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## Foreword: Combating Terrorist Financing

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## FOREWORD: COMBATING TERRORIST FINANCING

*Richard Gordon\* & Christyn Rossman†*

As with all human endeavors, successful terrorism requires resources, which is why even prior to the tragic events of September 11, 2001, combating terrorist financing has been an important law enforcement tool.<sup>1</sup> With the increased focus on terrorism after September 11, governments, scholars, and practitioners have raised many questions regarding how best to combat terrorist financing. What party is best suited to bear the burden of compliance: government or financial institutions? Can informal financial systems be regulated without unreasonable burdens? Do non-profit institutions deserve heightened scrutiny?

In an effort to help answer these questions, the Case Western Reserve University School of Law's Institute for Global Security Law and Policy hosted a symposium entitled, "The World Conference on Combating Terrorist Financing," from April 10 to 11, 2008. The symposium was part of the International Association of Penal Law's two-day Preparatory Colloquium for its Eighteenth International Congress of Penal Law.<sup>2</sup> This issue features the articles generated from the symposium.

### COMBATING MONEY LAUNDERING AND TERRORIST FINANCING

Anti-money laundering (AML) and combating the financing of terrorism (CFT) preventive measures create a constant tension between finan-

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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); see also International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. No. 106-9, 2178 U.N.T.S. 229.

<sup>2</sup> A webcast of the conference is available at <http://law.case.edu/centers/igsip/webcast.asp?dt=20080411>.

cial institutions and governments over the responsibility to catch potential money launderers and terrorist financiers. International AML/CFT standards and domestic laws place considerable responsibility to discover launderers and terrorist financiers squarely on the shoulders of financial institutions. AML/CFT preventive measures are fundamentally different from other, truly prudential rules that are designed to protect the safety and soundness of individual financial institutions and the financial system as whole. Before AML rules were established, banks did not consider themselves in the business of catching criminals. Similarly, before the addition of CFT rules they did not consider themselves in the business of catching terrorists. Even the link between AML and CFT regulations is not entirely apparent. The anti-money laundering principles were designed to stop crooks from taking dirty money, running it through a bank or other financial institution, and in doing so, hiding that it was their money or that it was the proceeds of crime. Yet combating terrorism financing does not focus on the origin of money, but more critically on the ultimate use of the money.

A central actor in AML/CFT regulation is the Financial Action Task Force (FATF), an inter-governmental body designed to adopt and implement measures designed to counter the use of the financial system by criminals.<sup>3</sup> One of the first acts of the FATF was to create a list of 40 Recommendations against money laundering. The 40 Recommendations were (more or less) divided into three subject areas: (1) strictly criminal law and enforcement; (2) international cooperation; and (3) "preventive measures for financial institutions." Those so called "preventive measures" included such matters as banning bank secrecy, monitoring of client accounts for suspicious transactions that might indicate money laundering, and reporting such suspicions to appropriate government authorities.

In the aftermath of the September 11 terrorist attacks, the FATF was tasked with expanding its 40 recommendations against money laundering to include terrorism finance, and a few weeks later the FATF adopted the 8 Special Recommendations against Terrorism Finance.<sup>4</sup> While terrorism had existed before 9/11, the FATF 40 had made no explicit reference to it.

Some of the 40 original FATF recommendations were easily extended to terrorism financing. With respect to criminal enforcement, the FATF 40 required criminalizing money laundering, signing on to relevant international treaties, and cooperating with other countries in investigating and prosecuting such cases. These requirements were extended to crimina-

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<sup>3</sup> Financial Action Task Force, *The Forty Recommendations* (June 20, 2003), <http://www.fatf-gafi.org/dataoecd/7/40/34849567.pdf>.

<sup>4</sup> Financial Action Task Force, *Special Recommendations on Terrorist Financing* (Oct. 22, 2004), <http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf>.

lizing terrorism financing, signing on to relevant treaties concerning terrorism, and cooperating in terrorism financing cases. The FATF also extended preventive measures to include terrorism financing. For example, Special Recommendation IV extends suspicious transaction/activity reporting to terrorism financing transactions.<sup>5</sup>

The increased compliance requirements targeting financial institutions prompted concerns as to whether the procedures would prevent terrorist acts or unnecessarily complicate the flow of monetary funds. Sue Eckert, Former Assistant Secretary of Export Administration, noted that “[i]n a rush to action following the terrorist attacks, existing AML measures were extended, largely unmodified, to address terrorist financing.”<sup>6</sup> Even the FATF’s guidance acknowledged that financial institutions will probably be unable to detect terrorist financing unless a known terrorist opens an account.<sup>7</sup>

In light of institutional concerns and emerging empirical data, complex questions regarding effective measures to combat the financing of terrorism exist. In order to best address these questions, the “World Conference on Combating Terrorist Financing” symposium was organized into four distinct panel discussions: (1) Issues in Formal Financial Institutions; (2) Issues in Informal Funds and Value Transfer Systems; (3) Charities and Special Recommendation VIII; and (4) Key Developments in Enforcement and Asset Seizure. During the panel discussions, current and former government officials, scholars, and practitioners, shared their thoughts and ideas regarding the legal and practical issues associated with combating the financing of terrorism.

#### OVERVIEW OF THE SYMPOSIUM ISSUE

The forward-looking articles in this issue not only outline current problems in combating terrorism financing but also suggest possible avenues for solving these problems. In *Time to Re-examine Regulation Designed to Counter the Financing of Terrorism*, Richard Barrett, Coordinator of the United Nations Al Qaida Monitoring Team, details from his personal perspective how regulation contributed to defensive measures to combat terrorism. Barrett analyzes the impact of regulation based on evidence of how Al Qaida leaders and local cells acquired funds for their operations.

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<sup>5</sup> *Id.* at 1.

<sup>6</sup> Sue Eckert, *The US Regulatory Approach to Terrorist Financing*, in COUNTERING THE FINANCING OF TERRORISM 209, 217 (Thomas J. Biersteker & Sue E. Eckert eds., 2008).

<sup>7</sup> Financial Action Task Force, Guidance for Financial Institutions in Detecting Terrorist Financing (April 24, 2002), <http://www.fatf-gafi.org/dataoecd/39/21/34033955.pdf>.

Barrett contrasts the financing methodology of the Taliban and Al Qaida to demonstrate the limited effectiveness of financial regulations.<sup>8</sup>

Jimmy Gurulé, Professor of Law at Notre Dame Law School, explores efforts by the United Nations to combat terrorist financing in *The Demise of the U.N. Economic Sanctions Regime to Deprive Terrorists of Funding*. Professor Gurulé surveys the implementation and effect of the U.N. Security Council resolutions that form an international assets freeze program. By examining the legal challenges to domestic implementation of the resolutions, the article analyzes possible weaknesses in the program's future success. Professor Gurulé outlines several important recommendations for enhancing the effectiveness of the counter-terrorism sanctions program.<sup>9</sup>

From an alternative perspective, *Applying Asset Recovery Concepts to Disrupt Terrorist Financing* outlines the advantages of pursuing the personal assets of terrorists. Authors Jack Smith, former Deputy General Counsel of the Federal Deposit Insurance Corporation, and Gregory Cooper, a Fulbright Scholar at the Basel Institute of Governance, cite terrorist organization's efforts raise funds worldwide through "witting and unwitting" contributions from mosques, non-governmental organizations, wealthy donors, and charitable foundations as a potential source of civil litigation. Based on the positive impact of civil and criminal asset recovery enacted by Anti-Terrorism Act of 1992 in the United States, the authors conclude aggressive asset recovery programs could serve as a powerful tool in combating terrorism.<sup>10</sup>

Ross Delston, former Consulting Counsel for the AML/CFT Unit at the International Monetary Fund, and Stephen Walls, an R. Michael Gad-baw Fellow on the International Law & Policy Team of the General Electric Company, propose that a Financial Action Task Force recommendation regulating trade based money laundering would close a relatively untouched avenue of terrorist financing. In *Reaching Beyond Banks: How to Target Trade-Based Money Laundering and Terrorist Financing Outside the Financial Sector*, Delston and Walls illustrate that the Financial Action Task Force's prior success using "name and shame" sanctions could extend regulatory pressure beyond financial institutions to business organizations. Preventing trade based money laundering involves crafting a compliance program that extends to business organizations engaged in trade. According to Delston and Walls, requiring parties in the international supply chain to

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<sup>8</sup> Richard Barrett, *Time to Re-examine Regulation Designed to Counter the Financing of Terrorism*, 41 CASE W. RES. J. INT'L 7 (2009).

<sup>9</sup> Jimmy Gurulé, *The Demise of the U.N. Economic Sanctions Regime to Deprive Terrorists of Funding*, 41 CASE W. RES. J. INT'L 19 (2009).

<sup>10</sup> Jack D. Smith & Gregory J. Cooper, *Applying Asset Recovery Concepts to Disrupt Terrorist Financing*, 41 CASE W. RES. J. INT'L 65 (2009).

adopt AML safeguards to protect their businesses, could curtail trade-based money laundering as a terrorist financing channel.<sup>11</sup>

The International Association of Penal Law's *General Report on Terrorism Financing*, composed by Northeastern University College of Criminal Justice Professor Nikos Passas, sets forth a resolution draft for consideration at the Eighteenth International Congress of Penal Law.<sup>12</sup> The report and resolution draft are reprinted from the *International Review of Penal Law*. The report digests the empirical data collected in fifteen national reports submitted to the International Association of Penal Law's. The regulatory summary supports the resolution drafts proposal for "an adequate system of targeting terrorism finance."<sup>13</sup>

The articles in this symposium issue are among the most important yet written on the topic of terrorism financing because of their emphasis on solutions. The articles of Richard Barrett and Jimmy Gurulé not only underscore the difficulties in stopping terrorism financing, but also suggest how a change in focus may lead to beneficial developments, especially in the sanctions program. Jack Smith and Gregory Cooper, while noting past difficulties in seizing financial assets of terrorists, propose using existing asset recovery techniques to go further in tracing and seizing terrorist assets. While Ross Delston and Stephen Walls note a potentially huge loophole for terrorist financing in the use of trade invoicing, they propose crafting an effective antiterrorism financing compliance program for companies that could go a long way to closing that loophole. Finally, Nikos Passas's proposed resolution draws together key elements of anti-terrorism financing with concern for protecting fundamental human rights. Collectively, the articles in this symposium issue propose forward-looking solutions to combating the financing of terrorism and provide a key reference for anyone working in the field.

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<sup>11</sup> Ross Delston & Stephen Walls, *Reaching Beyond Banks: How to Target Trade-Based Money Laundering and Terrorist Financing Outside the Financial Sector*, 41 CASE W. RES. J. INT'L 85 (2009).

<sup>12</sup> *General Report*, 79 INT'L REV. OF PENAL L. 325 (2008), reprinted in 41 CASE W. RES. J. INT'L 243 (2009).

<sup>13</sup> *General Report*, 41 CASE W. RES. J. INT'L L. 263, 264 (2009).