-winning economist Amartya Sen is more appropriate. Sen states that “[c]orruption involves the violation of established rules for personal gain or profit.”\(^{157}\)

It is particularly significant to note that one of the most important substantive provisions of this Convention is Article 14, which requires each State Party to implement comprehensive domestic regulatory and supervisory measures to combat money laundering. The importance and prominence given to this provision on money laundering is clear because of the concern expressed by the State Parties in the Preamble “about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money laundering.”\(^{158}\) In calling on State Parties to implement this provision, the Convention recommends that they “use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money laundering.”\(^{159}\)

The Corruption Convention also includes detailed provisions concerning the application of sanctions for corruption offences established under the Convention that take into account the gravity of the offence; freezing, seizure and confiscation of the proceeds derived from such offences or of property, equipment or other instrumentalities used in or destined for use in such offences; protection of witnesses, experts and victims; protection of reporting persons; dealing with the consequences of

\(^{146}\) Id. art. 15.  
\(^{147}\) Id. art. 16.  
\(^{148}\) Id. art. 17.  
\(^{149}\) Id. art. 18.  
\(^{150}\) Id. art. 19.  
\(^{151}\) Id. art. 20.  
\(^{152}\) Id. art. 21.  
\(^{153}\) Id. art. 22.  
\(^{154}\) Id. arts. 15, 23.  
\(^{155}\) Id. art. 24.  
\(^{156}\) Id. art. 25.  
\(^{157}\) AMARTYA SEN, DEVELOPMENT AS FREEDOM 275 (1999).  
\(^{158}\) Corruption Convention, supra note 18, at Preamble, ¶ 2.  
\(^{159}\) Id. art. 14, ¶ 4.
corruption such as annulling or rescinding contracts or withdrawing concessions or other similar advantages awarded through corruption and taking other remedial action; compensation for damage suffered as a result of corruption; overcoming bank secrecy rules; cooperation between national authorities and between such authorities and the private sector; international cooperation and mutual assistance measures; and asset recovery. These provisions are substantially similar to or consistent with those included in other international criminal law conventions such as the Vienna Convention and the Palermo Convention, and also in FATF Forty.

Before leaving the subject of the Corruption Convention, it should be noted that there have been several earlier international and regional conventions aimed at preventing and combating corruption. These conventions include the following: the Inter-American Convention against Corruption,160 adopted by the OAS in 1996; the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union,161 adopted by the Council of the European Union in 1997; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,162 adopted by the OECD in 1997; the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption,163 adopted by the Committee of Ministers of the Council of Europe in 1999; and the African Union Convention on Preventing and Combating Corruption,164 adopted by the Heads of State and Government of the African Union in 2003.165

Today, it is widely accepted that poor governance, including corruption in particular, has the most pernicious effects on development. The following words from Amartya Sen are particularly instructive:

The prevalence of corruption is rightly regarded as one of the major stumbling blocks in the path to successful economic progress, for example in many Asian and African countries. A high


162. Convention on Combating Bribery, supra note 144.


165. See Corruption Convention, supra note 18, at Preamble.
level of corruption can make public policies ineffective and can also draw investment and economic activities away from productive pursuits towards the towering rewards of underhanded activities. It can also lead . . . to the fostering of violent organizations such as the Mafia.166

In a similar vein, United Nations Secretary-General Kofi Annan, on the occasion of the adoption of the Corruption Convention, declared:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violation of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to flourish.167

The FATF has addressed the issue of corruption and its link to money laundering in the revised FATF Forty issued in June 2003. As noted earlier, a new recommendation has been added which calls on financial institutions to exercise enhanced customer due diligence measures in relation to PEPs.168 PEPs are defined as follows:

[I]ndividuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials.169

This provision was included in view of growing concerns over corruption and abuse of public funds by government leaders and public sector officials in many countries. The high profile investigations of former Presidents Sani Abacha of Nigeria, Suharto of Indonesia, Ferdinand Marcos and Joseph Estrada of the Philippines, and Intelligence Chief Vladimiro Montesinos of Peru demonstrated how enormous amounts of illegal wealth acquired by corrupt leaders and senior government officials have been transferred to foreign jurisdictions and concealed through private companies, trusts or foundations or under the names of relatives or close associates of the PEPs. Accordingly, the new Recommendation 6 requires financial institutions to:

a) have appropriate risk management systems to determine whether the customer is a politically exposed person;

b) obtain senior management approval for establishing business relationships with such customers;

166. SEN, supra note 157, at 275 (emphasis added).
168. FATF Forty, supra note 25, at Recommendation 6.
169. Id. at Glossary (defining “politically exposed persons”).
c) take reasonable measures to establish the source of wealth and source of funds; and

d) conduct enhanced ongoing monitoring of the business relationship.\(^{170}\)

This important new provision in FATF Forty, taken together with the adoption of the landmark Corruption Convention, clearly demonstrates the international community's determination to stamp out corruption in all its forms worldwide.

It is important to note here that the widespread prevalence of corruption throughout the world, both in developing and developed countries, stands as a major obstacle to combating other international crimes such as money laundering, terrorism, smuggling, drug trafficking and white slavery. There is a growing body of evidence that has built up over the years, particularly from the jurisprudence of many national courts, including the United States and several European States, that organized crime syndicates and individual criminals, including money launderers, have been able to buy immunity from detection and prosecution through the payment of large bribes to politicians, law enforcement officials and officers in financial institutions and financial supervisory agencies. Therefore, unless and until this fundamental underlying problem of corruption is attacked and reduced (if not eliminated), the prospects for winning the war against international crime are not good.

### IV. SOME IMPEDIMENTS TO WINNING THE WAR AGAINST INTERNATIONAL CRIME

A number of factors severely complicates and frustrates the national and international law enforcement agencies' efforts to prevent, detect, investigate and prosecute the crimes of money laundering, financing of terrorism and corruption. The first complicating factor is a set of developments that may be characterized as the changing typologies of international crime. These impediments, however, lend themselves more readily to solution by amendment of national laws, changes in law enforcement strategies and better international cooperation. The second factor is poor implementation or difficulties in implementing international and national laws and standards at the national level. The final factor is the conflicting policies and strategies adopted by the United States to fight international crime, especially terrorism. These factors are discussed below.

#### A. Changing Typologies of International Crime

First, it is important to appreciate that the defining characteristic of the three crimes under discussion is the rapid movement of money or value between jurisdictions. The cross-border characteristics of such

\(^{170}\) Id. at Recommendation 6.
crimes dictate that they cannot be solved without effective international cooperation and mutual assistance between the jurisdictions involved. As the strategy of the criminal is to de-link the proceeds of the crime from the crimes and criminals, money launderers typically move the proceeds to a jurisdiction with weaker laws and law enforcement regimes. This practice has sometimes been referred to as "regulatory arbitrage." Frequently, the proceeds of the crime, and sometimes also the criminal, have left the jurisdiction by the time the crime has been reported to the national law enforcement authorities. Unfortunately, effective international cooperation and mutual assistance arrangements between jurisdictions are few and far between. In the absence of such arrangements, it is usually very difficult for the law enforcement authorities from the requesting jurisdiction to secure effective cooperation and assistance from the other jurisdictions involved, such as when the request involves the collection of evidence, the freezing and seizure of the proceeds of the crime and extradition of the criminal.

Second, as legal measures and law enforcement efforts worldwide continue to tighten the noose around money launderers, terrorists and corrupt public officials, criminals have shown remarkable determination and ingenuity in devising new methods and schemes to launder criminal proceeds or finance terrorist activities over and above the traditional laundering techniques using the formal banking system. Money laundering studies carried out by the FATF in recent years have identified several of these new techniques. 171 Some of these new techniques are difficult to detect and present law enforcement authorities with new challenges in collecting and presenting evidence to prosecute the crimes. The following sections provide some examples of these techniques.

1. Using Informal Financing Channels or Alternative Remittance Systems

As noted earlier, investigations since the September 11, 2001 terrorist attacks revealed the existence of a pervasive international financial network outside the formal banking system that allowed terrorists and terrorist organizations to transfer funds surreptitiously to finance terrorist activities around the world. These investigations showed that a substantial part of the financing for terrorism was transferred through informal financing channels or alternative remittance systems. One good example of this is the hawala system—meaning "in trust," in Hindi—which is used mainly in India, Pakistan and the Middle East to transfer money or value across borders without involving any physical movement of the money or any paperwork. These transactions escape the usual bank scrutiny through customer due diligence, oversight by financial regulators and

171. For a detailed discussion of the money laundering trends and typologies discussed in this section, see FATF Annual Reports (2000-01, 2001-02 and 2002-03) located at http://www.fatf-gafi.org/findDocument/0,2350,en_32250379_32237235_1_3247548_1_1_1,0 0.html.
monitoring by law enforcement authorities. Hawala brokers, known as hawaladars, usually work out of small storefront operations. The hawala system works in the following way. A Pakistani living in Baltimore approaches a hawaladar in Baltimore with a request to transfer $5,000 to his brother in Karachi, Pakistan. He negotiates a service fee and the exchange rate, and then delivers $5,000 in cash plus the fee to the hawaladar. This hawaladar immediately instructs, usually by telephone, another hawaladar in Karachi to deliver the rupee equivalent of the funds to the brother under a pre-arranged code, usually a set of numbers. The transaction takes one to two days, which is faster than most bank wire transfers. The whole transaction is consummated without leaving a paper trail. There is no opening of accounts and no maintenance of records. While this informal system is widely used for transfers of legitimate funds, such as remittances by overseas workers to their families at home, it is also believed to be one of the key channels for money laundering and the financing of terrorism because of the anonymity that it provides.

Informal financing channels or alternative remittance systems also operate in China and East Asia. This system is based on the use of “chits” or “tokens” and is, therefore, often referred to as the “chit system.” It has spread to other parts of the world through immigration. In the Western Hemisphere, the Black Market Peso Exchange has been used to support both legitimate trade and smuggling between North and South America. These two systems operate very much like the hawala system, and involve the use of a local remittance service and a sister company overseas. Variations of these alternative remittance systems also exist in Europe and Africa. 172

The FATF response to this problem was Special Recommendation Six of FATF Eight, which stipulates that:

Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Each Country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions. 173

When FATF Forty was revised and reissued in June 2003, the definition of “financial institutions” was broadened to include any person or entity that conducts as a business “the transfer of money or value” for or


173. FATF Eight, supra note 132, at Special Recommendation 6.
FATF then included a new recommendation that provides:

At a minimum, businesses providing a service of money or value transfer . . . should be licensed or registered, and subject to effective systems for monitoring and ensuring compliance with national requirements to combat money laundering and terrorist financing.\(^{175}\)

While the rules with respect to alternative remittance systems have been tightened, it is doubtful that most of the entities that operate such systems will come out into the open now and license or register themselves as financial institutions. The reason is that their most attractive feature has been the secrecy of their modus operandi. They are likely to see no benefit in transforming themselves to regular financial institutions subject to regulatory oversight. In fact, they would be particularly reluctant to assume the burden of exercising customer due diligence, reporting suspicious transactions and record keeping. Moreover, the risks-reward premium for such clandestine money or value transmission services has increased in their favour since September 11, 2001.

2. Purchasing Insurance Policies, Bearer Bonds and Other Negotiable Financial Instruments

There is growing evidence that criminals are using their criminal proceeds to purchase financial products and instruments from non-bank financial institutions, investments advisers and brokers to bypass the banks and the banking regulators. They do this by purchasing bearer bonds in the international capital markets in order to hold such bonds anonymously and outside the detection of financial regulators or law enforcement officials. Similarly, criminals also purchase life insurance policies by paying high upfront premiums and negotiating early cancellation or redemption provisions. The securities and insurance sectors are particularly vulnerable to abuse of money laundering and the financing of terrorism because, until very recently, insurance companies and securities firms, brokers, agents and investment advisers were not subject to the same rigorous oversight by national financial regulatory bodies as banks were even though the previous FATF Forty issued in 1996 indicated that its recommendations should also apply to non-bank financial institutions.

The latest FATF Forty, as revised and reissued in June 2003, now makes it more explicit, through an expanded definition of “financial institutions,” that non-bank financial institutions such as insurance companies, securities firms, their brokers and agents are subject to the anti-money


laundering and anti-terrorist financing recommendations in the same way as banks. As noted earlier, IOSCO and IAIS have issued guidelines to their respective sectors to combat money laundering and the financing of terrorism. The IAIS, in particular, has issued very detailed guidelines.176

3. Using Special Corporate Vehicles

Criminals have also used the cover of various corporate vehicles such as international business corporations, shell companies, offshore entities including offshore banks, trusts and nominee companies to launder their criminal proceeds. Many of these entities are licensed and registered in small island jurisdictions in the South Pacific but maintain offices and carry out their activities in other countries. These entities are generally not subject to any ongoing national regulation or supervision. Therefore, the transactions that these entities enter into are shrouded in considerable secrecy, which allows their clients to establish accounts and transfer funds using proxies, nominees, trustees and agents without disclosing the true beneficial owners. These entities also do not always record their financial transactions, submit financial statements or audits to the regulators and frequently are not even required by the governing law of the countries of incorporation or registration to disclose information to regulators and law enforcement officials.

The latest FATF Forty includes a number of provisions to deal with this problem. These measures include requiring financial institutions to considerably strengthen the due diligence requirements for verifying the identity of their customers, particularly the true beneficial owners of accounts;177 extending the application of such requirements and record-keeping and reporting of suspicious transactions requirements to lawyers, accountants and trust and company service providers;178 and closely scrutinizing the transactions of PEPs.179 Countries are urged not to approve the establishment or continued operation of shell banks. Financial institutions are asked not to enter into or continue correspondent banking relationships with shell banks or foreign financial institutions that permit their accounts to be used by shell banks;180 to give special attention to business relationships and transactions with persons, companies and financial institutions from countries that do not or insufficiently apply FATF Forty;181 and to ensure that their branches and majority-owned subsidiaries located abroad apply FATF Forty, especially in countries that do not or insufficiently apply FATF Forty.182

176. For a discussion of IAIS guidelines, see supra notes 96-97 and accompanying text.
177. FATF Forty, supra note 25, at Recommendation 5.
178. Id. at Recommendations 12, 16.
179. Id. at Recommendation 6.
180. Id. at Recommendation 18.
181. Id. at Recommendation 21.
182. Id. at Recommendation 22.
4. Using Non-Profit Bodies Such As Charities and Foundations

The September 11, 2001 investigations revealed that, in addition to using informal financing channels or alternative remittance systems, the terrorists used several non-profit bodies such as charities and foundations in the Middle East, the United States and Europe to raise funds for terrorist activities. They then used the same non-profit bodies to transfer the funds to other persons and jurisdictions to finance terrorist activities. In some cases, the non-profit body was a mere sham that was set up simply as a cover to funnel money to terrorists. Many of these non-profit bodies, however, were established for purposes related to education, religion, community service, helping the poor, women and children, health care promotion and social advancement. The evidence gathered in the investigations revealed that funds legitimately raised by several of these non-profit bodies were then secretly diverted to terrorists and terrorist organizations to finance terrorist activities, either with or without the knowledge of the donors or the management of these bodies. Non-profit bodies were especially attractive because, in most cases and particularly in the Middle East, they were not subject to close supervision by financial regulators and were tax-exempt, thus also avoiding the notice of the tax authorities.

The FATF response to this problem was Special Recommendation Eight of FATF Eight, which called on countries to "review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism." Non-profit organizations were identified as particularly vulnerable to such misuse. Therefore, countries were urged to ensure that these organizations "cannot be misused: (i) by terrorist organizations posing as legitimate entities; (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and (iii) to conceal or obstruct the clandestine diversion of funds intended for legitimate purposes to terrorist organizations." More detailed guidance notes were issued later by FATF to assist countries in taking the required measures to closely monitor the activities of their non-profit organizations.

5. Using "Gatekeepers" to Structure Special Financial Transactions and Corporate Vehicles

The most recent FATF studies have highlighted the problem that, as the risk of detection becomes greater under the banking system, money launderers have increasingly sought the advice or services of specialized professionals to facilitate their financial operations. These professionals include various legal experts such as solicitors, notaries and other independent legal professionals and financial experts such as accountants and financial analysts. Such professionals have been used to create "front companies" or "shadow companies" that serve as a front for money laundering activities. The FATF has issued guidance on how to identify and monitor such professionals to prevent their misuse.

183. FATF Eight, supra note 132, at Special Recommendation 8.
184. Id.
investment advisers, who are generally referred to as "gatekeepers."\textsuperscript{186} These experts provide advice to individuals and businesses on such matters as investment, company formation, setting up special corporate vehicles, trusts and other legal arrangements and tax optimization. In addition, they are also frequently involved in executing various types of financial transactions, including the purchase of real estate or securities. Gatekeepers offer the cover of legitimacy for such transactions, serving as intermediaries in dealing with financial institutions. Most importantly, accountants, financial advisers and lawyers are generally protected by client confidentiality or professional privilege provisions.

The latest FATF Forty has addressed the issue of gatekeepers by calling on financial institutions to apply the same customer due diligence and record-keeping requirements to a new group of "designated non-financial businesses and professions" in certain specified situations. These requirements will apply to gatekeepers when they prepare for, engage in or carry out transactions for their clients in buying or selling real estate; managing client money, securities or other assets; managing bank, savings or securities accounts; organizing of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements; and buying and selling of business entities.\textsuperscript{187} Similarly, the requirement for the reporting of suspicious transactions will also apply to gatekeepers when they engage in one of the transactions described above on behalf of their clients. When these gatekeepers are acting as independent professionals, however, they are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.\textsuperscript{188} The formulation of this particular recommendation is not a model of clarity because it does not provide precise guidelines on how to draw the line between the two types of functions. As a practical matter, it is very difficult to know how or where to draw this line in many cases, thus exposing the gatekeeper professionals to potential criminal or civil liability. The recommendation has also aroused controversy and objections from some bar associations and professional bodies. Time will tell how well this recommendation can or will be implemented in practice.


\textsuperscript{187} See FATF Forty, \textit{supra} note 25, at Recommendation 12.

\textsuperscript{188} See \textit{id.} at Recommendation 16.
6. Use of Electronic Non-Face-to-Face Financial Transactions

The great benefits of information technology, including the ease and speed with which financial transfers can be executed, are also available to the money launderer, corrupt public official and terrorist. In recent years, growing concern has been expressed about the vulnerabilities that the Internet might offer for the laundering of criminal proceeds. The range of financial services that could be carried out over the Internet include direct payment, electronic funds transfer, issue of checks, purchase of securities and opening and closing of accounts. Many financial institutions now offer online banking facilities to their customers. This poses new challenges for implementing customer identification and suspicious transactions reporting requirements because the customer can initiate and complete such transactions with minimum scrutiny. Another emerging area of concern is the use of the Internet for gambling. Virtual casinos are being used by organized crime groups in a number of jurisdictions to launder their criminal proceeds.189

This problem is still being studied by the FATF. The delay in developing any new recommendations to deal with this problem is due primarily to the lack of sufficient examples of this abuse. Moreover, given the absence of any clearly-established guidelines as to which law applies to borderless Internet transactions and which jurisdictions have primary responsibility for detecting and punishing such crimes, the task of formulating recommendations is more complex.

B. Poor Implementation or Difficulties in Implementation at the National Level

The earlier discussion has shown that there is now a formidable body of international treaty law and a corpus of other international standards, codes and best practices that provide very explicit guidance to countries, financial institutions and other relevant persons on the adoption and implementation of measures to combat money laundering, terrorism and the financing of terrorism and corruption. The evidence indicates that the majority of countries in the world have taken a variety of legal measures to implement this new international legal regime within their own national jurisdictions—particularly in the area of anti-money laundering and combating terrorism and the financing of terrorism—through the promulgation of new legislation and regulations. It is still too early to assess the quality of compliance with the new Corruption Convention, which was only signed in December 2003. While the adoption of new laws and regulations is a positive and necessary first step towards establishing a sound legal regime, the real test of their effectiveness is how well they are actually enforced in practice. With respect to anti-money laundering and combating terrorism and the financing of terrorism, the quality of compliance by countries and financial institutions with substantive rules has been some-

189. See FATF, Money Laundering, supra note 186, at 2-8 (discussing some examples of Internet-based financial transactions).
what disappointing. There are several reasons for this and a few of the
more important ones are discussed below.

First, the disparities in the legal provisions of national laws between
different jurisdictions pose serious practical problems for law enforce-
ment. Material differences in legal provisions include matters such as the
scope of the offence (e.g., in the case of money laundering, differences in
the number of predicate offences and, in the case of terrorism and the
financing of terrorism, how "terrorism" is defined), the extent to which
bank secrecy laws apply, whether liabilities are also placed on legal persons
and corporate management and the nature of the penalties. One unfortu-
nate consequence of such disparity in laws is that it provides an opportu-
nity for criminals to engage in regulatory arbitrage. Another consequence
is that cooperation between law enforcement officials and financial regula-
tory agencies becomes more complex and problematic where the national
law provisions in the two jurisdictions are materially different. The
problem here is not dissimilar from the one usually experienced in extradition
cases.

Second, a major obstacle to successful law enforcement in many de-
veloping and transition countries is the weakness of the institutions re-
sponsible for enforcing the laws. This is particularly true, for example, in
the small Pacific islands such as the Cook Islands, Samoa and Marshall
Islands where only one or two officials constitute the entire institutional
machinery to enforce the laws against anti-money laundering and the fi-
nancing of terrorism. In the case of many developing and transition coun-
tries, there is the added problem of ill-equipped agencies and staff who
are not trained in the prevention, detection or prosecution of sophisti-
cated international crimes. The investigating and unraveling of these
crimes call for the highest forensic and financial intelligence expertise,
which is seriously lacking in most developing and transition countries.
Even with the availability of such skills in developed countries like the
United States, United Kingdom, Australia and New Zealand, it usually
takes as long as three to four years of painstaking investigations, carried
out in several jurisdictions, before a money laundering or corruption case
can be unraveled and solved.

Third, the cost of compliance is very high for many developing and
transition countries. The high cost is due to the need to allocate substan-
tial human, financial and technical resources and institutional arrange-
ments to implement the laws and regulations effectively. With extremely
limited financial resources at their disposal for developmental needs, gov-
ernments have to balance their priorities carefully and make sure that
their other needs for food, health care, education and social services are
not jeopardized by a disproportionate allocation of resources to fighting
international crime. It is also important to appreciate that many of these
countries do not see terrorism as significant a threat to their security as the
United States does, even though money laundering and corruption could
threaten the integrity of their financial systems. Finally, because the cost of compliance is so high, developed countries would need to provide much more financial and technical assistance than they currently do to help developing and transition countries to effectively implement their laws against international crime. Some assistance is currently being provided under various bilateral aid programs and through international financial institutions such as the IMF, the World Bank and the Asian Development Bank. These organizations have projects designed to assist such countries establish the required legal regimes and by training their financial regulatory and law enforcement officials.

Fourth, the lack of political will in several countries to enforce the laws is another serious problem. Widespread corruption among senior political leaders, financial regulators and law enforcement officials in these countries is a major factor. The latest FATF Forty has addressed this problem by calling on financial institutions to exercise enhanced customer due diligence on PEPs. It is particularly delicate and difficult, however, for the staff of financial institutions to apply strict customer due diligence requirements to their PEPs.

Fifth, the increasing use of electronic non-face-to-face financial services such as online banking, Internet gambling or casinos, telephone banking, ATMs, credit cards, smart cards and electronic purses will also continue to pose serious obstacles to the strict enforcement of customer identification/"know your customer" procedures and reporting of suspicious transactions until some solution to this problem is found through international agreement on how such transactions are to be regulated and by whom.

Sixth, the injection of religion and politics into the money laundering, terrorism and financing of terrorism equation has made it much more difficult to secure an effective global, political and legal consensus and unified strategy to combat these crimes. In the absence of a real political and legal consensus, international law enforcement efforts to secure close cooperation between jurisdictions will become much more difficult.

In the past, several countries have complained that their efforts to combat international crime have been severely hampered by the lack of cooperation and mutual assistance between the jurisdictions involved. This may have been true for many years because the ability to secure international cooperation and mutual assistance was largely dependent on the existence of bilateral agreements between jurisdictions. The legal framework for international cooperation and mutual assistance, however, is much stronger now as several of the major international conventions for combating international crime, which have been signed and ratified by a very large number of countries, impose extensive legal obligations on their States Parties to extend effective cooperation and mutual assistance to other jurisdictions in law enforcement efforts to combat international crimes. These conventions include the Vienna Convention, the Palermo
Convention, the Terrorism Financing Convention and the Corruption
Convention.

C. **Conflicting Policies and Strategies Adopted by the United States to Fight
International Crime**

The overarching theme of this Symposium raises the implicit question
of whether the United States' responses to international crime have been
legally justified, appropriate or successful. Taking that cue, I will answer
the question in two parts. First, there is no question that the United States
has, at least over the last quarter century or so, played a strong leadership
role in the war against international crime. This has been clearly demon-
strated by the initiatives taken by the United States towards the adoption
of numerous international treaties and standards to fight different inter-
national crimes such as drug trafficking, organized crime, money launder-
ing, terrorism, corruption, torture, war crimes, crimes against humanity
and white slavery. Second, notwithstanding its substantial earlier contribu-
tions, the United States has, in recent years, made a number of decisions
and taken actions that have puzzled other States and seriously under-
mined its traditional leadership role in combating international crime.
This is particularly evident in the war on terrorism, where the politiciza-
tion by the United States government of its policies and strategies in fight-
ing terrorism has posed major impediments to winning this war and has
even jeopardized international efforts to fight other crimes. Rather than
focusing on concerted legal, diplomatic and economic measures, the
United States is seen to have arbitrarily and unilaterally used the military
instrument of war against two States—Afghanistan and Iraq—as its pri-
mary response and strategy to fight terrorism. It has been pointed out that
"the greatest concern is that the perceived need to act decisively has
pushed responses from a criminal law track to the path of war."190

This politicization has alienated and confused the vast majority of
States in the world, including some of the country's traditional allies. As a
result, it cannot be said that there is a well-established international con-
sensus to fighting international crime, including terrorism. This aliena-
tion and confusion has, in turn, reduced the political will of many of these
States, especially Muslim States, to cooperate fully or effectively with the
United States and other countries in fighting international crimes such as
terrorism.

The other major impediment to the United States' ability to effect-
tively lead the war against international crime is its own demonstrated in-
consistency in adherence to the rule of law and its treaty commitments.
Professor John Murphy sums up this problem aptly:

The United States has had considerable difficulty in adhering to the rule of law in its conduct of foreign affairs. However, there have also been occasions when the United States has taken the lead in supporting the rule of law in resolving some of the major international issues. There has been, in other words, a substantial degree of inconsistency in the U.S. record.\footnote{\cite{Murphy2004}}

Inconsistency by the United States in its adherence to the rule of law and its international treaty commitments has placed it at great odds with the majority of other States who view this country as using its status as the sole superpower to act unilaterally and without feeling bound by the restraints set by the applicable rules of international law. This posture robs the United States of much of its political and moral credibility to lead and influence other States to join it in fighting international crimes. Let me provide a few concrete examples of how this perception of the United States has arisen:

1. \textit{The Invasion of Iraq as a Strategy to Fight Terrorism Was Not Legally Justified, Appropriate or Generally Supported by the International Community}

In defending the invasion of Iraq in 2002, the United States government had used a variety of arguments, articulated at different times and by different senior government officials, most notably President George W. Bush, Vice President Dick Cheney, Secretary of State Colin Powell, Defence Secretary Donald Rumsfeld and National Security Adviser Condoleezza Rice. Between 2001 and 2003, these arguments have been modified, qualified, explained differently and sometimes withdrawn wholly or partly as new facts became known. The main arguments put forward, however, included the following: (a) Iraq possessed weapons of mass destruction, including biological and chemical weapons, that posed a serious threat to the national security of the United States—particularly if such weapons came into the hands of terrorists—and that the United States therefore had a pre-emptive right of self-defence against a possible future attack by Iraq; (b) the invasion was part of the overall strategy to fight terrorism because Iraq was harbouring terrorists and was alleged to have had some links to the September 11, 2001 terrorist attacks; (c) Iraq had failed to comply with repeated United Nations Security Council resolutions to disarm and to submit to United Nations inspections, and the United Nations sanctions had proved ineffective; (d) to effect regime change (that is, to oust Saddam Hussein and his regime from power);\footnote{\cite{Katzman2004}}

\begin{thebibliography}{99}
\bibitem{Murphy2004} \textsc{John F. Murphy}, \textit{The United States and the Rule of Law in International Affairs} 349 (2004).
\bibitem{Katzman2004} \textsc{Kenneth Katzman}, \textit{Iraq: Regime Change Efforts and Post-Saddam Governance}, CRS Report for Congress, \textit{(updated Oct. 22, 2004)}, \textit{available at} http://fpc.state.gov/documents/organization/38004.pdf (providing background to evolution of regime change policy under Bush administration, with particular ref-
and (e) to promote democracy and human rights for the long-oppressed people of Iraq. To sum up, the overall justification for the invasion was that it was a necessary and appropriate response to the continuing threats posed to the national security of the United States flowing from the September 11, 2001 terrorist attacks and, more specifically, a pre-emptive and protective measure against the perceived threat of future terrorist acts by Iraq against the United States.193

After extensive inspections by the International Atomic Energy Agency and the United States’ own inspectors, no weapons of mass destruction were found. The most recent reports submitted by the inspection groups led by Charles Duelfer194 and David Kay195 effectively confirmed, in a great twist of irony, that Saddam Hussein had either destroyed his weapons of mass destruction or halted their production, which indicates that the United Nations sanctions had actually worked.196 The bipartisan 9/11 Commission was also unable to find any link between Iraq and the September 11, 2001 terrorist attacks.197

The question that is raised is this: Was this military invasion legally justified either as an appropriate response to the September 11, 2001 terrorist attacks or as a protective measure against the possibility of future terrorist attacks by Iraq? World opinion has clearly answered these questions in the negative.198 The Secretary General of the United Nations, Mr. Kofi Annan, has described the invasion as “illegal” because it contravened the United Nations Charter, and it is not unreasonable to assume that his views reflected the opinion of the majority of the member States of the

tences to Iraq); see also W. Michael Resiman, Why Regime Change Is (Almost Always) a Bad Idea, 98 AM. J. INT’L L. 516, 517 (2004).


196. See George A. Lopez & David Cortright, Containing Iraq: Sanctions Worked, FOREIGN AFF., July-Aug. 2004, at 90, 96 (2004) (“Once the ongoing monitoring system was in place, sanctions continued to help force the regime to disarm.”).

197. See 9/11 COMMISSION REPORT, supra note 4, at 228-29.

198. See, e.g., Roger Cohen, The World: The War on Terror; An Obsession the World Doesn’t Share, N.Y. TIMES, Dec. 5, 2004, § 4, at 6 (“Because America’s central preoccupation—the war on terror—is not widely shared, it tends to isolate the United States, as a country whose power is not so overwhelming as to invite dissent and countervailing currents.”).
Several leading international law and foreign policy scholars have characterized this war as illegitimate and/or illegal. More United Nations. Several leading international law and foreign policy scholars have characterized this war as illegitimate and/or illegal. More

199. Interview by BBC with Kofi Annan, Secretary-General, United Nations, in New York, N.Y. (Sept. 16, 2004), available at http://news.bbc.co.uk/2/hi/middle_east/3661640.stm ("Q: So you don’t think there was legal authority for the war? A: I have stated clearly that it was not in conformity with the Security Council—with the UN Charter. Q: It was illegal? A: Yes, if you wish.").

200. See, e.g., Richard Falk, The Iraq War and the Future of International Law, 98 AM. SOC'Y INT'L L. Proc. 263, 263 (2004) (asking, among other things, whether Iraq war is legitimate and answering "no"); Thomas M. Franck, The Role of International Law and the UN After Iraq, 98 AM. SOC'Y INT'L L. Proc. 266, 266 (2004) (comparing United States to historic empires). "Washington seems determined to do what all other empires did: lay down the rules by which everyone else, except it, is expected to play." Id. See Mary Ellen O'Connell, The End of Illegitimacy, 98 AM. SOC'Y INT'L L. Proc. 269, 269 (2004) (expressing her personal belief that Iraq war is illegal); Anne-Marie Slaughter, The Use of Force in Iraq: Illegal and Illegitimate, 98 AM. SOC'Y INT'L L. Proc. 262, 262 (2004) ("I conclude that the invasion was both illegal and illegitimate."); see also Brunei & Toope, supra note 190; Jonathan I. Charney, The Use of Force Against Terrorism and International Law, 95 AM. J. INT'L L. 835 (2001); Thomas M. Franck, Terrorism and the Right of Self-Defense, 95 AM. J. INT'L L. 839 (2001); Vaughan Lowe, The Iraq Crisis: What Now?, 52 INT'L & COMP. L.Q. 859, 865 (2004) (stating that only legal basis for invasion is Kuwait "revival" and dismissing this as not valid); Adam Roberts, Role of Law in the "War on Terror": A Tragic Clash, 97 AM. SOC'Y INT'L L. Proc. 18, 22 (2003) (contesting "legal" treatment of prisoner detainees); A. Mark Weisburd, The War in Iraq and the Dilemma of Controlling the International Use of Force, 97 AM. J. INT'L L. 521, 522 (2004) (advancing two theses: United States attack on Iraq violated United Nations Charter and Charter has fundamental flaws in addressing security concerns). In the United Kingdom, sixteen international law professors signed a letter declaring that "there is no justification under international law for the use of military force against Iraq" because there were no grounds for a claim of self-defence and no authorization by the United Nations Security Council. See Bernitz, et al., War Would Be Illegal, GUARDIAN, Mar. 7, 2003, at 29 (stating belief before actual invasion was launched); see also Robert W. Tucker & David C. Hendrickson, The Sources of American Legitimacy, FOREIGN AFF., Nov.-Dec. 2004, at 18, 27 (2004) (declaring "Washington had acted illegally in going to war against Iraq," and that Bush doctrine supporting this war was "severely wanting in all four of the elements that had sustained U.S. legitimacy in the past"). The four elements consist of the use of power in accordance with international law, consensual modes of decision-making, moderation in policy and preserving peace and prosperity within the community of advanced industrialized countries. But see Christopher Greenwood, International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda, and Iraq, 4 SAN DIEGO INT'L L.J. 7, 10 (2003) (reasoning that key to peace is compliance with United Nations Charter); William H. Taft IV & Todd F. Buchwald, Preemption, Iraq and International Law, 97 AM. J. INT'L L. 557, 557 (2003) ("The use of force preemptively is sometimes lawful and sometimes not."); John Yoo, International Law and the War in Iraq, 97 AM. J. INT'L L. 563, 571-74 (2003) (theorizing that anticipatory self-defence justified taking out Saddam Hussein's regime). For an excellent and balanced discussion of United States policy and practice with respect to the use of force including in Iraq and Afghanistan, see MURPHY, supra note 191, at 142-206. Professor Murphy has expressed his view that "the policy arguments in favor of invading Iraq are much the stronger [than those against the invasion], and would have fully supported the Security Council authorizing the use of armed force against Iraq—in which case there would have been no reasonable doubt about the legality of the invasion." Id. at 173. My only comment on this argument is that the record of extensive deliberations on the Iraq situation in the Security Council gives no confidence that the
recently, Mr. Annan asserted that this war, beyond being illegal, had not reduced terrorism, which has continued unabated in several parts of the world. This finding has been further confirmed by the most recent United States State Department revised annual report on terrorism. Indeed, the 9/11 Commission report and the Kay and Duelfer reports have further confirmed that, because the Iraqi borders were not properly sealed by the United States' military soon after the invasion, a large number of foreign terrorists have entered Iraq and are fuelling the current insurgency. Paradoxically, therefore, the invasion of Iraq has increased terrorist activity in that country, which will not only be a threat to the security of Iraq, but will also serve as a destabilizing force in the Middle East. The original purported United States strategy of going into Iraq to stop terrorism has faced a serious setback—it has provided a new and much larger sanctuary for terrorists, including terrorists from other countries who slipped into Iraq before, during and after the invasion.

2. The Torture, Mistreatment and Denial of Rights to Prisoners Is a Serious Violation of International Conventions

When the United States embarked on its war with Iraq, it promised the world that it would bring democracy, freedom and civilizing American values to the country, replacing the repressive regime of Saddam Hussein, which had been accused of torturing and killing the Kurds and his political opponents. Yet, it has been established that some elements of the United States' military forces in Iraq have engaged in the torture of Iraqi and other prisoners in their custody. The world has seen the shocking photographs at Abu Ghraib Prison in Iraq of naked and blindfolded prisoners being hooked up to electric wires and threatened with attacks by dogs as one of the methods of torture used by the United States military in Council would have supported the invasion on the basis of such policy arguments and this is also borne out by the United States' decision not to seek Security Council authorization prior to the invasion.

201. Patterns of Global Terrorism 2003, supra note 102. The original report, issued in April 2004, claimed that worldwide terrorism dropped by 45 percent between 2001 and 2003, that the number of acts committed in 2003 represents the lowest annual total of international terrorist attacks since 1969 and that the statistics provided "clear evidence that we are prevailing in the fight." Id. The report was found to contain several statistical errors, which were corrected when the report was reissued in June 2004. With the corrections, the original claim of a reduction in terrorism was not supportable. See Alan B. Krueger & David D. Laitin, "Misunderestimating" Terrorism: The State Department's Big Mistake, FOREIGN AFF., Sept.-Oct. 2004, at 8, 9-10 (2004) (detailing statistical differences in studies).

the interrogation of their prisoners. Investigations conducted by the United States Army of this scandal have resulted in a very detailed report listing, describing and confirming many of these acts of torture and mistreatment.203 Most recently, it has also been reported that the United States military command was fully aware of these incidents of torture as early as December 2003, more than a month before Army investigators received the photographs from Abu Ghraib Prison.204

First, the acts of torture violated the provisions of the Third Geneva Convention of 1949, which sets out clear provisions calling for the humane treatment of prisoners of war. The United States government has argued that the prisoners in question are unlawful enemy combatants and, as such, are not entitled to the protections offered by the Geneva Convention, a position that has been criticized by several legal scholars.205 Further, in August 2002, the Department of Justice provided a questionable legal opinion in a memorandum prepared at the request of Alberto Gonzales, then Counsel to the President, stating that although certain interrogation acts “might constitute cruel, inhuman and degrading treatment or punishment,” they fail to rise to the level of torture under the Torture Convention and the applicable implementing United States law.206 In addition the memorandum stated in order to constitute torture, the acts must be “extreme acts” and the severe pain must be “generally of the kind difficult for the victim to endure.”207 It further stated that “where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure.”208 This opinion is not consistent with the definition of torture contained in the Torture Convention, which defines torture as any act by which “severe pain or suffering,” whether physical or mental, is intentionally inflicted on a person for such purposes as interrogation or punishment.209 Lawyers from the


205. Mr. Alberto Gonzales, then the White House Counsel and now Attorney General, had also expressed the view that “the war against terrorism is a new kind of war” and “this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.” Draft of Memorandum for the President from Alberto R. Gonzales, (Jan. 25, 2002), available at http://www.msnbc.com/ modules/newsweek/pdf/gonzales_memo.pdf.


207. Id.

208. Id.

209. See Torture Convention, supra note 17, arts. 1-2 (defining torture). Article 1 defines torture as:
United States State Department and the military have expressed reservations about the correctness of this legal opinion. It is most interesting to note, however, that in December 2004, the Department of Justice issued a substantially revised memorandum which directly contradicted its August 2002 memorandum and now stated that torture need not rise to the level of pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." 210 The memorandum concludes that the anti-torture law passed by Congress equates torture with physical suffering "even if it does not involve physical pain" but must still be more than "mild and transitory." 211 This revised memorandum was issued one week prior to the confirmation hearings in the United States Senate for Mr. Gonzales on his nomination to be Attorney General. 212

Numerous questions have also been raised about the mistreatment and abuse of prisoners held at a United States military facility in Guantanamo Bay, Cuba. Civil liberties groups around the world—including the American Civil Liberties Union, the International Red Cross, Amnesty International and Human Rights Watch—and legal scholars have expressed strong objections to the denial of due process to the prisoners held in Guantanamo Bay. 213 Among the allegations of legal misconduct by the United States authorities are continuing acts of torture, the denial of ac-

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity . . . .

Id. art. 1.


211. Id.


cess to legal counsel, denial of access to families and the proposed trial of terrorist suspects by military commissions.

Most recently, a number of courts in the United States and the United Kingdom have issued decisions calling on the governments to accord certain minimum legal rights to these prisoners.\textsuperscript{214} To date, only a few junior level soldiers have been prosecuted for these crimes and no senior military or civilian official has been prosecuted. The military commander of the Abu Ghraib prison, however, was reassigned.

3. The Failure to Closely Examine and Deal with the Root Causes of Terrorism Will Make It Difficult to Win the War Against Terrorism

When I speak of the need for the United States and other countries to understand and deal with the “root causes” of terrorism, I want to make it absolutely clear that I am not in any way suggesting that there are any legitimate grounds or justification for the commission of the horrendous acts of terrorism on September 11, 2001. I believe that these terrorist attacks were a crime against humanity and the masterminds behind this crime should be apprehended, prosecuted and punished. Having said that, I still believe that it is critical for the United States and other countries to identify and help to eliminate the “root causes” or conditions that explain or give rise to such terrorist behaviour.

We have heard the constant refrain that September 11, 2001 was an attack on Western civilization, freedom and American values. This kind of simplistic analysis or sweeping generalization is most regrettable and prevents us from understanding and addressing the underlying currents that give rise to terrorism. As noted earlier, this line of thinking may have been influenced by some scholars like Samuel Huntington and Bernard Lewis who put forward their “clash of civilizations” theory. Such an unfortunate characterization does great injustice to one of the world’s great religions and sows the seeds of distrust and intolerance towards the West in the hearts of more than one billion law-abiding Muslims around the world.

As several American, European, Islamic and Middle Eastern scholars have pointed out, the world needs to see and understand the “root causes” that breed terrorists. Leading experts on terrorism such as Jessica Stern and Philip Heymann have strongly recommended that such an analysis of
the “root causes” of terrorism is a critical prerequisite to finding a long-term solution to the problem. There are at least four root causes that have been repeatedly identified in various statements issued by the terrorists. The first root cause is the perceived American support for repressive regimes in the Middle East. Looking at the landscape of Middle East countries, many are authoritarian regimes under which citizens are denied many basic human rights. It is a very telling statistic that fifteen of the nineteen hijackers who carried out the September 11, 2001 terrorist attacks were from Saudi Arabia. Ordinary Arabs in these countries simply do not understand why America, the leader of the free world and a great champion of human rights that regularly lectures other countries on the need to promote democracy and respect human rights, has maintained a deafening silence on undemocratic, repressive regimes and human rights violations in the Middle East.

Professor Amartya Sen has reminded us of the important link that exists between freedom and development. The full enjoyment of political, economic and social freedoms is a critical prerequisite for growth and development. Sen argues:

Development requires the removal of major sources of un-freedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states. Despite unprecedented increases in overall opulence, the contemporary world denies elementary freedoms to vast numbers—perhaps even the majority—of people . . . . In [some] cases, the violation of freedom results directly from a denial of political and civil liberties by authoritarian regimes and from imposed restrictions on the freedom to participate in the social, political and economic life of the community.215

The second root cause is the long-unresolved problem of Palestine. This is a sore that has festered for too long in the region. Again, right or wrong, Arabs (and indeed many developing countries and several developed countries) see the United States as either being on the side of Israel or as not doing enough to support Palestinian aspirations. The continued occupation of large sections of the West Bank and Gaza by Israeli troops, tanks and Jewish settlements is a source of great frustration and pain to the Palestinian people and the Arab world at large, including America’s strong allies, Saudi Arabia, Egypt and Jordan.

The third root cause is the anger and fear that Arabs feel from globalization. For them, the symbols of globalization—free trade, the Internet, Western pop culture, drugs, permissiveness and pornography—are eroding the core Islamic religious beliefs and values of their sons and daughters, and will gradually but surely destroy Islamic civilization, which they

fear is being marginalized. As noted earlier, Jessica Stern refers to those feelings as alienation and humiliation.  

The fourth root cause is a mix of religious and economic opposition to the presence of American troops and armaments in the land of the Two Holy Mosques—Saudi Arabia. First, many Muslims consider this a defilement of their sacred places of worship. Second, they see this foreign military presence as an economic stranglehold or control over their oil wealth. They see this as a new form of economic colonialism or imperialism. America's status as the sole superpower is also particularly worrisome to them. This problem has been partly addressed by a reduction in United States troops and armament levels in Saudi Arabia.

Both Arab/Islamic and Western scholars have suggested that some or all of the above "root causes" have generated feelings of despair and helplessness among Muslims in the Middle East and driven many of them into the arms of the religious fundamentalists and extremists. Finally, this sense of frustration has exploded in acts of terrorism designed to capture the world's attention to their plight and to seek a change of policy by the West. This is certainly not an excuse for the terrorism but provides an explanation of it. Following this line of thinking, it has been suggested that the primary target of the terrorist attacks was not the United States or its people, but the repressive Arab regimes. The longer-term objective of these terrorist attacks, it is argued, is to inflame the passions of ordinary Muslims in these countries to rise up in a jihad or holy war and overthrow those regimes, which would hopefully be replaced by new fundamentalist Islamic regimes that would then set things right for the Muslim world. This is borne out by the most recent statement issued by Osama bin Ladin, where he openly calls on the Saudis to launch a rebellion against the royal family.

Based on the above preliminary analysis, I believe that it is essential that, in addition to adopting legal and security measures, the United States and its coalition partners immediately address the underlying factors that tend to give rise to terrorism so as to create the foundation for sound economic, political and social development in the Middle East and other Asian countries like Indonesia and Pakistan. Unfortunately, there is very little public discussion of, or interest in this approach, although it has been considered and recommended in internal government analyses and reports. One of the key recommendations of the 9/11 Commission, under the heading "Preventing the Continued Growth of Islamist Terrorism," is the following:

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216. Stern, supra note 101, at 9, 32.
217. See id.
The small percentage of Muslims who are fully committed to Usama Bin Ladin's version of Islam are impervious to persuasion. It is among the large majority of Arabs and Muslims that we must encourage reform, freedom, democracy, and opportunity, even though our own promotion of these messages is limited in its effectiveness simply because we are its carriers. Muslims themselves will have to reflect upon such basic issues as the concept of jihad, the position of women, and the place of non-Muslim minorities. The United States can promote moderation, but cannot assure its ascendancy. Only Muslims can do this.\footnote{219}

More specifically, the 9/11 Commission recommended:

A comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children's future.\footnote{220}

In my opinion, the real war against terrorism must be a war of ideas, a war to persuade Muslim societies in the Middle East, Asia and Africa to rein in the radical and criminal fringe elements of their societies by offering them better political, economic and social opportunities so as to release them from their despair and sense of hopelessness.\footnote{221} It has been wisely observed that:

Although the actual "root causes" of terrorism are complex, repressive States, weak States, destitute States, and States in internal chaos provided a potential breeding ground for the radicalization of discontent. Terrorist organizations can recruit effectively in these settings.\footnote{222}

At the same time, a separate effort needs to be launched to persuade Muslims living in Europe and America to better integrate themselves into their adopted societies without necessarily compromising their Muslim identity, religion or culture. The strategy here must be to persuade them to participate fully in the civic life of Western secular States and to live in harmony with and tolerance towards their fellow-citizens who belong to other faiths, thereby rejecting the radical view that Islam must be defined in opposition to the West.\footnote{223} Nicholas Sarkozy, until recently the Finance

\footnote{219. 9/11 Commission Report, supra note 4, at 375-76 (stating Recommendation 12.3).}
\footnote{220. Id. at 379.}
\footnote{221. See also Gilles Kepel, The War for Muslim Minds: Islam and the West 287-95 (2004).}
\footnote{222. Bruneel & Toope, supra note 190, at 786.}
\footnote{223. See Tariq Ramadan, Western Muslims and the Future of Islam 224-29 (2004). Ramadan is a Professor of Philosophy at the College of Geneva and Professor of Islamic Studies at the University of Fribourg in Switzerland. In 2000, Time}
Minister of France and now head of the French ruling party, the Union for
a Popular Movement, "has proposed allowing State funding for mosques
as a way of curbing foreign financing of them." Although this proposal
runs counter to France's strict separation of Church and State, it was put
forward as a way to ease rising tensions in Europe's Muslim communities
and questions about past integration policies.

The war against terrorism can never be fought and won by a foreign
superpower like the United States, which has suffered a loss of moral and
political credibility in the Muslim world through its recent actions.
Surveys carried out by the Pew Research Center reveal that, one year after
the Iraq war, discontent with America and its policies had increased
rather than diminished in Europe and the Middle East and that in the
Middle East countries anger towards the United States remains perva-
sive. Professor Philip Heymann has characterized the results of this sur-
vey as showing that "we are rapidly losing the support of our allies, and
that the reaction in the Muslim world to what we are doing is a disaster,"
and that "[w]e've been doing a terrible job" of maintaining support from
friendly nations in Europe and Asia and from governments where most of
the terrorists come from, the Middle Eastern countries and Southeast
Asia. In the final analysis, the war against terrorism must be fought and
won by the Muslim States themselves rather than by a foreign superpower
wielding bombs and bayonets. The current quagmire in Iraq establishes
the wisdom of following this approach.

It seems to me that the United States, supported by its major allies in
Europe including France and Germany, should embark without further
delay in implementing strong diplomatic and economic initiatives to re-
move some of the underlying conditions that give rise to terrorism. It
seems to me that there are at least two specific areas that should be given
high priority.

Magazine named him one of the 100 most important innovators for the twenty-first
century. Yet, the United States government, in August 2004, revoked his visa and
work permit, thereby preventing him from taking up a teaching appointment at
the University of Notre Dame. See Paul Donnelly, The Ban on a Muslim Scholar,
WASH. POST, Aug. 28, 2004, at A25 (comparing proclaimed and actual reasons for
revocation of his visa).

225. See id.
226. Pew Research Center for the People and the Press, A Year After Iraq War
ReportID=206 (summarizing findings of survey).
227. Interview by Michael Rodman with Philip Heymann Talking About Terror,
HARV. L. BULL., Fall 2004, at 19, 21.
228. See Brune & Toope, supra note 190; Lowe, supra note 200; HEYMANN,
supra note 101, at 47-65; see also Madeleine K. Albright, Bridges, Bombs, or Bluster,
East countries to become more involved, especially in development of their eco-
nomic and political systems).
First, in the same way that the United States is arguing that freedom and democracy are essential for Iraq, it should urge other Middle Eastern governments to gradually introduce political and economic reforms, so as to give their citizens a greater say and involvement in the political and economic affairs of their countries. I emphasize "gradually" because any quick transition, without adequate preparation of the basic conditions for democracy to thrive, is likely to turn power in these countries to the radical fringe or fundamentalist religious elements. A gradual transition would enable the citizens to be educated and suitably prepared to assume their new responsibilities.

Second, the United States should lead the way for education reform in Muslim countries. The September 11, 2001 investigations revealed that among the principal breeding grounds for the new terrorists are the religious schools called madrassahs, which operate extensively in the Middle East and countries like Pakistan and Indonesia. In Pakistan alone, it is reported that there are about 39,000 madrassahs. These madrassahs admit young children who are taught under a curriculum that is exclusively or primarily based on the Islamic religion. Some of these madrassahs unfortunately teach radical and violent versions of Islam and influence their students with negative impressions of the West and its culture, religions and values. It would be extremely helpful if the students at these schools were also taught math, science, world history, geography, literature and similar subjects so that they could become more educated and enlightened citizens of their countries and thereby properly equipped to take up gainful employment to support themselves and their families. This will not be an easy task, particularly for the United States, which is strongly resented now, or other foreign aid donors. The best approach, therefore, is for the United States and its partners to work through the United Nations and its specialized agencies, including the World Bank and the regional development banks, which should ensure that the leadership in such education reforms is undertaken by indigenous institutions and non-governmental groups to give them credibility and acceptance.

The lessons of history and my own instincts as a former international development official with the World Bank, the Asian Development Bank and the IMF have taught me that violence is often the expression of the despair and helplessness that ordinary people in the developing world feel when they suffer poverty, disenfranchisement and injustice; the expression of the frustration and indignity they feel when their most basic human rights are denied, rendering them voiceless and powerless in their own societies; the humiliation and threat they sense when they see rich and powerful developed countries trying to impose their Western values over their religions and cultures in the name of globalization; and the homelessness they experience from decades of dispossession from their own lands.
In a true sense, this is the crisis of development that faces many parts of the developing world. Mr. James Wolfensohn, the President of the World Bank, aptly summed up the challenges ahead as follows:

The horrifying events of September 11th have made this a time of reflection on how to make the world a better and safer place. The international community has already acted strongly, by confronting terrorism directly and increasing security. But those actions by themselves are not enough. We will not create that better and safer world with bombs or brigades alone. We will not win the peace until we have the foresight, the courage, and the political will to redefine the war.229

To sum up, it is my view that we will not even begin to understand the problem of terrorism or know how to defeat terrorism if we allow ourselves to be caught up in the simplistic characterizations and misunderstandings that mark the debate taking place in our media and other fora, and thereby fail to understand the underlying factors that tend to give rise to terrorism.

4. United States’ Gradual Retreat from Observance of International Law Principles Seriously Hinders Its Ability to Exercise Leadership in Fighting International Crime

Since the present Administration took office in 2001, it has taken a number of steps to withdraw or renege on the United States’ previous international commitments under treaties that it had signed and promised to observe. Three examples come to mind.

First, under the Clinton administration, the United States in 1997 signed the Rome Statute Establishing the International Criminal Court.230 In May 2002, the United States government renounced its signature of this treaty on the ground that it had a number of fundamental flaws, including particularly that it exposed American officials and servicemen to the risk of politicized prosecutions. Yet, 139 other States have signed the Statute, among them most of the major allies of the United States—the United Kingdom, France, Germany, Canada, Australia, New Zealand, Belgium, Austria, Denmark and Sweden.

Although it is appreciated that the United States, as a superpower, is frequently involved in military operations abroad and exposed to somewhat greater risk than other countries, nevertheless the rationale given by the government is not persuasive as the Statute contains several safeguards for prosecution and the Court will be staffed by highly qualified and capable prosecutors and judges. The United States’ objections have been described as “at best, exaggerated far out of proportion to any actual risks to

be faced by United States personnel and, at worst, grounded in untenable extrapolations of international law."\(^\text{231}\) The position of the United States is even more perplexing because it had itself called for the establishment of the International Criminal Tribunals for Rwanda and the former Yugoslavia and the experience to date of these tribunals is excellent.

Second, in July 2004, the United States government announced that it would oppose provisions for inspections and verification of nuclear weapons and materials under the Nuclear Non-Proliferation Treaty.\(^\text{232}\) It is altogether strange that the United States, which led the fight for inspections and verification of Iraq's nuclear weapons and used Iraq's non-compliance as a principal justification for the invasion of that country, now itself rejects inspection and verification provisions under the treaty. Given the United States' objective of removing weapons of mass destruction wherever they may be found, it seems inconsistent for this government to adopt this attitude of non-cooperation under a treaty it has promised to observe. This position can only encourage other States like North Korea, Iran, Pakistan, India and Israel, which has one of the largest nuclear stockpiles, to equally resist inspection and verification of their countries' nuclear weapons. Moreover, such a position by the United States will result in making it easier for terrorists to obtain possession of nuclear weapons.

Third, many member States of the United Nations have accused the United States of violating the fundamental provisions of the United Nations Charter by its unilateral invasion of Iraq under the doctrine of pre-emption, instead of respecting the clear Charter injunction that decisions on such intervention should be based on the collective wisdom of the international community. It is unfortunate that the United States, which was one of the founding fathers of the United Nations, ignored the provisions of the Charter. Its proposed invasion of Iraq was never supported or authorized by the Security Council, which was still seised of the matter. As events have now proven, the arguments put forward by the United States of self-defence through pre-emption had no basis either in fact or law. Other arguments for intervention, such as to effect a regime change in Iraq, also have no legal basis in the Charter.


\(^\text{232}\) See Dafna Linzer, U.S. Shifts Stance on Nuclear Treaty: White House Resists Inspection Provision, WASH. POST, July 31, 2004 at A1 ("For several years the United States and other nations have pursued the treaty, which would ban new production by any state of highly enriched uranium and plutonium for weapons. . . . [T]he Bush administration told other nations it still supported a treaty, but not verification.").
Finally, as noted earlier, the failure of the United States to observe the provisions of the Third Geneva Convention and the Torture Convention is also very disturbing.

To sum up, all of the above actions by the United States government in recent years have only served to convey to the other States in the world that the United States is not serious about observing all of its international treaty commitments and the basic principles of international law or that it is selective about which commitments it will observe and which it will not. With such an attitude, it is going to be very difficult and possibly impossible for the United States to exercise any effective leadership in the war against international crime, particularly to persuade other States to honor their international obligations to fight international crime.

IV. CONCLUSION

The international legal framework to combat international crime, especially money laundering, the financing of terrorism and corruption, is now well-established in terms of the development of most of the fundamental norms that should be followed by all countries, financial institutions and other affected persons. Although there is broad agreement in principle to condemn terrorism and to take measures to fight it, there is still no true international consensus on the definition of "terrorism" and "terrorist organizations." In the absence of such consensus in clearly defining the enemy, it will be very difficult to produce a unified and coordinated international strategy to fight terrorism. More diplomatic efforts to promote a greater consensus are clearly called for, and countries like the United States and other developed countries need to address some of the root causes that give rise to terrorism through economic and social programs designed to promote better understanding and tolerance between nations. One such diplomatic effort might be to work steadily towards the adoption of a comprehensive new international convention against terrorism. The other would be to initiate development programs that seek to remove the root causes that foster terrorism and other international crimes.

In outlining some of the impediments to the war against international crime, my purpose is to suggest that much more work needs to be done to improve the conditions for compliance. The challenges faced by governments, financial institutions, corporations and law enforcement officials in fighting international crime are quite formidable. They need to be addressed in a systematic and coherent way if the war against international crime is to be won. As has been noted earlier, the war against international crime is no longer the business of governments alone. It is everybody's business. It is particularly interesting to note that the evolution of the norms towards fighting international crime has increasingly incorporated the active involvement of the private sector such as financial institutions, non-financial businesses and professions, non-profit organizations
and "gatekeepers" that can be misused for the laundering of criminal proceeds or the financing of crimes such as terrorism. Thus, civil society has been fully incorporated in this effort and the cooperation of all sectors of this society is critical for the success of law enforcement efforts.

For many years, the United States has been a champion and leader in fighting international crime such as drug trafficking, money laundering and corruption. Nevertheless, some of its recent actions in fighting the war on terrorism (including the financing of terrorism) have raised serious questions in the minds of many countries and even among many of its own legal scholars about its commitment to the rule of law and respect for the basic principles of international law. The United States cannot ask other countries to respect the rule of law or to comply with the principles of international law if it has itself failed to do so in a number of important instances which have been discussed in this Article. If the United States is to reclaim its role as leader in this war against international crime, as it clearly should, and if this war is to be won, it must quickly restore the trust and confidence that it had built up over the years throughout the world. There is simply no better way to lead than by the sheer force of example.

The war against international crime is a very serious and dangerous war. It is a war that must be won and won quickly. The costs of failure are just too high.