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**COMBATING TERRORIST FINANCING:  
GENERAL REPORT OF THE CLEVELAND PREPARATORY COLLOQUIUM\***

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*The Case Western Reserve University School of Law's Institute for Global Security Law & Policy and the International Association of Penal Law sponsored the "World Conference on Combating Terrorist Financing" from April 10-11, 2008. The symposium, held at the Case Western Reserve University School of Law in Cleveland, Ohio, was part of the Preparatory Colloquium for the Eighteenth International Congress of Penal Law. Representatives from each country participating in the Colloquium were asked to submit a "country report" summarizing laws aimed at combating terrorist financing in their respective countries. This General Report synthesizes the individual country reports and provides overall recommendations about how to combat terrorist financing around the world. The General Report considers country reports from the following countries: Argentina, Austria, Belgium, Brazil, Croatia, France, Germany, Guinea, Italy, Hungary, Japan, Poland, Romania, and the United States.*

INTRODUCTION

The international community accorded high priority to the issue of terrorist finance in the 1990s as evidenced by the General Assembly Resolution 51/210,<sup>1</sup> and more importantly, by the International Convention for the Suppression of the Financing of Terrorism.<sup>2</sup>

It is beyond doubt that financial controls against the financing of terrorism are useful and necessary. They perform a number of functions, including the reduction of possible harm caused by terrorist operations and attacks. Financial controls also facilitate the monitoring of militant activities so that preventive actions can be taken. They also enable the reconstruction

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<sup>1</sup> See G.A. Res. 51/210, ¶ 3(f), U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

<sup>2</sup> See International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270.

of events and the detection of co-conspirators who can then be pursued. Moreover, the knowledge that all types of financial activities are under scrutiny forces extremist groups to make frequent tactical changes and engage in communications, which generates valuable opportunities for intelligence gathering.

The Convention for the Suppression of the Financing of Terrorism gained new life after the September 11, 2001 attacks in the United States of America. In the aftermath of 9/11, numerous initiatives and measures supplemented this convention. What was previously known as anti-money laundering (AML) speedily expanded to also include countering terrorist finance (AML/CFT).

The new acronym reflected the consideration of the two types of activities as similar in at least many important respects, thereby justifying not only the parallel treatment of money laundering and terrorist finance for policy responses but also the application of largely the same legislative and regulatory tools against both activities. As seen in national reports received, this occasionally identical treatment gives rise to difficulties and calls for a thoughtful reconsideration of existing national and international measures.

National CFT laws and measures grew in number, scope and geographic application due to Financial Action Task Force (FATF), U.N., E.U., and other initiatives, including some springing from national levels. Lists of designated suspected terrorists were created and circulated and assets of those named in such lists were frozen, including those of non-profit organizations. Laws were introduced regarding terrorist finance and material support for terrorism.

Several heated debates accompanied these developments, including the process by which suspects' names are placed on a designation list and how should the names of those found innocent be removed from them. In some instances, the process of removal is unclear, while no judicial or other legal process addresses the status of a suspect on such lists; that is, there is frequently no criminal or other charge, no court proceeding and, in essence, no means for a judicial determination of guilt or innocence of named suspects. Nevertheless, the effects of executive decisions made on the basis of not fully known or transparent criteria and evidence are devastating for those affected. Concerns about due process and transparency are reflected in recent lawsuits, court rulings, opinions and authorities in a significant number of U.N. member states.<sup>3</sup> They are also echoed in the national reports

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<sup>3</sup> See *e.g.*, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the E.U. and Commission of the E.C.* (E.C.J. Judgment), Sept. 3, 2008, available at <http://curia.europa.eu/en/content/juris/index.htm>; *A, K, M, Q, & G v. H.M. Treasury*, [2008] EWHC 869 (Admin) (Eng.), available at [http://www.judiciary.gov.uk/docs/judgments\\_guidance/a\\_k\\_m\\_q\\_g.pdf](http://www.judiciary.gov.uk/docs/judgments_guidance/a_k_m_q_g.pdf); Rosemary Foot, *The*

received for this project, which accompany calls for a fundamental rethinking and redesign of the international and national CFT arrangements on the basis of long-standing, universal principles of criminal and human rights law as well as on the basis of evidence and facts relative to the financing of terrorism in general and with respect to particular extremist groups.

Unfortunately, the factual questions on terrorism finance are hard to answer due to the lack of systematic collection and analysis of reliable information at national and international levels. This problem has led to a collective call from the national representatives for the creation of a database.<sup>4</sup>

The following countries sent reports that have been taken into consideration: Argentina, Austria, Belgium, Brazil, Croatia, France, Germany, Guinea, Italy, Hungary, Japan, Poland, Romania and the United States.<sup>5</sup> In addition, we have received a report on the European Union. Moreover, an oral presentation on the situation in Mexico at the preparatory colloquium and reporting on other countries from external sources have also been considered.

In broad terms, this paper follows answers to the general questions raised in the questionnaire and which could be addressed during the forthcoming Congress.

#### I. EMPIRICAL ASPECTS

Authors of national reports had difficulties in finding information on the number of cases or methods of terrorism finance in their country. While most countries collect statistics on suspicious activity/transaction reports (SAR/STR), the dearth of detailed information affects law-making, policy and international cooperation. With the exception of very few countries, which offered some descriptions of suspicious activities, there is no concerted initiative to find out how the financing of terrorism takes place, how often, whether methods have changed overtime, for what amounts and for which particular terrorist groups.

Although the Belgian and Romanian reports outlined several transactions and cases, these were not proven terrorism finance cases, but rather, requests for investigation from other governments on the basis of undisclosed information and reported suspicious transaction (STRs), which need

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*United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas*, 29 HUM. RTS. Q. 489, 489–514 (2007).

<sup>4</sup> See *Draft Resolution: Cleveland Preparatory Colloquium*, 79 INT'L REV. OF PENAL L. 371(2008), available at <http://www.penal.org> (subscription only), reprinted in 41 CASE W. RES. J. INT'L L. 263 (2009).

<sup>5</sup> For the individual country reports, see *Cleveland Preparatory Colloquium*, 79 INT'L REV. OF PENAL L. (annex) (2008), available at <http://www.penal.org> (subscription only).

to be followed up and confirmed. If this does not occur, the continuing repetition of such reports may serve to perpetuate certain preconceived ideas. Romania appears to take this issue seriously and seeks to take into account empirical and scientific methods in the fight against terrorism. Media and other accounts are frequently unsupported, sensational and biased. Intelligence is not always correctly interpreted or corroborated leading to errors in accurately identifying financiers of terrorism. Hungary reported, for example, that it expelled one of its own citizens only to discover subsequently that the case was unfounded.

France, on the other hand, has reported that most terrorism finance (TF) cases can be characterized as "micro-finance," whereby terrorist operations are funded for comparatively petty crimes. This reality, however, contrasts sharply with TF measures that are generally devised to target very high amounts of money, because they are modelled largely after money laundering measures (see below).

The United States reports the existence of a "Terrorist Finance Tracking Program," which aims at identifying and disrupting terrorist networks. Yet, even there, law enforcement agencies do not systematically collect and analyze data on terrorists' use of all possible mechanisms and methods. So, there is no information on the number of detected terrorism financing cases and no breakdown of such cases by funding source, including non-Western and informal networks. As a result, controllers cannot conduct a complete and systematic analysis of trends and patterns from their own case data, which undercuts risk assessment and prioritization efforts.

So, even the few national reports that refer to some *modus operandi* do not rely on any comprehensive and systematic effort to collect and analyze verified information. Rather, they refer to *suspected* cases, anecdotal intelligence and unconfirmed connections to terrorism. Imperfect knowledge and stereotypes undermine policy-making and thereby security, the rule of law, and justice.

In the light of concerns and issues raised throughout the international community, there is an urgent need for evidence-based threat assessments and appropriate legal responses. We need a systematic effort to collect, validate, and make available empirical data that clearly illustrate the nature of terrorism finance and the ways in which laws or other measures are implemented to address the threats. As a result, the creation of a publicly available database is called for. This type of initiative would be able to furnish valid information, enable evidence-based policies, and make an extremely useful contribution to enhanced security.

## II. RATIFICATION OF UNIVERSAL AND REGIONAL INSTRUMENTS; LEGAL AND INSTITUTIONAL NATIONAL FRAMEWORK

All countries that reported have ratified the United Nations 1999 International Convention for the Suppression of the Financing of Terrorism

and many of the other universal terrorism conventions. Under this convention, the offense of terrorist financing is committed, if one “by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex,”<sup>6</sup> or by any 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 to abstain from doing any act.”<sup>7</sup>

The implementation and enforcement of terrorism and terrorism finance laws, however, suffers from the lack of uniform definitions of both terms. The difficulty of defining “terrorism” is well-known and the subject of intense discussions prompting many observers to argue for the introduction of a new terrorism convention aiming at the universal definition of the term.

Some countries, such as Japan and Guinea do not even attempt to define terrorism. Italy also does not define international terrorism. The United States defines differently the terms “terrorism” and “international terrorism.” The former refers to “premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience.”<sup>8</sup> The latter is defined as activities that:

- (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- (B) appear to be intended—
  - (i) to intimidate or coerce a civilian population;
  - (ii) to influence the policy of a government by intimidation or coercion; or
  - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended

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<sup>6</sup> International Convention for the Suppression of the Financing of Terrorism art. 9, Dec. 9, 1999, 39 I.L.M. 270

<sup>7</sup> *Id.* art. 2.

<sup>8</sup> 22 U.S.C. § 2656f(d) (West 2009).

to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.<sup>9</sup>

Romanian law considers terrorism as acts or threats that pose public danger, affect national security, and have the following characteristics: are premeditated, motivated by extremist beliefs or attitudes, employ violent and/or destructive means, are committed in pursuit of political objectives, target persons, public institutions and their belongings, and have a powerful psychological impact, in order to draw attention over the political objectives.<sup>10</sup>

Under French law, acts of terrorism are those included in the long list of Article 421-1 of the penal code, if committed intentionally in relation to an individual or collective endeavor aiming at seriously undermining the public order by intimidation or terror.

In Austria, terms such as “terrorist group,” “terrorist offences,” and “terrorist financing” are all defined in the Criminal Code in accordance with definitions contained in the E.U. Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).<sup>11</sup> An interesting example of practical difficulties created by definitional issues is offered by Germany. In Germany, since the legal definition of a “terrorist group” requires three or more persons, the law could not be applied to the two-person terrorist attempt to place a suitcase filled with explosives in a train in the summer of 2006.<sup>12</sup>

Similar definitional issues affect policies against the financing of terrorism as well. These are discussed in more detail in the section devoted to penal measures below. In short, the national reports show that some countries have a detailed separate incrimination, while others treat it as a preparatory act of terrorism or under conspiracy laws. In some countries, the laws are out of date and in need of amendments. In other countries, terrorism finance is almost the same as money laundering. In other countries, the term is used very broadly covering so many acts that legal challenges have been brought in courts—some successfully. Other countries do not define it at all, but consider it as participation in terrorism.

The institutional framework employed in the past to address questions of money laundering is essentially the same for terrorism finance, with financial intelligence units (FIUs) having responsibility for the collection and analysis of reports from financial institutions and the private sector.<sup>13</sup>

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<sup>9</sup> 18 U.S.C. § 2331 (West 2009).

<sup>10</sup> Lege Nr. 535/2004 [Law No. 535/2004] art. 1 (Romania).

<sup>11</sup> Strafgesetzbuch [StGB] [Penal Code] Bundesgesetzblatt art. 278b-d (Austria).

<sup>12</sup> Interview with author (on file with author).

<sup>13</sup> In Austria, however, there is a separate entity dealing with counterterrorism, including CFT. Roland Miklau, *Austria National Report: Cleveland Preparatory Colloquium*, 79 INT'L

However, some law enforcement agencies have created special units to look specifically into terrorism finance.<sup>14</sup>

### III. PREVENTION OF TERRORISM FINANCE

The general AML approach regarding registration and licensing, customer identification and due diligence, etc. apply to terrorism finance as well. Because there has been no insight into what transactions are indicative of terrorism finance, the practice internationally has been to check clients against lists of suspected and designated terrorist persons. Many countries are still in the process of enhancing their AML/CFT rules and overall framework to more fully comply with international standards set by U.N. conventions (not only the one against the financing of terrorism but also those against transnational organized crime and against corruption) and the Recommendations of the Financial Action Task Force.<sup>15</sup> The proper identification of clients is particularly challenging when it comes to illegal migrants who cannot have official documents issued by the host country. In response, Mexico and some Central American governments have issued their own identification documents States (*matricula consular*) for nationals present in the United States of America.

There is marked diversity among countries on which institutions are subject to these rules and frameworks. The applicability of CFT measures varies from financial institutions to other private sector entities and a range of professional categories. Countries with expanding lists of covered sectors and professional categories include Argentina, Japan, and the United States, but most markedly are Belgium and France,<sup>16</sup> which take certain risk factors into account (e.g., notary public, accounting professionals, casinos, investment companies, real estate agents, precious stone traders, art traders, etc.). Such expansions also reflect the Directive of the European Parliament and Council (Dec. 4, 2001) aiming at the coverage of all serious crimes includ-

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REV. OF PENAL L. (annex) 15–21 (2008), available at <http://www.penal.org> (subscription only).

<sup>14</sup> Such as the Terrorism Finance Operations Section (TFOS) at the Federal Bureau of Investigation (FBI) in the U.S. and the National Terrorism Financial Investigative Unit (NTFIU) in the U.K. See, e.g., *Terrorist Financing and Money Laundering Investigations: Who Investigates and How Effective are They?*, Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Gov't Reform, 108th Cong. (2004) (statement of Michael F. A. Morehart, FBI Counterterrorism Division), available at <http://www.fbi.gov/congress/congress04/morehart051104.htm>.

<sup>15</sup> See, e.g., *Guinea National Report: Cleveland Preparatory Colloquium*, 79 INT'L REV. OF PENAL L. (annex) 145–55 (2008), available at <http://www.penal.org> (subscription only).

<sup>16</sup> See National Reports of Argentina, Belgium, France Japan, and the United States, *Cleveland Preparatory Colloquium*, 79 INT'L REV. OF PENAL L. (annex) (2008), available at <http://www.penal.org> (subscription only).



ing terrorism finance, organized crime, and frauds against the financial interests of the European Union.

Bank secrecy laws and practices are quite diverse ranging from no such laws at all (e.g., Belgium does not have *stricto sensu* bank secrecy) to several countries reporting no practical problems so far, but theoretical possibilities of such rules impeding investigations or international cooperation in the future (see, for example, Croatia). Brazil, on the other hand, reports that, despite the 2001 bank secrecy law, bank confidentiality still limits the ability of stock exchange supervisors to fully monitor the sector and share all information with foreign counterparts. Although financial institutions must identify the owners and controllers of corporate accounts, they are not required to identify the final beneficiary of these accounts or of payments of insurance benefits.

The public-private interaction and cooperation is not uniform among countries. In some jurisdictions, such interactions are limited. Austria reports several good practices. After long-term debates, there are exchanges of information, training seminars and feedback between the financial sector and law enforcement authorities. Cooperation fora have also been set up and with annual strategic meetings. In addition, “the Supervisory Authority for the Financial Market” (*Finanzmarktaufsicht*—FMA), in cooperation with the competent branch of the Chamber of Commerce, has issued extensive guidelines and specific clarifications referring to the term “suspicious transaction” and to the typologies of such transactions. The Ministry of Justice and the Ministry of the Interior have informed the police and judicial authorities on new legal provisions, pertinent procedures and other issues.”<sup>17</sup>

Extensive interactions are also reported from the United States:

CFT authorities consult with the Bank Secrecy Act Advisory Group (BSAAG), which is comprised of representatives from the Treasury, FinCEN, the U.S. Department of Justice (DOJ), the Office of National Drug Control Policy, various law enforcement agencies, financial regulatory agencies (including . . . state regulatory agencies) as well as financial services industry representatives which are subject to BSA regulations (including trade groups and practitioners). The Secretary of the Treasury or his designee(s) sends the BSAAG, for consideration and comment, information concerning the administration and enforcement of the BSA and associated reporting requirements, and law enforcement’s use of such data. The BSAAG informs the participating private sector representatives about how law enforcement agencies make use of the filed reports. Based on this dialogue the BSAAG advises the Secretary of the Treasury on ways in

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<sup>17</sup> Roland Miklau, *Austria National Report: Cleveland Preparatory Colloquium*, 79 INT’L REV. OF PENAL L. (annex) 15–21 (2008), available at <http://www.penal.org> (subscription only).

which the reporting requirements could be modified to strengthen the ability of law enforcement agencies to use the information and/or to reduce the burden on reporting entities. Periodically regulators and law enforcement have outreach efforts to engage the private sector in a dialogue on AML/CFT and related issues (export control and economic sanctions). There are a variety of financial sector, bar, and trade association groups that discuss policies and implementation thereof.<sup>18</sup>

Even in this context, however, there is plenty of room for improvement, as the U.S. national report goes on to note:

The longstanding debate that U.S. AML/CFT policies are not as effective as they could be insofar as they are unilateral has continued. An important debate is that many of the policies are intended for other countries and are not required in the U.S. This debate rages with respect to corporate formation and regulation, transparency of entities, PEPs, and gatekeepers. For instance, the U.S. applies PEPs regulations only to foreign and not domestic PEPs. With respect to the gatekeeper regulations the U.S. government largely has not adopted any laws or regulations more than four years after the FATF June 2003 revised standards. In the private sector, the American College of Trust and Estate Counsel (ACTEC) is the only bar association to adopt AML good practice standards.<sup>19</sup>

In recent times, international organizations, policy-makers, and governments have been debating the respective benefits and shortcomings of principle-based and risk-based approaches to the implementation of preventive CFT measures.<sup>20</sup> In general terms, the former involves the application of certain rules and measures across the board, whereas the latter allows for some differentiation and stronger emphasis on areas of vulnerability. Austria, for instance, has been in favor of them since the beginning of AML policy debates. This preference was strengthened by the FMA guidelines and growing practical experience.

This experience notwithstanding, as a result of the lack of in-depth information and analysis of risks and threats noted above, the identification of vulnerabilities and alerts to the private sector as well as controllers are inevitably hampered. So, while risk-based approaches are widely discussed, practically there is little guidance from authorities on how to execute them.

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<sup>18</sup> Bruce Zagaris, *U.S. National Report: Cleveland Preparatory Colloquium*, 79 INT'L REV. OF PENAL L. (annex) 271-99 (2008), available at <http://www.penal.org> (subscription only).

<sup>19</sup> *Id.*

<sup>20</sup> See FINANCIAL ACTION TASK FORCE, GUIDANCE ON THE RISK-BASED APPROACH TO COMBATING MONEY LAUNDERING AND TERRORIST FINANCING: HIGH LEVEL PRINCIPLES AND PROCEDURES 3 (2007).

The listing of suspected terrorists or supporters for the purpose of refusing financial services, reporting suspicious transactions or freezing and confiscating assets has been widely practiced, but significant concerns about due process and constitutional issues as fundamental rights of suspects are not always observed. These are particularly worrying in the light of repeated mistaken identification of suspects who have nevertheless suffered consequences of administrative sanctions more severe than those possible following criminal convictions. Questions of human rights and democratic approaches to counter-terrorism are echoed throughout.

Strong arguments have been advanced for the reform of designation practices and standards and for judicial review and transparency. Current practices of executive decisions leading to long-term (punitive/deterrent) sanctions without trial or even formal accusations/charges are viewed as an issue that must be addressed thoughtfully and in accordance with international legal principles.

Perceptions of risk have led to significant preventive and other initiatives in the financial sector, informal value and fund transfer systems (IVTS)—which refers to ways in which value can be transferred either without leaving easily identifiable traces or entirely outside the formal financial system<sup>21</sup>—and non-profit organizations. The absence of comprehensive and valid evidence, analysis and useful guidance has led to very asymmetric and uncoordinated approaches that may be missing the most important targets.

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<sup>21</sup> See NIKOS PASSAS, *INFORMAL VALUE TRANSFER SYSTEMS AND CRIMINAL ORGANIZATIONS: A STUDY INTO SO-CALLED UNDERGROUND BANKING NETWORKS* (1999), available at <http://www.apgml.org/frameworks/docs/8/Informal%20Value%20Transfer%20Systems%20-%20Passas.pdf>. See generally Nikos Passas, *Hawala and Other Informal Value Transfer Systems: How to Regulate Them?*, 5 J. RISK MGMT. 39, 39–49 (2003); NIKOS PASSAS, *INFORMAL VALUE TRANSFER SYSTEMS, TERRORISM AND MONEY LAUNDERING: A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE* (2005), available at <http://www.ncjrs.org/pdffiles1/nij/grants/208301.pdf>; Nikos Passas, *Indicators of Hawala Operations and Criminal Abuse*, 8 J. MONEY LAUNDERING CONTROL, 168–72 (2004); NIKOS PASSAS, *INFORMAL VALUE TRANSFER SYSTEMS AND CRIMINAL ACTIVITIES* (2005), available at [http://english.wodc.nl/onderzoeksdatabase/99.154a-underground-banking-systems-vervolg.aspx?nav=ra&l=geografisch\\_gebied&l=azie](http://english.wodc.nl/onderzoeksdatabase/99.154a-underground-banking-systems-vervolg.aspx?nav=ra&l=geografisch_gebied&l=azie); Mohamed el Qorchi et al., *Informal Funds Transfer Systems: An Analysis of the Informal Hawala System* (Int'l Monetary Fund, Occasional Paper No. 222, 2003); Lee Rensselaer, *Terrorism Financing: The U.S. and International Response*, Congressional Research Service Report (Dec. 6, 2002); Samuel. M. Maimbo, *The Money Exchange Dealers of Kabul: A Study of the Informal Funds Transfer Market in Afghanistan* (World Bank, Working Paper No. 13, 2003), available at [http://www1.worldbank.org/finance/html/amlcft/docs/06.23.03%20The%20Hawala%20System%20in%20Afghanistan%20\(Maimbo\).pdf](http://www1.worldbank.org/finance/html/amlcft/docs/06.23.03%20The%20Hawala%20System%20in%20Afghanistan%20(Maimbo).pdf); FIN. ACTION TASK FORCE, *COMBATTING THE ABUSE OF ALTERNATIVE REMITTANCE SYSTEMS: INTERNATIONAL BEST PRACTICES* (2003), <http://fatf-gafi.org/dataoecd/39/17/34033713.pdf>; CHRISTINE HOWLETT, *INVESTIGATION AND CONTROL OF MONEY LAUNDERING VIA ALTERNATIVE REMITTANCE AND UNDERGROUND BANKING SYSTEMS* (2001), <http://www.ncjrs.gov/pdffiles1/190720.pdf>.

For instance, most countries have either no provisions regarding IVTS (such as hawala, hundi, fei chien, black market exchange networks) or subject them to the same regulation as formal institutions. In Austria, Brazil, and France, international remittances are only allowed through the formal banking system. Argentina acknowledges the existence of substantial informal economic activity and Belgium reports suspicious transactions going through informal channels that may be connected to the funding of terrorism. Policy attention is therefore warranted. However, the approach taken by the United States and other countries applying the same rules to formal institutions and informal/ethnic money transfer companies and networks can be counterproductive, as it may result in less transparency and higher risks, if this makes informal operators shun authorities, go underground, and refuse to cooperate.<sup>22</sup>

Charitable organizations have also been targeted extensively, even though there is a lack of criminal prosecutions and convictions for terrorism charges. Many national reports refer to investigated cases but raise concerns about the accuracy of information and the legal process used.

Comparatively neglected, on the other hand, are other economic spheres, such as the commercial sector, where vulnerabilities have been found to be very significant.<sup>23</sup> Risk analysis and vulnerability assessments are therefore called for in order to establish priorities and allocation of resources.

#### IV. FREEZING OF ASSETS

Along with designation lists, the freezing of assets of those suspected of supporting terrorist groups represents another frequently employed enforcement mechanism against the finance of terrorism after the 9/11 attacks. In general, countries allow the freezing of assets of persons designated by the United Nations Security Council. Countries vary a great deal, however, as to the length of such measures and what they allow to be used or spent out of frozen assets for the needs of suspects. This is quite important because in the overwhelming majority of the cases, there is no criminal or other legal proceeding against those whose assets are frozen. The process of confiscation and use of confiscated assets also vary extensively across countries with many requiring a prior criminal conviction.

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<sup>22</sup> See Bruce Zagaris, *supra* note 18. See also Nikos Passas, *Fighting Terror with Error: The Counter-Productive Regulation of Informal Value Transfers*, 45 CRIME, L. AND SOC. CHANGE, 315, 315–36 (2006).

<sup>23</sup> See Nikos Passas & Kimberly Jones, *Commodities and Terrorist Financing: Focus on Diamonds*, 12 EUR. J. CRIM. POL'Y & RES. 1, 9 (2006). See generally Nikos Passas, *Setting Global CFT Standards: A Critique and Suggestions*, 9 J. MONEY LAUNDERING CONTROL 281 (2006).

Argentina, Japan, and the United States, for instance, do not allow the use of frozen funds for daily expenses or for legal costs faced by the owners of frozen assets. In Belgium, the Minister of Finance may authorize the use of frozen funds for basic living expenses, legal costs, management cost of these assets or for extraordinary expenses. In Brazil, the judge may allow a part of frozen assets to be used for the ordinary support of the suspect and his family.<sup>24</sup> Moreover, if criminal charges are not filed within a certain period or if the charges are ruled to be unfounded, the assets must be unfrozen. Interesting differentiations are found in Austria, where assets subject to E.U. (National Bank) Regulations and assets frozen on the basis of a court order may be frozen indefinitely and independently of criminal charges. Freezing orders by the Criminal Investigation Agency (BK/FIU), on the other hand, may not exceed six months.

Noteworthy is that the United States has both civil (*in rem*) and criminal (*in personam*) forfeiture systems, which provide for the forfeiture of instrumentalities and as well as the proceeds of an offense. The federal and state governments also can use administrative forfeiture in certain circumstances.

Many countries have elaborate procedures in place for the unfreezing of funds and possible reparation for those exonerated,<sup>25</sup> but this has proven quite difficult in practice with respect to terrorism-related asset freezes. As echoed in several reports and reiterated in the Cleveland colloquium, it is worth emphasizing the fact that asset freezes are not criminal sanctions for proven law violations but temporary preventive measures. Yet, the effect of these preventive measures with regard to terrorism finance has been at times *de facto* punitive and devastating to those affected for extended periods of time without legal recourse.

In additional legal and ethical considerations, there are practical questions regarding these measures. It would be important to know what has been the preventive effect against terrorism and terrorism finance. Cost-benefit analyses are common in many areas of public policy. Cost-benefit analyses were recommended frequently in the past with respect to money laundering rules, but these have been largely abandoned in the aftermath of 9/11. As the Italian national report observes, there are many laws and measures in place against the financing of terrorism, but there is no effort to assess the cost-effectiveness of preventive and other policies. Consequently, we do not know at which point we may over-shoot and reach a point of diminishing returns at national and international levels. Several authors of

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<sup>24</sup> Código de Processo Penal [C.P.P.] art. 137 (Braz.).

<sup>25</sup> See National Reports of Belgium, France, and the United States, *Cleveland Preparatory Colloquium*, 79 INT'L REV. OF PENAL L. (annex) (2008), available at <http://www.penal.org> (subscription only).

national reports recognize this point and call for a thoughtful examination of policy effects for maximum returns and enhanced security.

## V. PENAL LAW AND PROCEDURE

### A. *Penal Laws*

The national reports, consistently with other research efforts, show that there is no uniform legal approach to CFT. With respect to definitions of terrorism finance, sanctions, treatment of victims and penal procedures we find again extraordinary diversity among countries reaching the point of cacophony ultimately impeding international cooperation and mutual legal assistance. Some jurisdictions quickly adopted U.N. model laws, while others employed their own methods or merely extended money laundering provisions to cover CFT. The national regimes vary with respect to the range of activities and groups covered, the types of assets or financial activities included, the origin of funds raised to finance terrorist acts, the intent or knowledge of individuals, whether they target the financing of an activity, act or group, etc.

Japan does not define specifically either terrorism or terrorist finance. Instead, the conduct is covered by the criminalization of the act of offering or collecting funds in order to assist others for committing certain offences such as murder in order to threaten a public, national or local governing body.

Several countries have provisions specifically about the offense of terrorism finance. Argentina's penal code defines the offense as the act of collecting and providing goods or funds with the knowledge that they will be used in whole or in part to finance a terrorist group described in penal code article 213, or a member of these groups for the commission of a terrorist act.<sup>26</sup>

Belgium's penal code goes beyond goods and funds to include also the provision of information, material goods to a terrorist group or any form of funding an activity of a terrorist group, with the knowledge that such participation contributes to the commission of a crime or offense by that terrorist group.<sup>27</sup> In addition to this offense of financing a particular terrorist *group*, the Belgian penal code also criminalizes the provision of material goods or financing of a specific terrorist *offense*.<sup>28</sup>

The French penal code equates terrorism finance with acts of terrorism and covers goods, funds and information in its definition; it also re-

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<sup>26</sup> Cód. Pen. art. 213 (Arg.).

<sup>27</sup> Code Pén. art. 140 § 1 (Belg.).

<sup>28</sup> Code Pén. art. 141 (Belg.).

quires knowledge that these are meant to be used for the commission of an act of terrorism, even if that acts is not eventually committed.<sup>29</sup>

Germany offers no definition of the financing of terrorism and its laws do not provide a separate crime for the financing of terrorism. The financing of terrorism is considered as one possible type of terrorist activity punishable as participation in or support of a terrorist group.<sup>30</sup> Italy also treats this offense as participation in terrorism.

The U.S. has a set of statutes covering “material support of terrorism” and what constitutes a terrorist act.<sup>31</sup> Material support covers anyone who: “provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out . . . ” a long list of offenses.<sup>32</sup> Further, “material support or resources” means “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”<sup>33</sup> This has been criticized as overly inclusive in law review articles as well as in court with some success and more cases pending.

On the other extreme, terrorist financing in Brazil is punishable if treated as participation in terrorism, as defined in article twenty-nine of the Penal Code, which addresses conspiracy among persons.<sup>34</sup> Thus, it must be shown that the provision of resources to a terrorist or terrorist group is directly related to a terrorist act. Hence, material and indirect participation depends, on the initiation or the execution of a terrorist act. Brazilian au-

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<sup>29</sup> See C. PÉN. art. 421-2-2 (Fr.).

<sup>30</sup> Strfgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Bundesgesetzblatt, § 129a (F.R.G.) (stating that participation in a terrorist group is punishable, even without the commission of a terrorist act).

<sup>31</sup> See Cleveland Preparatory Colloquium, International Association of Penal Law, INT'L REV. OF PENAL L., Vol. 79, Nos. 3 & 4 (2008), available at <http://www.penal.org> (subscription only).

<sup>32</sup> 18 U.S.C. § 2339A (a) (West 2009).

<sup>33</sup> *Id.* § 2339A (b), declared unconstitutional in part by Humanitarian Law Project v. Mukasey, 509 F.3d 1122 (9th Cir. 2007) (holding bans on providing “training” and “service to designated foreign terrorist organizations were impermissibly vague and “other specialized knowledge” portion of ban on providing “expert advice or assistance” was also void for vagueness).

<sup>34</sup> Código Penal [C.P.] art. 29 (Braz.).

thors strongly criticize this arrangement, which may also violate constitutional standards.<sup>35</sup>

The bulk of CFT measures is based on previous anti-money laundering measures, even when the two offenses are defined clearly differently. De facto neglected in this process are the following:

- A growing consensus that terrorism finance and money laundering activities often involve very different activities, especially with respect to the volume of funds involved;
- That different aims underlie social responses to each (e.g., combating serious crime by depriving offenders of their illicit assets compared to prevention of terrorism through reduction of material support for it and information gathering); and
- A growing unease about the balance of benefits and costs of AML policies that gradually became an end in itself, rather than an instrument against serious crime.

In essence, the problem is that measures with debatable capacity to undermine criminal enterprises seeking to hide the origin of *voluminous* criminal proceeds have been applied to the usually much *smaller* amounts involved in terrorist operations.<sup>36</sup>

Rules regarding corporate criminal liability range from absence of such provisions in the national legal system (e.g., in Germany) and limited applications (as in Brazilian law, where corporate entities have such liability only in relation to environmental crimes) to full corporate criminal liability (e.g., in the United States).<sup>37</sup>

Historically, sanctions against politically motivated offenders have gone through phases characterized by a *regime de faveur*, when they were considered as aristocrats of delinquency and respected for their strong ideological commitments, to a *regime de rigueur*, as these offenders started being handled as terrorists.<sup>38</sup> The possible penalties against terrorism finance vary widely and range from five months to life imprisonment in the event of conviction, while it remains uncertain and unknown how long offenders

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<sup>35</sup> Carlos Eduardo Adriano Japiassú & Fauzi Hassan Choukr, *Brazil National Report: Cleveland Preparatory Colloquium*, 79 INT'L REV. OF PENAL L. (annex) 59–71 (2008), available at <http://www.penal.org> (subscription only).

<sup>36</sup> This refers mainly to the *operational* costs of terrorist activities. This is different from the *operating* costs of large and established terrorist groups that control certain geographic areas and perform quasi government functions.

<sup>37</sup> See also Law No. 25.246, art. 24 (Arg.) (describing how natural and legal persons can be held responsible for not reporting unusual or suspicious activities to the FIU, but only natural persons can be held responsible for terrorism financing).

<sup>38</sup> Nikkos Passas, *Political Crime and Political Offender: Theory and Practice*, 8 LIVERPOOL L. REV. 23, 26 (1986).



actually serve. In Austria, financing of terrorism is punishable by imprisonment from sixth months to five years. In Brazil, deprivation of liberty ranges from three to ten years. If the result of the offense is grave bodily injury, the penalty can be increased to twice that length, and if it results in death, it can be increased by three times. In Belgium, the length is five to ten years. In Japan, the maximum penalty for "offering or collecting funds in order to assist others for committing certain offences" is either ten years imprisonment with forced labor or a fine of ten million yen. In the United States, penalties are fines and/or imprisonment for a period of up to fifteen years for each violation, and if death of any person results, for any term of years or for life.<sup>39</sup>

Statutes of limitation are generally very long. In Brazil, there is actually no statute of limitation at all for this offense. In the United States, the time count starts at the point only when the facts of the offense are discovered.

The treatment of victims of terrorism is also diverse. In Argentina, for example, the procedure for compensation or reparation of victims is decided *ex post facto*. In Austria, victims of terrorism are entitled to compensation under the general provisions of the Act on Victims of Crime. In general, countries do not report any provisions for the use of confiscated assets for victim compensation. In Belgium, victims have the right to make their claims alongside penal procedures in terrorism cases or to pursue the civil route. In the United States, the legal system also allows for civil recourse and victims of terrorist acts overseas have brought civil actions successfully.

Finally, some reports point out the importance of context and illustrate how old laws introduced to address different problems may not be appropriate or adequate today. One example were the U.S. provisions against Nelson Mandela, which were drafted long after he was released from prison and became a well respect African leader. Brazil's National Security Law is another example. This law reflects the context of the military dictatorship at the beginning of the 1980s, when the primary concerns and priorities were rather different from contemporary ones.

As a result of the issues discussed above, there are well-grounded calls for careful reconsideration of the problems and reforms or adjustments of national laws.

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<sup>39</sup> See National Reports of Austria, Belgium, Brazil, Japan, and the United States, *Cleveland Preparatory Colloquium*, 79 INT'L REV. OF PENAL L. (annex) (2008), available at <http://www.penal.org> (subscription only).

*B. Penal Procedure*

The pace of creating new counter-terrorism financial regulatory and enforcement measures has been brisk and mainly has emanated from the executive branch. The legislative, administrative, and judicial processes have struggled to keep pace and to provide a fair process in determining whether all actions are effective, based on solid evidence, fairly and consistently enforced.

One matter that preoccupied the authors of many national reports is the designation process of suspects of terrorism under United Nations, European Union or national processes. The areas of focus revolve around the applicable standards, the procedures used domestically for enforcement and the procedures for de-listing those against whom no sufficient evidence has surfaced. This is particularly sensitive given that most of the designations are not done on the initiative or evidence produced by a domestic authority but through international organizations with little insight as to the inner workings and criteria.

As noted earlier, the listing process is administrative in nature and preventive in its objectives, yet the consequences for those affected by the measures are often harsher than for those convicted of serious criminal offenses. The process has become controversial with legal challenges underway in national courts as well as before the European Court of Justice relating to due process, transparency and right of appeal. The European Union report summarizes several cases, comprehensively addresses many critical issues at that regional level as well as the implementation of United Nations Security Council Resolutions relative to terrorism finance,<sup>40</sup> so these will not be repeated here. Noteworthy, however, is that these are not formalistic actions. They concern substance, justice, and avoidance of harm to innocent parties. As the United States and Hungarian national reports clearly illustrate, there have been several errors and lack of evidence in the past raising justified concerns throughout the international community and undermining the legitimacy of the overall endeavor to strengthen security.

The Belgian report has confirmed how keen the government is to meet its international obligations through swift action but without external supervision and controls. Notable is a legal case cited in this report, whereby the Belgian government was ordered to do the necessary for the removal of two names from the designation list.

Administrative and executive units are generally responsible for the implementation and enforcement of TF measures. In Japan, this is the task of a special administrative committee composed of senior officials from

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<sup>40</sup> See Council Common Position (EC) No. 931/2001 of 27 Dec. 2001, 2001 O.J. (L. 234) 93. See also Council Regulation 881/2002, 2002 O.J. (139) 9.

various Ministries (e.g., Justice, Finance, Foreign Affairs, the Economy, Trade, and Industry).

The Austrian designation implementation illustrates how most countries proceed: measures against suspects appearing on lists related to U.N. Resolutions are taken on the basis of administrative regulations of the Austrian National Bank. There is no judicial process and no judicial remedy. "Inner-European" terrorism (e.g., Northern Ireland and Basque areas) is addressed through a coordination process on the European Union level in the framework of the Common External and Security Policy which leads to common positions concerning the listing of names or groups whose assets are to be frozen by member states.

In the United States, several federal agencies are in charge of the designation process, but there are no official/publicly available standards on how precisely they operate and employ a "reasonable cause" standard. Information has often turned out to be incomplete or erroneous, which has caused implementation and compliance difficulties for the financial sector as well as other countries called upon to sanction the same persons. As the U.S. report notes:

In 1998, OFAC [the Office of Foreign Asset Controls] issued, but then less than one year later withdrew a regulation providing for the right to review the factual basis or reasons for the initial blacklisting decision. Apparently, OFAC's withdrawal was based partly upon a concern for protecting intelligence sources and methods. Although parties can still request that a blacklisting decision be administratively reconsidered, they no longer have a regulatory right to review the basis for the agency's actions.

The report summarizes cases where mistaken identities and unfounded suspicions led to drastic but regrettable action against individual and organizational actors.

In the United States, actions have also stirred controversy when it was discovered that national and international laws were violated by the surveillance and monitoring of SWIFT fund transfer messages as well as electronic and telephonic communications.<sup>41</sup>

Hungary also reports cases where mistakes were made. In one instance, a case was dropped because of the lack of good evidence—that is, the case was based on allegations made by a person with a criminal/police record and two previous extraditions from Hungary.

Finally, the question about extraordinary and emergency measures in pursuit of counter-terrorism policies struck a sensitive cord and lively debate and arguments in the reports as well as the Cleveland colloquium. Authors of the national reports were unanimous in condemning the violation

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<sup>41</sup> See Bruce Zagaris, *supra* note 18.

of human rights, including the use of torture, double standards, reversal of burden of proof, etc., some of which are specifically prohibited by their own constitutions too.

Most countries provide for special investigative techniques, secret surveillance or undercover investigations. All reports underline the importance of prior authorization of exceptional measures and proper supervision in order to avoid fishing expeditions and unnecessary violations of citizens' privacy rights.

#### VI. INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

The international cooperation against terrorism, including the finance of terrorism, has been quite extraordinary since September 2001. Nevertheless, thorny issues remain, particularly with respect to the appropriate use of intelligence that cannot be shared by national governments. The past errors, examples of draconian measures despite the lack of sufficient or shareable evidence, due process and transparency questions, violations of national and international laws by government agencies combine with the absence of universal definition of terrorism and terrorist group to render international cooperation less than fully effective and smooth.

National provisions against extradition or mutual legal assistance in cases deemed to be of political nature may continue to frustrate requesting States, despite the acceptance of the general principle *aut dedere, aut judicare*.

National standards for extradition or mutual legal assistance still vary a great deal,<sup>42</sup> but it is hoped that recent U.N. conventions against terrorism, financing of terrorism, transnational organized crime, and corruption will be implemented effectively and thereby improve the understanding of how different legal systems work and bolster significantly international cooperation (the latter two U.N. conventions contain very comprehensive international cooperation provisions).

#### CONCLUSION

In conclusion, while virtually all agree on the necessity of financial controls against terrorism, the current patchwork of regulatory arrangements leaves plenty of room for improvement. Many of the national laws and measures against the finance of terrorism is driven by external and international institutions, the approaches are inconsistent and asymmetrical, the procedures and processes are non-transparent, the criteria are unclear, preventive and temporary measures last for extended periods of time and have

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<sup>42</sup> Austria, for instance, generally acts upon mere requests containing a statement of facts, without evidence requirements; Brazil has detailed requirements on extradition but virtually none for mutual legal assistance.

severe impact on those subject to them, errors have been made repeatedly and disagreements on who is and who is not a terrorist are unlikely to be resolved in the immediate future.

Importantly, there is no systematic and valid knowledge on precisely how different countries go about controlling the finance of terrorism and how effective they are. The international community still does not have a good overall picture of the methods terrorist groups use, their needs, how they shift their modus operandi in response to counter-terrorism, and how different funding mechanisms are (or are not) accessible to specific groups or ideological/religious orientations. In other words, we do not know exactly what the nature of terrorism finance is, how countries and regions target it, how we can offer better guidance to the private sector whose cooperation is vital, and how to improve the effectiveness of our social and legal controls.

In this light, we can all agree that the systematic research and database recommended in the section of "empirical aspects" may offer the insights and solid grounds on which policy can be constructed, legitimacy can be strengthened and security can be enhanced. As academics and scholars, we have the duty to pursue and participate in this critical project.