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Lan Cao

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# The Transnational and Sub-National in Global Crimes

By  
Lan Cao\*

## INTRODUCTION

Human trafficking and money laundering are international problems that have been fueled by globalization. "Fundamentally the Global Age involves the supplanting of modernity with globality. . . ."<sup>1</sup> At the heart of the globalization debate lies the market and its relationship to the nation state. Due to globalization, markets and other non-state entities are increasingly important actors in the political and economic orders.<sup>2</sup> Commerce has transcended territorial definitions and is now extra-territorial and global in orientation, as capital, technology, and investment routinely cross national boundaries.

This phenomenon, referred to interchangeably as globalization, transnationalization, postnationalization, or denationalization,<sup>3</sup> involves the process by

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\* Lan Cao is Professor of Law at the William & Mary Law School. Thanks to Meghan Hallock, Bradley Henderson, Mugdha Kelka, Ryan Pedraza and Jeff Reale for valuable research assistance.

1. MARTIN ALBROW, *THE GLOBAL AGE* 4 (1996); *see also* MALCOLM WATERS, *GLOBALIZATION* 1 (1995) ("globalization may be the concept of the 1990's, a key idea by which we understand the transition of human society into the third millennium."); ROLAND ROBERTSON, *GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE* 113 (1992). This discussion on globalization in the Introduction is drawn from Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401 (2002).

2. *See generally* LOWELL BRYAN & DIANA FARRELL, *MARKET UNBOUND: UNLEASHING GLOBAL CAPITALISM* (1996); SUSAN STRANGE, *THE RETREAT OF THE STATE* (1996); HENRY WENDT, *GLOBAL EMBRACE: CORPORATE CHALLENGES IN A TRANSNATIONAL WORLD* (1993).

3. Terms such as globalization, internationalization, transnationalization, postnationalization, and even denationalization have been used to describe the process by which activities, which were once taking place within national borders, are now taking place beyond national borders. *See* R.J. BARRY JONES, *GLOBALISATION AND INTERDEPENDENCE IN THE INTERNATIONAL POLICY ECONOMY* 3 (1995). Goods, financial instruments, capital, services, technology, even culture itself, are being exchanged across national borders. Each of the terms above describes something about that process, although each term may connote something specific about the character of and consequences to this phenomenon.

The term "globalization" is generally associated with various forms of linkages among businesses and markets across and without regard to national borders and usually connotes some erosion of the national state, provoking questions about the meaning of democracy, participation, sovereignty. *See* Gordon R. Walker & Mark A. Fox, *Globalization: An Analytical Framework*, 3 IND. J. GLOBAL LEGAL STUD. 375, 380 (1996) ("Internationalization" or "transnationalization" may simply mean "cooperative activities of national actors," bilaterally or multilaterally so that the national is not necessarily diminished); *see also* Anne Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997) ("The state is not disappearing, it is desegregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies, executives, and even legisla-

which activities that historically took place within national borders are now conducted across national borders through the intermediary of non-state actors. This process is most evident in the fields of trade and investment. The global economy has made it easier for multinational companies to engage in transnational economic activities such as "world-wide sourcing"<sup>4</sup> and foreign direct investment,<sup>5</sup> thus freeing companies from the restraints and "factor endowment of a single nation"<sup>6</sup> and allowing them access to resources and markets across

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tures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order.”). “Postnationalization” implies a shift, conceptually and paradigmatically, from the national to something beyond the national, although the term does not necessarily implicate a shift in the relationship between the state and the market, as in “globalization,” but rather a shift in the relationship between the state and other non-market, non-state entities, such as non-governmental organizations in the fields of human rights and the environment. See, e.g., Richard Falk, *The Making of Global Citizenship*, in *GLOBAL VISIONS: BEYOND THE NEW WORLD ORDER* 47-48 (Jeremy Brecher et al. eds., 1993); Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 *WORLD POL.* 311, 312-13 (1995). “Denationalization” is less used, but refers to the phenomenon, primarily economic, in which the national is diminished. See SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 31 (1995) (“Economic globalization has contributed to a denationalizing of national territory.”). “Transnationalization,” “postnationalization,” and “denationalization” have also been used to describe wholly non-economic developments, to capture the emergence of cross-national or sub-national identities to give rise to a new meaning of citizenship that is multiple and transterritorial. See, e.g., Peter J. Spiro, *The Citizenship Dilemma*, 51 *STAN. L. REV.* 597 (1999) (book review); Yasemin Nuhoglu Soysal, *Changing Parameters of Citizenship and Claims-Making: Organized Islam in European Public Spheres*, in 26 *THEORY & SOC’Y* 509, 513 (1997) (post-national citizenship).

4. SUSAN STRANGE, *STATES AND MARKETS* 82 (2d ed. 1994). See, e.g., J. Linn Allen, *Chicago Mecca for Real Estate Gurus*, *CHI. TRIB.*, Sept. 8, 1996, § 3, at 1 (describing how a major telecommunications company outsources management of its real estate assets to another company); Leslie Helm, *The Fading Metropolis*, *L.A. TIMES*, June 3, 1996, at D1 (describing how a major accounting firm institutes “hoteling” for its auditors—auditors are to make reservations to use a limited number of office spaces when not conducting audits); see also Norman Jonas, *The Hollow Corporation*, *BUS. WK.*, Mar. 3, 1986, at 57-58 (“Outsourcing breaks down manufacturers’ traditional vertical structure, in which they make virtually all critical parts, and replaces it with networks of small suppliers . . . . In the short run, the new system may be amazingly flexible and efficient. In the long run, however, some experts fear that such fragmented manufacturing operations will merely hasten the hollowing [out of U.S. industry].”). Various industries are resorting increasingly to outsourcing.

5. In the United States, foreign direct investment is defined as “the ownership or control, directly or indirectly, by one foreign person of 10 per centum or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch.” 15 C.F.R. § 806.15(a) (1998). “A key element of the structural transformation into the global company town was the role played by the multinational corporation and foreign direct investment . . . . Technological advances have played a part in triggering the global revolution, but the multinational corporation has evolved to become an important vehicle for allocating resources.” Bijit Bora, *The Implications of Globalisation for Australian Foreign Investment Policy*, in *ECONOMIC PLANNING ADVISORY COMMISSION, GLOBALIZATION: ISSUES FOR AUSTRALIA* 92 (1995), quoted in Walker & Fox, *supra* note 3, at 375. The flow of foreign direct investment into and out of a country is routinely used as a reliable indicator or gauge of corporate international expansion. See U.N. Center on Transnational Corporations, *The Process of Transnationalization in the 1980s*, in *READINGS IN INTERNATIONAL BUSINESS: A DECISION APPROACH* 23, 26, 33 (Robert Z. Aliber & Reid W. Click eds., 1993). The growth of foreign direct investment in 1995 exceeded that of export of goods and non-factor services by 18 percent and world output by 2.4 percent. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT*, at 3 (1996).

6. MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 14 (1990).

national boundaries.<sup>7</sup> Multinational companies routinely operate in many countries besides their home countries and the products they make are themselves global composites, with parts manufactured in multiple national jurisdictions.<sup>8</sup>

This shift has meant more than simply the internationalization of economic activities.<sup>9</sup> It has also resulted in a fundamental transformation of the relationship between market power and state authority, in which the state is increasingly unable or unwilling to regulate the activities of non-state actors.<sup>10</sup> This process has provoked a shift from public to private modes of regulation and a shift from territorially-based to non-territorially based centers of authority.<sup>11</sup>

This altered relationship between the state and the market has had a significant impact not just on conventional trade but also on the trade in "violence commodities."<sup>12</sup> The erosion of state sovereignty and the concomitant "compression of the world"<sup>13</sup> through developments in technology, transportation, communication, and information processes have created a "borderless global economy"<sup>14</sup> in which criminal activities too are increasingly transnational.

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7. Asea Brown Boveri, Inc., a Swiss-Swedish electrical engineering company, for example, considers itself "a company without any regard to national boundaries." See Charlene Marmer Solomon, *Transplanting Corporate Cultures Globally*, PERSONNEL J., Oct. 1993, at 78, 80 (statement by Richard P. Randazzo, ABB's Vice-President of Human Resources). ABB also planned to lay off a thousand Swiss workers and invest \$1 billion in Asia. WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* 62 (1997).

8. For a discussion of the effect globalization has on corporate nationality and products' rule of origin, see Cao, *supra* note 1.

9. Some of the transformations associated with globalization have been identified as early as 1944 by Karl Polanyi. See generally KARL POLANYI, *THE GREAT TRANSFORMATION* (1944). However, while the rise of the market and the retreat of the state might have occurred previously, they have not occurred with such speed nor breadth. "[T]oday's era of globalization is not only different in degree; in some very important ways it is also different in kind . . . . Today's era of globalization is built around falling telecommunications costs—thanks to microchips, satellites, fiber optics and the Internet. These new technologies are able to weave the world together even tighter." THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* xv (1999).

10. Multinational corporations, for example, are increasingly mobile and unconstrained by national or territorial restrictions. See generally U.N. Conference on Trade and Development, *Programme on Transnational Corporations, World Investment Report 1993: Transnational Corporations and Integrated International Production*, U.N. Sales No. E.93.II.A.14 at 161, U.N. Doc. ST/CYC/159 (1993) [hereinafter WIR 1993] (discussing the inability of states to regulate corporate multinational activities whether for tax and other revenue-raising purposes or to restrain unfair business practices).

11. In this way, free market globalization, like its antithesis from a prior era, communist internationalism, is obtuse to the pull of the particular and instead exhibits behavior that generally scorns the relevance of place. See, e.g. ROSA LUXEMBURG., *THE NATIONAL QUESTION*, SELECTED WRITINGS BY ROSA LUXEMBURG 135, 159, 161 (Horace B. Davis ed., 1976) (favoring internationalism over nationalism, which Luxemburg considered to be a mask for class division); see also JOHN GRAY, *FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM* 3 (1998) (equating the flaws of global capitalism with those of global communism).

12. Alex Y. Seit, *The Role of Market Forces in Transnational Violence*, 60 ALB. L. REV. 635, 637 (1997) ("Illegal or not, the demand for (and supply of) particular commodities can often be a contributing cause of violence, whether narrowly defined to mean death or serious physical injury to human beings, or broadly defined to include psychological harm to human beings and physical harm to other living organisms and the environment.").

13. ROBERTSON, *supra* note 1, at 8.

14. Mike Featherstone & Scott Lash, *Globalization, Modernity, and the Spatialization of Social Theory: An Introduction*, in GLOBAL MODERNITIES 2 (Mike Featherstone et al. eds., 1995).

Transnational organized crime has become "the new authoritarianism."<sup>15</sup> Governments are pitted against market forces, but in this case, the latter are not conventional markets but rather markets of violence. Trafficking in women is only one part of a global decentralized network of crime, in which the actors are highly mobile, stateless, and in a transnational market, unbound by geography.

In addition to such transnational forces, sub-national forces organized around common religious, ethnic, communal, and traditional ties have redefined the nature and dimensions of international criminal networks. There is a dialectical interplay of internal, centripetal forces pushing the nation state inward towards the realm of the sub-national with external, centrifugal forces pushing the nation-state outward towards the realm of the global in ways that have facilitated the agenda of the criminal network. In other words, the rise of a "global localism"<sup>16</sup> is intertwined with the workings of "global crime." As this article explains further below, criminal alliances are both transnational and sub-national; although they operate transnationally, many are organized around common ethnic ties. Furthermore, the proceeds from such illicit operations may be laundered through the use of transnational offshore banks but also through traditional modes of money transfers, also organized along sub-national ethnic lines, such as the "fei qian" or "flying coins" method, as the Chinese call it, or the "hawala" system, meaning "trust" or "exchange" in Hindi. To the extent that anti-money laundering efforts adopted by the United States and by the international financial system focus primarily on the activities of financial institutions, they are ignoring a vast, parallel mode of money transfers that have become increasingly intertwined with the illicit activities of global criminals. The current lack of information and understanding regarding these "ethnic banking systems"<sup>17</sup> and their underlying cultural norms has prevented the international community from developing an effective response to laundering activities. Indeed, although the legal regime instituted after September 11, 2001 may be a necessary response to the concern that underground ethnic systems are being used for criminal and terrorist objectives, it is highly unlikely, however, that such a regime—imposing formalization requirements on the informal ethnic banking system—will achieve the desired outcome. This may be an instance where law is necessary but wholly inadequate, and a more comprehensive ap-

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15. Louise I. Shelley, *Transnational Organized Crime: The New Authoritarianism*, in *THE ILLICIT GLOBAL ECONOMY & STATE POWER* 25, 32 (H. Richard Friman & Peter Andreas eds., 1999). This new authoritarianism exploited the void left by the weakened states, such as the disintegrating former Soviet Union. TOM FARER, *Conclusion: Fighting Transnational Organized Crime: Measures Short of War*, in *TRANSNATIONAL CRIME IN THE AMERICAS* 245, 267-68 (Tom Farer ed., 1999); PETER B. MARTIN, *Confronting Transnational Crime*, in *GLOBAL ORGANIZED CRIME AND INTERNATIONAL SECURITY* 27 (Emilio C. Viano ed., 1999). It also took on some traditional state responsibilities. The Chinese Triads and the Japanese Yakuza, for example, perform social welfare functions. Shelley, *supra*.

16. Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 360 (1996).

17. Lisa C. Carroll, *Alternative Remittance Systems: Distinguishing Sub-Systems of Ethnic Money Laundering in Interpol Member Countries of the Asian Continent* (Jan. 31, 2003), available at <http://www.interpol.com/public/FinancialCrime/MoneyLaundering/EthnicMoney/default.asp> [hereinafter Carroll, *Interpol Report*].

proach would be required, one that emphasizes community norms and long-term economic development in developing countries that lack an effective legal and financial framework.

Part I of the article examines the burgeoning problem of global traffic in persons, particularly women, and places this problem within the continuum of global criminal activities that result from the altered relationship between the state and the market. Trafficking in women is viewed not as a phenomenon that exists in isolation but as one part of a global, decentralized trade in violence arising from the relationship between centripetal, sub-national forces on the one hand and centrifugal, transnational forces on the other. Part II studies the financial dimensions of global crimes and the ways in which criminal organizations launder illegal proceeds to make them appear legitimate. Part II also discusses the various anti-money laundering regimes designed to regulate financial institutions initiated at the national and international levels by the United States and various intergovernmental organizations, respectively. Part III explores the underground financial system that exists in the shadow of formal financial institutions and looks at how such sub-national, ethnically based alternative remittance systems are being used by criminal organization for money laundering purposes. Part III also examines state responses to such alternative systems and evaluates their effectiveness. Part IV, the conclusion, assesses the relationship between the market and the state, the rise of both transnationalism and sub-nationalism, and provides some observations about how the relationship between law and norms may facilitate or impede the effectiveness of anti-money laundering efforts.

## I.

### THE GLOBAL TRAFFIC IN WOMEN AND TRANSNATIONAL CRIME

According to the United Nations ("U.N."), millions of people are trafficked every year.<sup>18</sup> According to the U.N. Office for Drug Control and Crime Prevention, it is estimated that 200 million people worldwide may be subject to the control of traffickers.<sup>19</sup> Trafficking in persons is becoming the fastest growing

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18. See REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, U.N. ESCOR, COMMISSION ON HUMAN RIGHTS, 53rd Sess., Provisional Agenda Item 9(a), at IV, U.N. Doc. E/CN.4/1997/47 (1997). According to the U.S. Congressional Research Service, between seven thousand to two million people, most women and children, are trafficked across international borders. Francis T. Miko, *Trafficking in Women and Children: The U.S. and International Response*, Cong. Res. Service Report for Congress, Order Code 30545 (2002), available at <http://fpc.state.gov/documents/organization/9107.pdf>; see also Amy O'Neill Richard, U.S. Dep't of State, Center for the Study of Intelligence, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* 1 (1999), available at <http://www.odci.gov/csi/monograph/women/trafficking.pdf>. A distinction is also drawn between human trafficking and human smuggling. In the latter case, voluntary migrants enlist smuggling rings to transport them illegally into another country. Interpol, *People Smuggling*, available at <http://www.interpol.com/Public/THB/PeopleSmuggling/Default.asp> (describing how migrants are at the mercy of people-smuggling criminal syndicates who require them to work for years to pay off debts incurred as a result of their transportation).

19. Barbara Crossette, *UN Warns that Trafficking in Human Beings is Growing*, N.Y. TIMES, June 25, 2000, at A10. Trafficking in children has also increased. The Center for Protection of

activity conducted by organized crime.<sup>20</sup> The U.N. General Assembly defines trafficking as:

the illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers, and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment, and false adoption.<sup>21</sup>

Annual profits are estimated to be up to U.S. \$7 billion.<sup>22</sup> Traffickers have traditionally targeted women from Southeast Asia and Latin America. Since the fall of the Berlin Wall, however, they have increasingly relied on Eastern European countries to be a source of procurement.<sup>23</sup> Economic difficulties during the transitional period from a planned to a market economy have prompted impoverished Eastern European women to search for employment in Western Europe, making them susceptible to exploitation by criminal syndicates.<sup>24</sup> Indeed, sex traffickers target women from poor and unstable regions of the world because the combination of economic hardship and the temptations of a better life elsewhere render these women particularly vulnerable to traffickers' schemes.<sup>25</sup>

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Children's Rights estimates that as many as 800,000 children worldwide are in prostitution. In India alone, UNICEF estimates that there are approximately 400,000 to 500,000 child prostitutes. MANUEL CASTELLS, *END OF MILLENNIUM* 155 (1998).

20. Crossette, *supra* note 19.

21. *Id.* See also Richard, U.S. Dep't of State, *supra* note 18, at v. The U.S. State Department defines trafficking as "all acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of person; within national or across international borders; through force, coercion, fraud, or deception; to place persons in situations of slavery or slavery-like conditions, forced labor or services, such as forced prostitution or sexual services, domestic servitude, bonded sweatshop labor or other debt bondage." *Id.*

22. Janie Chuang, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 68 (1998); Maya Raghu, *Sex Trafficking of Thai Women and the United States Asylum Law Response*, 12 GEO. IMMIGR. L.J. 145, 171 (1997); Penny Venetis, *Violence Against Women: International Solutions Symposium, International Sexual Slavery*, 18 WOMEN'S RTS. L. REP. 263, 279 (1997) (describing a multi-billion dollar business); Roger Cohen, *The Oldest Profession Seeks New Market in West Europe*, N.Y. TIMES, Sept. 19, 2000, at A1; Gillian Caldwell et al., *Global Survivor Network, Crime & Servitude: An Exposé of the Traffic in Women for Prostitution from the Newly Independent States* 3 (1997), available at [www.global-survival.net/femaletrade/9711russia.html](http://www.global-survival.net/femaletrade/9711russia.html); Nat'l Sec. Council, *Alien Smuggling, International Crime Threat Assessment* (2002), available at <http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/pub45270chap2.html>.

23. Laurie Hauber, *The Trafficking of Women for Prostitution: A Growing Problem within the European Union*, 21 B.C. INT'L & COMP. L. REV. 183, 184-85 (1998); Joel Brinkley, *Vast Trade in Labor Portrayed in CIA Report*, N.Y. TIMES, Apr. 2, 2000, at 22; Cohen, *supra* note 22, at A1; Michael Specter, *Contraband Women*, N.Y. TIMES, Jan. 11, 1998, at 1 (deceptive advertisements promising lucrative jobs); *Trafficking in Women: In the Shadows*, ECONOMIST, Aug. 26, 2000, at 38; Richard, U.S. Dep't of State, *supra* note 18, at iii; see also Phil Williams, *Emerging Issues: Transnational Crime and Its Control*, in GLOBAL REPORT ON CRIME AND JUSTICE 225, 225 (Graeme Newman ed., 1999) (describing trafficking of women from Eastern Europe to Western Europe).

24. Hauber, *supra* note 23, at 184-85; ECONOMIST, *supra* note 23, at 39.

25. Raghu, *supra* note 22, at 145-46 (women in developing countries are targeted because of the imbalances in power); ECONOMIST, *supra* note 23, at 39; Human Rights Watch, Women's Rights Project, *The Human Rights Watch Global Report on Women's Human Rights* 196 (1999); Richard, U.S. Dep't of State, *supra* note 18, at 1; see also Williams, *supra* note 23, at 225 (describing methods of procurement targeted at women in Thailand, Brazil, and the Philippines).

Methods of procurement include outright abduction to false promises of jobs in other countries.<sup>26</sup> Criminal syndicates traffic women for numerous purposes, including pornography, sex tourism, mail order brides, and forced prostitution.<sup>27</sup> In order to control women's movement, traffickers routinely confiscate their passports<sup>28</sup> and keep them confined, in brothels, under surveillance, sometimes even chained to beds.<sup>29</sup> Until all debts incurred to the traffickers are repaid, the victims exist in a condition of debt bondage.<sup>30</sup>

Although this section focuses on the global traffic in women in particular, it is important to understand this problem within a broader context, as part of a spectrum of interconnected criminal activities with global and transnational as well as local or sub-national characteristics. International sex trafficking is generally undertaken by organized crime groups,<sup>31</sup> which are often engaged in other criminal activities,<sup>32</sup> each connected with the other, locally as well as globally.<sup>33</sup> Many of these groups are also ethnic-based such as "the Italian Mafia, the Russian mob, the Japanese Yakuza, the Chinese Triads, the Colombian cartels, and the Mexican criminal organizations."<sup>34</sup> Such global networks often leverage their pre-existing ethnic ties. For example, the mainland Chinese and the Chinese diaspora have consistently maintained these ties to the benefit of the Chinese triads.<sup>35</sup> These groups are moving beyond competitive inclinations to form

26. Chuang, *supra* note 22, at 69 (deceptive promises of employment); Becki Young, *Trafficking of Women Across United States Borders: How United States Laws Can Be Used to Punish Traffickers and Protect Victims*, 13 GEO. IMMGR. L.J. 73, 79 (1998) (kidnapping); Caldwell et al., *supra* note 22, at 3 (deceptive promises of employment); Specter, *supra* note 23, at 1.

27. Jennifer L. Ulrich, *Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?*, 7 IND. J. GLOBAL LEGAL STUD. 629, 634 (2000).

28. Specter, *supra* note 23, at 1; *Slave Trade Endures in the 21st Century*, S.F. CHRON., July 2, 2000, at 8.

29. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 324 (1999); Venetis, *supra* note 22, at 269; Richard, U.S. Dep't of State, *supra* note 18, at 5.

30. Lan Cao, *Illegal Traffic in Women: A Civil RICO Proposal*, 96 YALE L.J. 1297, 1306 (1987); Christopher M. Pilkerton, *Traffic Jam: Recommendations for Civil and Criminal Penalties to Curb the Recent Trafficking of Women from Post-Cold War Russia*, 6 MICH. J. GENDER & L. 221, 228-29 (1999) (describing debts incurred because the victims had to pay for the purchase of passports and other travel documents); Human Rights Watch, *supra* note 25, at 197; Richard, U.S. Dep't of State, *supra* note 18, at 5.

31. Cao, *Illegal Traffic in Women*, *supra* note 30, at 1299; Rassam, *supra* note 29, at 305; Cohen, *supra* note 22, at A1; Richard, U.S. Dep't of State, *supra* note 18, at vii-viii.

32. Edgardo Rotman, *The Globalization of Criminal Violence*, 10 CORNELL J.L. & PUB. POL'Y 1, 8-9 (2000) (including drug trafficking, illegal traffic in cultural property, automobiles, arms trafficking); Joyce M. Davis & Nomi Morris, *Growth of Slave Trade Sounds Alarm*, TIMES UNION, Jan. 7, 2001, at A10, 2001 WL 6285248 (including drug and arms smuggling and money laundering).

33. JOHN KERRY, *THE NEW WAR: THE WEB CRIME THAT THREATENS AMERICA'S SECURITY* 24 (1997) (noting that "vast poppy fields in eastern Turkey are linked to the heroin dealer in downtown Detroit" and that "the men of the Chinese triads who control gambling and extortion in San Francisco's Chinatown work the same network as the Singapore gang that turns out millions of fake credit cards."); Frank Pearce & Michael Woodiwiss, *Introduction*, in *GLOBAL CRIME CONNECTIONS: DYNAMICS AND CONTROL* xiii (Frank Pearce & Michael Woodiwiss eds., 1993).

34. Rotman, *supra* note 32, at 8; see also Carrie Lyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT'L L. 53, 57-61 (2000).

35. KERRY, *supra* note 33, at 68.



strategic and interactive alliances with each other, each attempting to move beyond their particular national boundaries to establish a global network,<sup>36</sup> a pax mafiosa.<sup>37</sup> The Chinese triad and the Russian mob, for example, have collaborated with each other to maximize their illegal human trafficking networks.<sup>38</sup> French intelligence observed that a 1994 gathering in Burgundy, France, of Russian, Chinese, Japanese, Italian, and Colombian "businessmen" was in fact a meeting of leaders of international criminal syndicates "to discuss carving up Western Europe for drugs, prostitution, smuggling and extortion rackets."<sup>39</sup> As one commentator observed regarding the emergence of a "global mafia capitalism,"<sup>40</sup> there is a "growing tendency of hierarchical criminal organizations [not only to] specialize in certain illicit markets (drugs, arms, sex trade, gambling, and so on) [but] to diversify and form international business links both among themselves and with more conventional business partners . . . [and to increase] their efficiency at raising and laundering huge amounts of capital for strategic investments in foreign or transnational markets."<sup>41</sup> Indeed, ethnically or culturally-based criminal organizations with deep, historical roots in national traditions, such as the Italian Mafia and the Chinese triads, have managed to exploit globalization for their own benefit.<sup>42</sup> Thus, although criminal syndicates may turn insular or inward, organizing themselves along pre-globalization ties of culture, religion, or ethnicity, they have also successfully manipulated globalization's advances in communications, transportation, technology, open borders and reduced state authority<sup>43</sup> to extend their power and reach.

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36. CASTELLS, *supra* note 19, at 169 (1998); Carol Hallett, *The International Black Market: Coping with Drugs, Thugs, and Fissile Materials*, in GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL 74, 76 (Linnea P. Raine & Frank J. Ciluffo eds., 1994); JAMES R. RICHARDS, TRANSNATIONAL CRIMINAL ORGANIZATIONS, CYBERCRIME, AND MONEY LAUNDERING 3 (1999).

37. Claire Sterling, *Containing the New Criminal Nomenclatura*, in GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL, *supra* note 36, at 107-111; *see also* CLAIRE STERLING, CRIME WITHOUT FRONTIERS: THE WORLDWIDE EXPANSION OF ORGANISED CRIME AND THE PAX MAFIOSA (1994).

38. KERRY, *supra* note 33, at 1401; *see also* Louis J. Freeh, *International Organized Crime and Terrorism: From Drug Trafficking to Nuclear Threats*, in GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL, *supra* note 36, at 2 (describing collaboration and coordination between organized crimes in Russia and Colombia and similar collaboration among Russian, Sicilian and American organized crimes); KERRY, *supra* note 33, at 29 (describing secret summits between the leaders of the Russian and Italian mobs in Prague, Warsaw, and Zurich in the summer of 1992); CLAIRE STERLING, THIEVES' WORLD 130-31 (1994) (describing how the Chinese Triads smuggle aliens through crime capitals in Russia, Eastern Europe, and Italy); Center for Strategic and International Studies, *Russian Organized Crime: Global Organized Crime Project* 42-43 (1997) (describing collaboration between the Italian Mafia and South American cartels).

39. Andrew Alderson & Carey Scott, *Crime Kings Meet to Carve Up Europe*, SUN. TIMES, Mar. 29, 1998, available at LEXIS, Home News.

40. Maria Los, *Beyond the Law: The Virtual Reality of Post-Communist Privatization*, in GOVERNABLE PLACES: READINGS IN GOVERNABLE GOVERNMENTALITY AND CRIME CONTROL 244-45 (Russell Smandych ed., 1999).

41. *Id.* at 244-45.

42. CASTELLS, *supra* note 19, at 170.

43. Dr. Sally Stoecker, *Introductory Remarks at the Trafficking Conference: The Exploitation of Women from Russia, Scale and Scope*, available at <http://american.edu/transcrime/misc/5April99.htm> (Mar. 11, 1999). Criminal organizations generally operate with the technology of many multinational corporations. KERRY, *supra* note 33, at 19 (1997). In many cases, the power of the state is reduced because governments are often complicit in trafficking schemes, with officials bribed either

In other words, the two recurring themes emphasized in this Article—transnationalism and sub-nationalism—are fully evident in the global activities of ethnically based criminal organizations. As I discuss in Part II below, in examining the related problem of international money laundering, it is equally important to understand the role transnationalism and sub-nationalism have played in facilitating this growing international crime.

## II.

### INTERNATIONAL MONEY LAUNDERING: THE TRANSNATIONAL AND THE SUBNATIONAL

Money laundering has become a global problem<sup>44</sup> arising from the need to reinvest proceeds of criminal activities. Money laundering is the financial component of transnational crimes. Given the enormous profits involved in trafficking of persons and other transnational criminal activities, there is a growing need to cleanse or launder such proceeds for use in conventional traditional channels. For example, millions of dollars derived from organized criminal activities in Russia have found their way into major banks in New York; millions from an investment fraud scheme in Japan were similarly invested in Las Vegas.<sup>45</sup> Approximately U.S. \$500 billion dollars of illegally obtained funds are laundered throughout the world annually.<sup>46</sup>

Money laundering is “the process by which the proceeds of crime or fraud are made to appear as if they have emanated from a legitimate source.”<sup>47</sup> Money laundering generally consists of three stages: the placement of money, the layering of money, and the integration of money.<sup>48</sup> Placement refers to the physical disposal of cash into a financial institution<sup>49</sup> and the conversion of this illicit cash into different negotiable instruments such as money orders or cash-

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to turn a blind eye to the problem or to protect traffickers from arrest or even to engage themselves in the procurement and transportation of women. Human Rights Watch, *supra* note 25, at 199 (1995). There is collusion between governments and criminal non-state organizations not only in developing countries but also in the United States and European countries. Shelley, *supra* note 15, at 35, 45; see also R. James Woolsey, *Global Organized Crime: Threats to U.S. and International Security*, in *GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL*, *supra* note 36, at 138. For a discussion of corruption among Thai authorities who are bribed to protect brothels or who are themselves pimps, see SAUK PHONGPAICHT ET. AL., *GUNS, GIRLS, GAMBLING, GANJA: THAILAND'S ILLEGAL ECONOMY AND PUBLIC POLICY* 210-211 (1998).

44. Stefan D. Cassella, *Money Laundering Has Gone Global: It's Time to Update the Federal Laws*, 49 FED. LAW. Jan. 2002, at 25.

45. *Id.*

46. Peter J. Quirk, *Money Laundering: Muddying the Macroeconomy*, FIN. & DEV. 7, Vol. 39, Issue 1, Mar. 1997, at 8. If the pool is expanded to include any funds that the owners wish to hide from governments, creditors, or business partners, the estimated amount increases to between \$800 billion to \$2 trillion a year. William F. Wechsler, *Follow the Money*, FOREIGN AFF., July-Aug. 2001, at 40, 45.

47. Duncan E. Alford, *Anti-Money Laundering Regulations: A Burden on Financial Institutions*, 19 N.C.J. INT'L & COM. REG. 437, 437 (1994); Nicholas Clark, *The Impact of Recent Money Laundering Legislation on Financial Intermediaries*, 14 DICK. J. INT'L L. 467, 469.

48. Clark, *supra* note 47, at 470.

49. *Id.*; see also Alford, *supra* note 47, at 439 (at the placement stage, money laundering is most susceptible to detection.); Peter E. Meltzer, *Keeping Drug Money from Reaching the Wash Cycle: A Guide to the Bank Secrecy Act*, 108 BANKING L.J. 230, 231 (1991).

ier's checks.<sup>50</sup> The placement stage may consist of several phases. First, cash received at the initial transaction is brought to safe houses—intermediary sites controlled by the criminal organization—and then to brokers for distribution to import/export businesses.<sup>51</sup> These businesses subsequently deposit the money into financial institutions as part of an apparently legitimate business transaction,<sup>52</sup> structuring the deposit to avoid threshold reporting requirements<sup>53</sup> and often converting such illicit proceeds to a more convenient or less suspicious medium for purposes of exchange, such as cashier's checks or money orders.<sup>54</sup>

Layering, the second stage of money laundering, refers to the movement of money through several accounts or several financial institutions in an attempt to distance the funds from its illegal source, thereby legitimizing them.<sup>55</sup> Techniques for layering include international wire transfers through offshore entities,<sup>56</sup> the establishment of boutique banks for the purpose of accepting illicit

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50. Scott Sultzer, Note, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 149 (1995). Transforming large amounts of cash into negotiable instruments makes such illicit proceeds easier to smuggle as well as easier to deposit into mainstream financial institutions. *Id.* It is in the placement stage that the money laundering process is most susceptible to detection by law enforcement because banks are required to report cash deposits in excess of a certain amount. Alford, *supra* note 47, at 439.

51. Timothy H. Ehrlich, Note, *To Regulate or Not? Managing the Risks of E-Money and its Potential Application in Money Laundering Schemes*, 11 HARV. J.L. & TECH. 833, 836 (1998).

52. *Id.*

53. *Id.* In the United States, financial institutions are required to file a Currency Transaction Report ("CTR") for transactions of US \$10,000 or more. 31 C.F.R. § 103.22 (b)(1) (1998). Individuals must also file a Report of International Transportation of Currency or Monetary Instruments if they transport more than US \$10,000 into or out of the United States. 31 U.S.C. § 5316(a)(1) (1994).

54. Lawrence L.C. Lee, Note, *Combating Illicit Narcotics Traffic in Taiwan: The Proposed Money Laundering Control Act*, 4 TUL. J. INT'L & COMP. L. 189, 210 (1996); *see also* Carroll, *Interpol Report*, *supra* note 17, at 6-7. In general, money laundering begins with the placement phase whereby criminal proceeds are placed into the formal, legitimate financial system. In order to minimize suspicion, large deposits are divided into smaller deposits—a process known as structuring or "smurfing." Where there are large amounts of cash, such amounts will be first brought physically (carried personally, by courier, or other means used by smugglers) to a place lacking in anti-money laundering regulations in order to make placement easier to achieve. Illegal proceeds may also be converted into other financial instruments or used to buy goods. This may be accomplished by using non-traditional venues, such as casinos, check cashing services, postal services, currency exchanges, metals brokers, etc. *Id.*

55. Clark, *supra* note 47, at 470. Alford, *supra* note 47, at 439-40; *see also* Barry A.K. Rider, *The Wages of Sin—Taking the Profit out of Corruption—A British Perspective*, 13 DICK. J. INT'L L. 391, 400 (1995). The most direct solution for money launderers is to deposit money into a financial institution and then transfer and reroute such funds through wire transfers. Sultzer, *supra* note 50, at 149.

56. *See generally* David D. Beazer, *The Mystique of "Going Offshore,"* 9 UTAH BAR J. 19 (1996) (describing various financial transactions conducted through off-shore banks to avoid tax and regulatory scrutiny). Off-shore banks conduct financial transactions in foreign jurisdictions with favorable tax and regulatory environments. *Id.* at 19; *see also* Alford, *supra* note 47, at 439-41. Placing funds in a country with stringent bank secrecy laws makes it difficult to trace the origin of the funds. Rider, *supra* note 55, at 400. Bank secrecy laws prevent banks from providing information on a customer's account to anyone, even law enforcement agencies, without the authorization of the client. Alford, *supra* note 47, at 441; *see also* H.R. REP. NO. 98-907 (1984) (describing the difficulty of obtaining records from banks in countries with unregulated banking, especially when more than one foreign jurisdiction is involved).

funds,<sup>57</sup> or the use of a variety of mechanisms designed to disguise the identity of the depositor.<sup>58</sup> Money launderers have also turned to the non-bank financial sector for layering purposes.<sup>59</sup> The techniques include the use of counterbalancing schemes, that is, placing illicit funds in off-shore banks and using the value of the account as collateral for bank loans in the United States or another country,<sup>60</sup> front companies,<sup>61</sup> and payable through account arrangements.<sup>62</sup>

The third step in the money laundering process, integration, refers simply to the re-insertion of funds into the legitimate economy.<sup>63</sup> Funds are transmitted to legitimate operations, through a variety of instruments, such as letters of credit, bank notes, debt and equity securities, without revealing any link to their illicit origin.<sup>64</sup>

Because financial institutions are generally considered to be an integral part of any money laundering scheme<sup>65</sup> and because the placement stage is the point at which money laundering is most vulnerable to detection as that is where illicit funds are most easily traced to their original source, legislation in the United States as well as internationally has centered for the most part on the regulation

57. Sultzter, *supra* note 50, at 150-51. Money launderers may establish small boutique banks that are then used to transact business with larger correspondent banks at the placement stage. *Id.*

58. Numbered accounts may also be used so that the only contact the depositor has with the bank is through the account manager. Alford, *supra* note 47, at 439-40. Other ways of concealing the depositor's identity include the use of a trust whereby only the bank is aware of the trustee's identity or the use of paper corporations. *Id.* at 440. Only the attorney who sets up the corporation knows the identity of the shareholders and the corporation issues only bearer shares that can be redeemed by any bearer without the need to proffer identification. *Id.* at 468 n.30.

59. See generally *Money Laundering Trends Highlight FATF Report*, 7 No. 7 MONEY LAUNDERING L. REP. 1, 7 (1997) (discussing the movement by money launderers into the non-banking financial sector, for example, into currency-exchange businesses because, although the latter provide financial services they are subject to less stringent regulatory controls) [hereinafter *Money Laundering Trends*].

60. Sultzter, *supra* note 50, at 150; *Money Laundering Trends*, *supra* note 59, at 7.

61. Sultzter, *supra* note 50, at 156. Money launderers set up fictitious companies, for example, import/export companies that use the services of United States banks to conduct their businesses.

62. Payable through accounts ("PTAs") are checking accounts marketed to foreign banks that otherwise would not be able to offer their customers' access to the U.S. banking system. PTAs, in other words, provide foreign bank customers with access to the U.S. banking system without being subject to many U.S. banking guidelines. See generally *Money Laundering Trends*, *supra* note 59. A PTA is usually an account in a U.S. bank established by a foreign bank, through which the foreign bank's customers may conduct banking transactions. Christine M. Taylor, *Finding Laundering Perils*, *Fed Cracks Down on "PTAs"*, 3/1/95 MONEY LAUNDERING ALERT, 1995 WL 8353434 (describing instructions issued by the Federal Reserve Board on how banks should deal with the "latent money laundering menace" posed by PTAs). Through this mechanism, the foreign bank's customers can engage in most banking activities as if they were direct customers of the U.S. bank. They could, for example, transfer funds by writing checks at their own bank that are payable through the U.S. bank. See *Swiss Style Banking in Montana?*, 6 No. 7 MONEY LAUNDERING L. REP. 3 (1996). See also *FDIC Launches First Crackdown on Payable-Through Accounts*, 1/1/96 MONEY LAUNDERING ALERT, 1996 WL 8687165. These accounts became especially popular with international banks when it became increasingly difficult for foreign banks to receive approval to operate in the United States in the wake of the Bank of Credit and Commerce International money laundering case. See *United States v. Awan*, 966 F.2d 1415, 1417 (11th Cir. 1992).

63. *Id.*

64. Sultzter, *supra* note 50, at 151.

65. Clark, *supra* note 47, at 470.

of financial institutions.<sup>66</sup> Whether it is the entry of cash into the financial system, the subsequent transnational flows of cash, or wire transfers within the financial system, the use of a bank or some other deposit-taking financial institution is often involved.<sup>67</sup> A comprehensive scheme is therefore in place aimed at regulating the activities of financial intermediaries to ensure that they are not involved, intentionally or unintentionally, in money laundering activities. Yet, as Part IV will demonstrate below, in addition to the formal financial system, there is also a parallel, informal, or underground system, a "mysterious global structure for facilitating the transfer of funds between countries without touching the recognized and regulated international financial systems. . . [and] without any meaningful records being kept."<sup>68</sup> This ancient underground system has in recent years been hijacked by criminal and money laundering organizations to transfer illicit funds as well as to finance illegal activities without relying on the formal financial system. Until recently, anti-money laundering efforts undertaken by law enforcement authorities have, for the most part, neglected this informal underground sector.

In the United States, anti-money laundering initiatives center around the formal financial system. One example includes the Currency and Foreign Transactions Reporting Act, commonly referred to as the Bank Secrecy Act,<sup>69</sup> ("BSA") which remains, despite various amendments and supplements throughout the years, the centerpiece of United States money laundering regulation.<sup>70</sup> The BSA imposes currency reporting requirements for domestic financial institutions.<sup>71</sup> The BSA also contains "know your customer" ("KYC") guidelines.<sup>72</sup> KYC guidelines require financial institutions to develop certain internal policies, procedures, and controls<sup>73</sup> and to designate compliance officers to ensure their effective implementation.<sup>74</sup> These guidelines are an important part of the anti-money laundering effort because they are designed to prevent the placement of

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66. Meltzer, *supra* note 49, at 230.

67. Clark, *supra* note 47, at 470.

68. Alan Lambert, *Underground Banking and Financing of Terrorism*, 15 FLA. J. INT'L L. 9, 12 (2002).

69. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 114 (codified as amended at 31 U.S.C. § 5311-5314, 5316-5324). The purpose of the Bank Secrecy Act ("BSA") was to "require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311.

70. John J. Byrne et al., *Examining the Increase in Federal Regulatory Requirements and Penalties: Is Banking Facing Another Troubled Decade?*, 24 CAP. U.L. REV. 1, 40-41 (1997).

71. The BSA requires financial institutions to file an IRS Form 4789, Currency Transaction Report ("CTR") whenever a person engages in one or more cash transactions exceeding in total US \$10,000 in a single day. See BSA, *supra* note 69; Sultz, *supra* note 50, at 152-67.

72. This guideline originated in a legislative report on the BSA. See H.R. REP. NO. 91-975, at 8 (1970) (requiring insured banks to keep records of the identities of customers authorized to sign checks, make withdrawals, or have control over the account).

73. 31 U.S.C. § 5318(h)(1)(a) (1994).

74. 31 U.S.C. § 5318(h)(1)(b) (1994). Although KYC guidelines are not codified, the Treasury Department has delegated authority, 31 U.S.C. 5318 (h)(1) (1994), to the federal banking agencies to require banks to comply with the reporting requirements of the BSA. 12 C.F.R. § 21.21 (1999). Law enforcement officials promote KYC guidelines as necessary for banks to prevent money laundering. Proposed Rules, Department of the Treasury, 31 C.F.R. pt. 103 (1998); Bank Secrecy Regulatory Applications to the Problem of Money Laundering Through International Pay-

illicit cash into the financial system<sup>75</sup> and to deter the use of financial institutions as laundering tools.<sup>76</sup> Additionally, by requiring banks to maintain certain records, the BSA aims at creating a paper trail that would aid law enforcement agencies in combating financial crimes.<sup>77</sup> Other anti-money laundering laws in the United States also center around financial institutions and the formal financial system. The Money Laundering Control Act ("MLCA"),<sup>78</sup> for example, imposes criminal liability on individuals who structure transactions<sup>79</sup> to avoid the filing requirement of the BSA and also requires financial institutions to report suspicious transactions to government officials.<sup>80</sup> Under the MLCA, financial institutions could also be liable for dealings with criminal entities if they fail to conduct investigations into their clients' histories.<sup>81</sup>

At the international level, there is a similar emphasis on regulating the financial system. A number of international money laundering regimes have been established to facilitate cooperation among signatory states.<sup>82</sup> Organizations such as the Basle Committee on Banking Regulations and Supervisory Practices ("Basle Committee") provide a guiding framework for adherence by financial institutions.<sup>83</sup> In 1988, the Basle Committee, consisting of officials from central banks of eleven major industrialized nations and Luxembourg,<sup>84</sup> adopted a statement of principles targeted specifically at money laundering.<sup>85</sup> It recom-

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ments, 54 FED. REG. 45, 45, 769, 771 (1989) (requesting that banks impose KYC procedures for suspicious wire transfers).

75. H.R. REP. NO. 101-446, at 21-22 (1990) (discussing the importance of monitoring and reporting cash flows and of identifying illegal sources of funds as important to anti-money laundering efforts).

76. Meltzer, *supra* note 49, at 239 (noting that KYC principles might reveal that services required by a client are consistent with a money laundering operation—customer information transferred to a database would indicate when transactions are inconsistent with a customer's normal business pattern); *see also* 31 C.F.R. pt. 103, app. at 10 (1998) (stating that strict adherence to KYC guidelines may help financial institutions detect the illicit nature of a customer's business because it would appear as inconsistent with the customer's profile).

77. H.R. REP. NO. 91-975, at 2 (1970).

78. Money Laundering Control Act, Pub. L. No. 99-570, 100 Stat. 3207-18 (codified as amended at 18 U.S.C. § 1956-1957, 31 U.S.C. §§ 5324-26).

79. 31 C.F.R. § 103.22(c)(2) (1998) (defining structured transactions to include multiple transactions made by one person or on behalf of any individual person in excess of U.S. \$10,000 on one day).

80. 31 U.S.C. § 5318(g) (1994). This section also exempts from liability directors, employees, officers, or agents of financial institutions for disclosure of such transactions. *Id.* § 5318(g)(3).

81. Alford, *supra* note 47, at 457 (noting that banks either have to investigate their customers' transactions or face liability under 18 U.S.C. § 1957).

82. *See generally* Bruce Zagaris & Sheila M. Castilla, *Constructing an International Financial Enforcement Subregime: the Implementation of Anti-Money Laundering Policy*, 19 BROOK. J. INT'L L. 871 (1993).

83. *See generally* CHARLES A. INTRIAGO, INTERNATIONAL MONEY LAUNDERING 29 (1991); Duncan E. Alford, *Basle Committee Minimum Standards: International Regulatory Response to the Failure of BCCI*, 26 GEO. WASH. J. INT'L L. & ECON. 241, 247 (1992).

84. Alford, *Basle Committee*, *supra* note 83, at 291 n.1 (The banking regulators are from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States.).

85. Basle Committee on Banking Regulations and Supervisory Practices December 1988 Statement on Prevention of Criminal Use of the Banking System, *reprinted in* INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING, 273-77 (Dr. W.C. Gilmore ed., 1992); *see also* INTRIAGO,

mended, for example, that banks make a concerted effort to know their customers' identities.<sup>86</sup> In accordance with the KYC rule, banks are supposed to take certain measures, such as severing relations with the client, and freezing or closing the account at issue, if they suspect that a deposit consists of proceeds from criminal activities.<sup>87</sup> Presumably these rules would make it difficult for money launderers to use banks because banks would require information as to the identity of their clients as well as the nature of the deposited funds.<sup>88</sup> The 1988 rules have been supplemented by additional rules in 1992—the Minimum Standards for the Supervision of International Banking Groups and Their Cross-border Establishment (“Minimum Standards”).<sup>89</sup> Under these new Minimum Standards, international banks would be subject to consolidated supervision by a home country regulator<sup>90</sup> and must receive prior consent from both host and home regulators before opening an establishment in a foreign country.<sup>91</sup> Additionally, host country banking regulators have the right to collect information from international banks and may impose sanctions if a bank fails to meet minimum standards.<sup>92</sup>

The Financial Action Task Force on Money Laundering (“FATF”), an intergovernmental organization formed by the G-7 countries to develop and promote anti-money laundering policies,<sup>93</sup> also has a financial institution focus.<sup>94</sup> In 1990, the FATF issued its Forty Recommendations on Money Laundering with broad suggestions on improving national legal systems<sup>95</sup> as well as the reporting and monitoring capabilities of the financial system.<sup>96</sup> The Task Force also favored international implementation of the KYC policy and of the BSA

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*supra* note 83, at 29 (discussing recommendations towards the prevention of the use of banks as “intermediaries for transfer or deposit of funds derived from criminal activity”).

86. Alford, *supra* note 47, at 444-45 (stating that banks should refuse to conduct business with clients lacking adequate identification).

87. *Id.*

88. *Id.*

89. The Basle Committee Report on Minimum Standards for the Supervision of International Banking Groups and their Cross-border Establishment, *reprinted in* INTERNATIONAL ECONOMIC LAW DOCUMENTS, I.E.L. II-I (1992) [hereinafter Minimum Standards].

90. *Id.* at 3; *see also* Alford, *Basle Committee*, *supra* note 83, at 267. A home country regulator, for example, may prevent the establishment of banking operations in foreign jurisdictions if it is deemed that the host country's supervision of foreign banks is inadequate.

91. Minimum Standards, *supra* note 89, at 4; *see also* Alford, *Basle Committee*, *supra* note 83, at 270.

92. Minimum Standards, *supra* note 89, at 3.

93. Financial Action Task Force on Money Laundering (FATF): The Forty Recommendations of the Financial Task Force on Money Laundering, with Interpretive Notes, June 28, 1996, 35 I.L.M. 1291, at introduction [hereinafter FATF]. The twenty-six FATF member countries are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States, and the two organizations are the European Commission and Gulf Cooperation Council.

94. *Id.* at 1293.

95. *Id.* at 1291; *see also* WILLIAM C. GILMORE, DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTER MEASURES 100 (1995).

96. FATF, *supra* note 93, at 1294-95.

reporting requirements already in place in the United States,<sup>97</sup> thus continuing the emphasis on regulating the formal financial system and essentially neglecting the informal, underground banking network.<sup>98</sup>

States have responded to the growth of global crimes by focusing on their transnational dimension, for example, and directing their anti-laundering effort on financial institutions and their cross-border transactions. Yet, as Part III below demonstrates, even as governmental scrutiny of the formal financial system intensifies in an effort to detect and prevent money laundering, money launderers increasingly turn their attention to the parallel, informal financial system as an alternative mechanism for remitting their criminally derived proceeds.

### III.

#### THE INFORMAL BANKING SECTOR: AN ALTERNATIVE REMITTANCE SYSTEM

##### A. *Ethnic Ties and the Methods and Norms of Alternative Remittance Systems*

The alternative remittance system ("ARS"), rooted in Asia, particularly China, and the Middle East, is known by a variety of names, the most common of which is hawala or chiti.<sup>99</sup> Depending on the spelling, the term hawala may mean "to change or transform" in Arabic, or "trust" in Hindi, or may even refer to a non-Arabic Muslim saying that means "transfer of money between two persons through a third person."<sup>100</sup> This system is generally believed to have been

97. *Id.* at 1293. These Forty Recommendations were subject to subsequent revisions in 1996 because universal, blanket recommendations may not be appropriate for certain countries. *Id.* at 1294. The revisions thus permit flexible implementation so that countries may apply the suggested recommendations within their own financial framework. *Id.* The Forty Recommendations were again updated in 2003 following the events of September 11. *Id.*

98. Characterizing these modes of transmittance as "underground" is not wholly accurate, "as they often operate in the open with complete legitimacy, and these services are often heavily and effectively advertised." Patrick M. Jost & Harjit Singh Sandhu, *The Hawala Alternative Remittance System and Its Role in Money Laundering* 1 (Feb. 3, 2003), available at <http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/hawala/default.asp> [hereinafter Jost and Sandhu].

99. "Chiti" comes from Hindi, the language used in India. The term was introduced into India by the English and is often used to describe the Chinese ARS. Hawala usually refers to the ARS of the Indian sub-continent. Both are founded on trust and on networks of immigrant and diaspora communities. The chiti system extends throughout China, Southeast Asia, and North America, and the larger hawala system extends through the Indian subcontinent, Southeast Asia, Europe, the Middle East, Africa, and North America. Interpol also identifies the Thai and Vietnamese sub-system of underground banking, with the latter being used extensively by the Vietnamese community in the United States for both legal and illegal remittances. Carroll, *Interpol Report*, *supra* note 17, at 10-11.

The Chinese chiti system and the Indian hawala system are virtually "identical in their adherence to trust, confidentiality, and efficiency," but there are some characteristic differences, which are important to drug dealers. The Chinese system, according to the Drug Enforcement Agency, is less prominent internationally and as a result, the hawala system, which prevails in North America, is preferred by Chinese heroin traffickers. Carroll, *Interpol Report*, *supra* note 17, at 11.

100. Lambert, *supra* note 68, at 13; see also Carroll, *Interpol Report*, *supra* note 17, at 1. According to this report, there is no one single system but rather two dominant systems, "the first encompassing the Asian-oriental countries and the second covering the Indian sub-continent," each with their own multiple regional sub-systems of ethnic banking; as a result, the literature on these alternative modes of money movement is filled with contradictions. Jammaz Al-Suhaimi, *Demysti-*



invented by the Chinese during the Teng Dynasty<sup>101</sup> and was subsequently adopted by others because of a distrust of banks on religious grounds<sup>102</sup> or because of a desire to avoid certain strictures imposed by the state, such as currency controls or taxes. The very informal and fluid nature of this system has made it especially equipped to serve as a conduit for currency transactions wholly outside of and unhampered by the current international anti-money laundering efforts. Indeed, the essential characteristic that defines an ARS is trust.<sup>103</sup> This trust is possible because the transaction is undertaken by members of a common ethnic community with a shared sense of identity, affiliation and obligation, thus reducing the transaction costs involved in screening, monitoring, and enforcement normally associated with conventional, mainstream, non-ethnically based economic activities.<sup>104</sup> "These cultural ties are the pillars of every transaction."<sup>105</sup>

As a result, transactions among these ethnic bankers—often established and respected members within their communities—are conducted through a system

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*fying Hawala Business*, THE BANKER, Apr. 1, 2002, available at 2002 WL 19007789 (explaining that "hawala" means "transfer," and in the context of hawala remittances, it means "transfer of value" rather than a "physical transfer").

101. The tea trade between the southern provinces of China and the Imperial Capitol during the Teng Dynasty made it necessary to introduce a more convenient mode of exchange, referred to by the Chinese as "flying money" or "fai chen." The system worked in the following way:

Provincial governors maintained special courts in the capitol; southern merchants paid the money they made from the sale of goods in the capitol into these courts, which then used it to satisfy tax quotas due from the southern provinces to the central government. In return, the courts issued a certificate to the merchants. When the merchant returned home, he presented the certificate to the provincial government and was paid an equivalent sum of money. In this way, both the merchant and the government avoided the risk and inconvenience of carrying large quantities of money or other valuable commodities. Arabic traders used a similar system as a means of avoiding being robbed on the Silk Road and again by avoiding the need to physically carry large sums of money.

Lambert, *supra* note 68, at 13; see also Mohammed El-Qorchi, *How Does This Informal Funds Transfer System Work, and Should It Be Regulated?* Fin. & Dev., Vol. 39, Issue 4, Dec. 1, 2002, at 31, 2002 WL 19084823 (ARSs or informal funds transfer ("IFT") systems were used in earlier times to finance trade. "They were created because of the dangers of traveling with gold and other forms of payment on routes beset with bandits. Local systems were widely used in China and other parts of East Asia and continue to be in use there. They go under various names—Fei-Ch'ien (China), Padala (Philippines), Hundi (India), Hui Kuan (Hong Kong), and Phei Kwan (Thailand).").

102. Some have suggested that because under Islamic law it is considered sinful to receive interest from money, it is unlawful to use certain recognized banking systems. In such cases, alternative procedures, known as the "Thick al muwamat" or "transactions amongst the people," are relied upon under sharia Islamic law. Lambert, *supra* note 68, at 13.

103. Carroll, *Interpol Report*, *supra* note 17, at 2; Jost and Sandhu, *supra* note 98, at 1. Al-Suhaimi explains the necessity of trust as follows:

[t]his requires that the persons collecting the funds to be remitted from the expatriates must have credibility. They are likely to have the same nationality as the expatriate, speak the same language or dialect, hail from the same region, town or village and belong to a prominent family or a tribe. Such people often have strong roots and ties with their home country and may even have legitimate, well-known local businesses.

Al-Suhaimi, *supra* note 100.

104. For a discussion and evaluation of the use of trust and ethnic ties in ethnic-based organizations, such as rotating credit associations, to lower transaction cost and produce economic capital, see Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841 (1999).

105. Carroll, *Interpol Report*, *supra* note 17, at 2.

of similarly situated bankers in corresponding diaspora communities around the world and make little, if any, use of formal contracts, written communications, or negotiable instruments.<sup>106</sup> Alternative remittances involve the delivery of money by one ethnic banker, at the request of a client, to another ethnic banker in another country, with orders to the latter to pay in accordance with the client's order—all with no money crossing a border and no involvement of the conventional banking system.<sup>107</sup> The debt between the two bankers would be settled by subsequent transactions, as described below.

A hypothetical transaction may be structured in the following way.<sup>108</sup> First, assume that X lives in New York and would like to send US \$5000 to his brother in Karachi. X has the option of using the services of a major bank. However, the bank may prefer that he have an account with it before it does business with him. It will sell him Pakistani rupees at the official rate (assume this rate is 31 rupees to the dollar), and it will charge him U.S. \$25 to issue him a bank draft. Delivery of the 154,225 rupees to X's brother in Karachi would involve an overnight courier service costing approximately U.S. \$40 to Pakistan and possibly taking as much as a week to arrive.

By contrast, the same transaction handled by a hawala operator would involve the following terms: a 5% "commission," (or as offered by another hawala operator, a pricing scheme of 1 rupee for each dollar transferred), an exchange rate that is more favorable to X than the official exchange rate—assuming a rate of 35 rupees to the dollar, delivery of the 166,250 rupees to X's brother; or assuming a rate of 37 rupees for the dollar, delivery of 180,000 rupees. Delivery would be included in the transaction fee, and the delivery associated with a hawala transaction would also be faster (usually within a day of the initial payment) and more reliable than a bank transaction. The recipient, in this case, X's brother, could claim the money either by showing an ID or relaying a password.<sup>109</sup>

The hawala transaction would involve the following steps. X gives US \$5000 to the New York hawala operator. The New York operator contacts her hawala counterpart in Karachi. The Karachi hawala operator arranges to have rupees delivered to X's brother. No money has left New York, and no money has entered Pakistan because what has been transferred is the value of money,

106. *Id.* at 2; Jost and Sandhu, *supra* note 98, at 1-2.

107. Carroll, *Interpol Report*, *supra* note 17, at 3.

108. Unless stated otherwise, this example and details of the transaction are drawn from Jost and Sandhu, *supra* note 98, at 2-4.

109. Ed Blanche, in *The Labyrinthine Money Trail of Osama bin Laden*, THE MIDDLE EAST, Jan. 2002, at 22, LEXIS, News Group File, describes the process between the customer and hawala operator as follows:

[the customer and operator] agree on a one-time identity number or a password and the dealer contacts his colleague at the other end telling him to pay out the money to whoever approaches him with the number or password. No identification is required, no cash is traceable through electronic or legal channels and the dealer and his partner, often members of the same clan, settle up later. Records are kept only until the transaction has been completed, when they are destroyed.

See also Michelle Cottle, *Hawala v. the War on Terrorism*, THE NEW REPUBLIC, Oct. 15, 2001, at 24, available at LEXIS, Magazine Stories; Lambert, *supra* note 68, at 14.

not money itself.<sup>110</sup> Upon delivery of the cash to X's brother, the New York operator then owes the Karachi operator the equivalent of US \$5000. The Karachi operator would recover that amount through subsequent arrangements with his New York counterpart. These arrangements are possible because the two hawala operators are part of a network of hawala operators based primarily on trust. Indeed, the New York operator trusts that the Karachi operator will deliver the money to X's brother in Pakistan. And the Karachi operator trusts that the New York operator will repay him for the money he delivered to X's brother. Between the two operators, there is no receipt or record keeping of individual remittances,<sup>111</sup> only an understanding of what is owed and how it will be paid. Indeed, "[t]he trust between the two bankers secures the debt and allows the debt to stand, with no legal means of reclamation. In some cases, the trust between client and banker allows the money to be delivered to its destination even before payment is requested of the sender."<sup>112</sup>

How the Karachi hawala operator will be repaid depends on the nature of the pre-existing ties existing between him and the New York operator. For example, in the first instance, both operators may be business partners or at least do business with each other regularly. Transferring money between them would simply be part of their routine business dealings. Or in the second instance, the Karachi operator might owe the New York operator money and because it might be difficult to transfer money out of the country, the Karachi operator is repaying his debt to the New York operator by paying the latter's hawala customers, that is, by delivering cash to them in Pakistan.

In the second scenario, the Karachi operator does not recover any money from the New York operator because he is simply repaying an existing debt to the New York operator, or handling money that for some reason the New York operator has entrusted to him, but is unable, perhaps because of exchange regulations, to move out of the country. In the first scenario, however, where the two operators conduct regular businesses with each other, some formal mechanism for balancing accounts between the two would be needed. If, for example, the two hawala operators also run an import/export business (which is a highly

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110. Lambert, *supra* note 68, at 14.

111. To the contrary, records of the transaction are usually destroyed once the transaction is completed. *Id.* As noted, ARSs consist of several sub-systems. The Chinese remittance system maintains few records because most transactions are conducted by phone or fax. However, if records are kept, two sets may be used, one to keep track of legitimate transactions, and the other containing a "hidden 'parasitic' account documenting off-the-books transactions. . . . [L]aw enforcement attempts to decode these records are complicated by the need to distinguish traditional Chinese accounting practices from accounting entries recording illegal activities." Carroll, *Interpol Report*, *supra* note 17, at 14. In the hawala system, remittances that are recorded are often encrypted and in the operator's "personal shorthand," for example, consisting of mere initials and numbers. *Id.* In some cases, bank notes or pictures may be torn in two, with one part given to the client and the other sent or delivered to the recipient. The two parts must be ultimately matched. *Id.*

112. *Id.* at 3. Given the fact that ARSs are based on informality and trust, they also carry certain risks. For example, a family lost a lot of money when its trusted hawala operator was murdered before family members could receive the transferred funds. The family had no legal claims. See Gregg Jones, *Shadowy Hawala System Moves Cash Quickly; Anonymity of Transfers Appeals to Terrorists, Criminal Syndicates*, DALLAS MORNING NEWS, Oct. 18, 2001, at 15A.

likely scenario because many hawala transactions are conducted in the context of import/export businesses), the New York hawala might purchase and import goods from the Karachi operator and through this import context, manipulate invoices to conceal the actual movement of money. Thus, if she needs to repay the Karachi operator 180,000 rupees or the equivalent of US \$5000, which was delivered to her client's brother in Karachi, she may do so by "under invoicing" a shipment to him, sending him US \$20,000 worth of goods but invoicing him for only US \$15,000. The additional US \$5000 value of the goods sent represents the money owed.

ARSs are preferred over traditional banking by those in developing countries with fragile banking systems and by many members of ethnic communities throughout the world. Though it is an ancient practice and in many ways still retains its traditional basis founded on common ethnic ties and community norms of trust, it has also adopted modern techniques such as advertising, whether in ethnic newspapers or even on the Internet,<sup>113</sup> and other high-tech devices such as computers and cell phones.<sup>114</sup> Because of their informal, often secretive nature, there are no definitive figures regarding the amount of money that is transferred via the ARS.<sup>115</sup> Pakistani bankers estimated that the annual hawala inflow into Pakistan was between \$2.5 billion and \$3 billion, compared to only \$1 billion through banks.<sup>116</sup> A 1999 investigation by Institutional Investor magazine revealed an estimated 1,100 hawala brokers operating in Pakistan, with individual deals running as high as \$10 million.<sup>117</sup>

ARSs are especially popular in diaspora ethnic communities, especially in U.S. cities with a high concentration of South Asian or Middle Eastern immigrants.<sup>118</sup> For years, ARSs functioned as a legitimate mode of money transfer used to transmit the earnings of those in immigrant communities to relatives in the home country.<sup>119</sup> While there may be regulations in many countries that

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113. Carroll, *Interpol Report*, *supra* note 17, at 12. Some researchers have found that hawala dealers advertise their services, and Interpol has documented cases of advertising in ethnic papers and on the Internet. Other researchers have found, however, that many hawala operators do not advertise. The Vietnamese and Chinese ARSs tend to restrict access to the system to those within the same ethnic network and do not advertise publicly.

114. Michael M. Phillips, *U.S. is Forced to Use Cash-Transfer System Utilized by Terrorists*, *ASIAN WALL ST. J.*, NOV. 13, 2002, at A1 (describing how "Kabul's hawaladars work with their computers and cellphones from an antenna-studded building where money changers swap the national currency, afghanis, for foreign bills").

115. Carroll, *Interpol Report*, *supra* note 17, at 4; El-Qorchi, *supra* note 101 ("Hawala transactions cannot be reliably quantified because records are virtually inaccessible, especially for statistical or balance of payments purposes.").

116. Cottle, *supra* note 109. There are larger estimates also. See Jones, *supra* note 112 (putting the figure at \$5 billion to \$6 billion being transferred in Pakistan annually by hawala dealers); Richard Behar, *Kidnapped Nation*, *FORTUNE*, Apr. 29, 2002, at 84, available at LEXIS, *Fortune* (describing documents prepared for the finance ministry which reveal that nearly \$8 billion was being remitted into Pakistan annually by overseas Pakistanis through the hawala system, an amount eight times what is transmitted into the country through banks).

117. Cottle, *supra* note 109.

118. *Id.*

119. Carroll, *Interpol Report*, *supra* note 17, at 4; see El-Qorchi, *supra* note 101 ("At present, its primary users are members of expatriate communities who migrated to Europe, the Persian Gulf region, and North America and send remittances to their relatives on the Indian subcontinent, East

make hawala transactions illegal,<sup>120</sup> it is by no means always the case that money transmitted via hawala operators derives from illicit earnings. For a variety of reasons, most associated with concerns about political stability, currency restrictions,<sup>121</sup> “repressive financial policies and inefficient banking institutions,”<sup>122</sup> many people opt to move their money to another country, and the use of ARSs “as a facilitator of ‘capital flight’ on both large and small scales is very common.”<sup>123</sup> ARSs have therefore proliferated as a result of the global movement of workers across national borders. ARSs are a quick and convenient way of maintaining a financial link between the expatriate and the homeland communities.<sup>124</sup> This is especially so because it is frequently the case that expatriate workers come from the underprivileged areas of their home countries, such as distant rural villages not served by their countries’ conventional banking system. As a result, hawala transactions are especially in demand among members of the expatriate community.<sup>125</sup>

Additionally, these communities are usually insular, tightly knit, and depend on trust and common understandings of community norms. “The

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Asia, Africa, Eastern Europe, and elsewhere. These emigrant workers have reinvigorated the system’s role and importance.”).

120. For example, to the extent that hawala operators engage in foreign exchange speculation or conduct transactions based on a parallel, unofficial rate of exchange, they would be engaged in an illegal activity in India. The Foreign Exchange Regulation Act of India, 8(2)(8) states that:

[e]xcept with the previous general or special permission of the Reserve Bank, no person, whether an authorized dealer or a moneychanger or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for time being authorised by the Reserve Bank.

Jost & Sandhu, *supra* note 98, at 5.

121. El-Qorchi, *supra* note 101 (describing how hawala transactions from developing countries are driven “by a desire to circumvent exchange control regulations and the like, leaving no traceable records”).

122. *Id.* The reason hawala is popular in developing countries is because of lack of confidence in the formal banking system. “Only a small percentage of people maintain bank accounts in Pakistan. Foreign currency transactions have only been legal since 1992, and bank-to-bank transfers even within the country are cumbersome and expensive.” Jones, *supra* note 112. Mohsin Khalid, a Pakistani who was president of the Islamabad Chamber of Commerce and Industry, said of a recent bank-to-bank transfer from the United States that took one month to complete, “I would have had that money in 24 hours if I had gone through the [hawala] system . . . And they would have delivered it to my place.” *Id.*

123. Jost & Sandhu, *supra* note 98, at 6 (“Many people in these countries [with capital outflow restrictions] have money that they would like to move to another country due to concerns about stability, to pay for education or medical treatment.”); see also Al-Suhaimi, *supra* note 100 (“Hawala is prevalent in many countries that have or had restrictions on free flow of capital and where many people need foreign exchange for travel, education, business and so on. Dealers can take local currency and provide hard currency overseas to travelers [sic], businesspeople and students at competitive rates.”); Behar, *supra* note 116 (describing the \$100 billion in capital government leaders believe to have been taken out of Pakistan in recent years); El-Qorchi, *supra* note 101 (“In addition to overly restrictive economic policies, unstable political situations have offered fertile ground for the development of the hawala and other informal systems. Most IFT (informal funds transfer) systems have prospered in areas characterized by unsophisticated official systems and during times of instability. They continue to develop in regions where financial development has been slow or repressed.”).

124. Al-Suhaimi, *supra* note 100.

125. *Id.* Carroll, *Interpol Report*, *supra* note 17, at 4 (“Ethnic banking systems are also popular because of their ability to serve remote Asian locations.”).

hawaladar [hawala operator] in any given country or region is known only to members of the same family, village, clan, or ethnic group. Their existence is not publicized outside their respective communities. But they will know of, and be in regular contact with, hawaladar in other regions and other countries of the world.”<sup>126</sup> They are also governed by a shared understanding of what is required of the parties involved in such transactions, and consequently, the system is highly efficient because of the minimal costs incurred in their performance. The need for enforcement therefore is unlikely because “[a]ny form of cheating within the system is said to be extremely rare. If cheating is discovered, it is usually punished by effective excommunication and loss of honor, which is in itself the equivalent of an economic death sentence.”<sup>127</sup>

Consequently, ARSs offer a number of advantages over conventional banking services. First, ARSs are cost effective due to “low overhead, exchange rate speculation and integration with existing business activities. . . .”<sup>128</sup> ARSs are embedded within existing businesses such as import and export. They are conducted on an informal basis and thus do not incur expenses usually associated with businesses in the formal sector, such as insurance or employee retirement plans.<sup>129</sup> Hawala operators routinely skirt exchange regulation laws and are therefore able to offer their clients a more favorable rate of exchange than that offered by banks, which transact at the official, authorized rate.<sup>130</sup>

Second, ARSs are efficient and reliable. Clients prefer the international network of hawala operators, who operate on trust and connections and whose remittances typically take one or two days, as opposed to international wire transfers which usually take about a week and may be subject to delays due to holidays, weekends, and time differences.<sup>131</sup> Because of their efficiency and

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126. Lambert, *supra* note 68, at 15; see Behar, *supra* note 116 (In Pakistan, it is alleged by central bank insiders that six men, all members of the Memon ethnic group, control the country’s hawala “mafia” or “cartel.” These six operate from their bases in Karachi and Dubai and rely on each other’s networks for their remittances.).

127. Lambert, *supra* note 68, at 15.

128. Jost & Sandhu, *supra* note 98, at 4.

129. *Id.*

130. *Id.* at 4-5. Hawala operators may engage in foreign exchange speculation or black market currency transactions, which means their dealings may be illegal in the country where they operate. *Id.*; see also Al-Suhaimi, *supra* note 100 (“As the cost of business for Hawala is very low, dealers can offer better exchange rates than those offered by licensed banks and money changers. Also, in many developing countries, there is normally a large difference in official and unofficial exchange rates.”); El-Qorchi, *supra* note 101 (“The fees charged by hawaladars on the transfer of funds are lower than those charged by banks and other remitting companies, thanks mainly to minimal overhead expenses and the absence of regulatory costs to the hawaladars, who often operate other small businesses. To encourage foreign exchange transfers through their system, hawaladars sometimes exempt expatriates from paying fees.”).

131. Jost & Sandhu, *supra* note 98, at 5-6; see also Lambert, *supra* note 68, at 15 (Hawala “is favored because it usually costs less than moving funds through the banking system, it operates 24 hours a day and every day of the year, it is virtually completely reliable, and there is minimal paperwork required.”); Al-Suhaimi, *supra* note 100 (“This channel is much faster and more efficient, as it requires only a telephone call or an e-mail for a transfer. There are no delays due to documentation, processing, clearing and arranging delivery. Normally Hawala transfers are delivered within 24 to 48 hours.”); El-Qorchi, *supra* note 101 (“The system is swifter than formal financial transfer systems partly because of the lack of bureaucracy and the simplicity of its operating system; instruc-

reliability, the use of ARSs has expanded from members of expatriate and ethnic communities to include organizations such as World Vision International, Care, and other aid agencies, which rely on hawala networks to move money from Pakistani banks to Kabul as well as to other isolated, often heavily-armed rural areas in Afghanistan where viable banking systems are non-existent.<sup>132</sup> The World Bank estimates that aid agencies have moved at least \$200 million through hawalas since the fall of the Taliban.<sup>133</sup> The Bush administration has allowed such funds to pass through the system because it fears that without aid inflows required for the construction of roads, bridges, and other basic infrastructure projects to show Afghans that progress is being made, the interim Afghan government may not survive.<sup>134</sup>

Third, ARSs are specifically geared to the needs of the ethnic and expatriate communities. In deference to expatriate workers' work schedules, hawala operators may even travel to workers' homes or places of work.<sup>135</sup> Many expatriate workers may also lack formal education and have a distrust of financial institutions. The absence of paperwork involved in a hawala transaction makes it especially appealing to such workers.<sup>136</sup> Given the preference for cash among expatriate workers and their family members in home countries, the delivery of funds is normally made in cash, thus saving the beneficiary the trouble of going to banks.<sup>137</sup> Additionally, funds are often paid by the transmitter only once the money has arrived at the receiving end and receipt has been confirmed, resulting in a few days' extension of credit by the hawala operator.<sup>138</sup> Finally, because many expatriate workers are males with wives still in the home country where old-world traditions require women to have few external contacts, the hawala system is particularly appealing. The family would rely on a trusted hawala operator familiar with local etiquette to act as a financial intermediary, thus making it possible for wives to avoid direct dealings with banks and their agents.<sup>139</sup>

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tions are given to correspondents by phone, facsimile, or e-mail; and funds are often delivered door to door within 24 hours by a correspondent who has quick access to villages even in remote areas.”).

132. Phillips, *supra* note 114.

133. See *id.* Graham Strong, operations director for western Afghanistan for World Vision International, said, “I don’t think there’s an agency in Afghanistan that doesn’t use the hawala system.” According to CARE, not once have its hawalas failed to deliver the money. Every few months, CARE conducts bids from rival hawaladars to ensure it is receiving the best rate. *Id.*

134. *Id.* Reconstruction efforts will require disbursement of millions of dollars to places far from the Afghan capital, but there are no nation-wide commercial banks. *Id.* The central bank is itself in disarray. Aid agencies are reluctant to transport large amounts of cash through the unstable countryside. “That leaves at least one way to move money safely and reliably: hawalas.” *Id.* John Taylor, the U.S. Treasury Undersecretary for International Affairs, said, “Eventually there will be other ways. But right now they’re there, and they’re very efficient.” *Id.* Aid workers judge the hawala system solely on whether it delivers the money needed for aid reliably and efficiently. “U.S. officials see the risk but feel they have no choice but to take it.” *Id.*

135. See also Al-Suhaimi, *supra* note 100; El-Qorchi, *supra* note 101 (“The flexible hours and proximity of hawaladars are appreciated by expatriate communities.”).

136. Al-Suhaimi, *supra* note 100.

137. *Id.*

138. *Id.* El-Qorchi, *supra* note 101 (“To accommodate their clients, hawaladars may instruct their counterparts to deliver funds to beneficiaries before expatriate workers make payments.”).

139. *Id.*

Fourth, ARSs are preferable to banks because bureaucratic hurdles are substantially reduced for those expatriate workers who deal exclusively in cash or are without social security numbers in the case of the United States.<sup>140</sup> Even for those who earn their money legally, the lack of a paper trail is an additional incentive to use ARSs and not banks.

Of course the informal nature of ARSs also facilitates tax evasion and other types of illegal ventures. Money transmitted through banking channels may attract attention from tax officials, whereas ARSs are essentially “a scrutiny-free remittance channel.”<sup>141</sup> The very essence of ARSs, its informality, has made it relatively easy for the system to defy national and even international control. There have been notable instances, especially in times of political upheavals, in which the system flourishes, flouting state law and regulation. For example, when currency exchanges between Pakistan and India were banned because of the 1947 partition of India, the ban was easily bypassed because hawala was used instead.<sup>142</sup> Following the Asian financial crisis, in order to curtail capital flight, the Malaysian government imposed currency controls in 1998 by restricting people’s ability to convert the local ringgit, a move also thwarted by hawala operators with ample access to hard currency.<sup>143</sup> In May 1998, because of a drop in domestic confidence in the Pakistani banking system as Pakistan weathered global condemnation for testing nuclear weapons, the amount transferred through official channels dropped from \$150 million per month to \$50 million. During this period, hawala became the preferred mode for remittances into Pakistan from overseas workers, essentially replacing banks for remittance purposes.<sup>144</sup> It has even been rumored that U.S. intelligence agents relied on hawala to incite unrest—using hawala operators to funnel money to anti-Soviet mujahedin guerillas fighting in Afghanistan.<sup>145</sup>

Even where ARSs are legal, they are not popular with the government. ARSs have significant economic implications because of their impact on the monetary accounts of countries at both ends of the transaction. Unlike funds transferred through the formal sector, hawala transactions are not recorded in official statistics, which means that fund transfers do not show up “as an increase in the recipient country’s foreign assets or in the remitting country’s liabilities. . . .”<sup>146</sup> At the same time, no direct or indirect tax is assessed on hawala transactions, resulting in “a negative impact on government revenue. . . .”<sup>147</sup>

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140. Jost & Sandhu, *supra* note 98, at 6.

141. *Id.*

142. Cottle, *supra* note 109.

143. *Id.*

144. *Id.*; see also Behar, *supra* note 116 (In this example, hawala helps Pakistan “defy” international sanctions. “Pakistan should have had hyperinflation in 1998 after its nuclear bomb tests caused capital flight . . . and it should have had plummeting foreign-exchange rates after Sept. 11. But neither of those things happened. The reason: Hundi [hawala] is both killing the economy and keeping it afloat.”).

145. Cottle, *supra* note 109.

146. El-Qorchi, *supra* note 101.

147. *Id.* See Behar, *supra* note 116 (noting a report prepared for Pakistan’s finance ministry describing the \$8 billion being remitted into Pakistan each year by overseas Pakistanis through the hawala system, none taxed.).



Hawala transactions, whether for benign or malignant purposes, may also damage a country's economy because they undermine the official exchange rate and may, in certain cases, result in the siphoning off of foreign currency reserves.<sup>148</sup>

At this point, it is useful to make a distinction between "transactions where the source of the money is legitimate . . . and where the source, and intent, of the transaction is illegitimate."<sup>149</sup> According to Indian and Pakistani usage, "white hawala" refers to legitimate transactions; these include hawala remittances, which, although illegal under Indian and Pakistani law, may not be illegal in other jurisdictions.<sup>150</sup> "Black hawala" refers to illegitimate transactions and is associated with offenses such as money laundering, narcotics trafficking, and fraud, which are illegal in most jurisdictions.<sup>151</sup> As the following section explains, with traditional avenues for money laundering becoming increasingly restricted by national and international regulations, "black hawala" is becoming more common and ARSs are proving to be an effective, fast, and inexpensive mechanism to launder money.

### *B. The Criminal Economy, Alternative Remittance, and State Regulation*

The lack of a paper trail and the emphasis on anonymity mean that ARSs are susceptible to multiple forms of misuse and abuse. In some instances, money, whether derived from legal or illegal sources, might be used for illegal purposes. India, for example, discovered that money transferred via hawala was being used to fund separatist movements in Punjab and to provide legal aid to gang members tried for the smuggling of arms from Pakistan across the Indian border.<sup>152</sup> Officials in the United States also determined that hawala money had been used to finance the smuggling of 200 aliens per month into the United States, at \$20,000 per person, from South Asia.<sup>153</sup> A Vietnamese underground bank, used by the Vietnamese in the United States to send money to relatives in remote rural areas in Vietnam, was also used to transmit money to Vietnam to destabilize the Communist government.<sup>154</sup> The United States government is in-

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148. Cottle, *supra* note 109. This is the case because in cases of transmittance of funds by a client from a hard currency country, for example, the United States, "dollars stay with U.S.-based hawaladar instead of being injected into the local banking system." *Id.* On the other hand, for countries such as Pakistan, hawala may be both a boost and a curse. The central bank of Pakistan itself has had to turn to hawala dealers. It purchased \$4.4 billion in 1999 from dealers in Dubai to increase its dwindling dollar reserves. Behar, *supra* note 116.

149. Jost & Sandhu, *supra* note 98, at 8.

150. *Id.*

151. *Id.*

152. Cottle, *supra* note 109.

153. *Id.*; Carroll, *Interpol Report*, *supra* note 17, at 16 (stating that illegal activities such as drug smuggling and traffic in humans produce cash surplus used by hawala operators to generate funds for their business); see also Barry Ryder, Interview with the BBC, in Fletcher N. Baldwin, Jr., *Organized Crime, Terrorism and Money Laundering in the Americas*, 15 FLA. J INT'L L. 3, 17-18 (2002) (describing the use of ARS orchestrated by one of the organizers of a human smuggling venture to transfer money from those smuggled back to their families in China. This underground banking system was so effective that it became a major competitor of the Bank of China located on East Broadway in New York City).

154. Cottle, *supra* note 109.

creasingly concerned that the hawala system is being used by not just criminal syndicates but also by terrorist organizations such as al-Qaeda.<sup>155</sup>

In other instances, the illegality lies not in the criminal use of the funds being remitted but in some other ancillary violations, for example, violation of exchange controls or of customs regulations.<sup>156</sup> In yet other instances, ARSs may be used to launder money that is itself illicitly gained,<sup>157</sup> and the illegality of ARSs lies additionally in the “act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources.”<sup>158</sup> In this last instance, the funds are therefore illegally obtained, which would not necessarily be the case in the first two instances, and through ARSs, laundered to disguise their illegal origin.

Part III explained that money laundering consists of three phases: placement, layering, and integration. Hawala may be used in any of these phases. In the placement phase, hawala may provide an especially useful means for introducing cash into the financial system.<sup>159</sup> In some national jurisdictions, financial institutions are required to report cash transactions over a certain amount—US \$10,000 in the United States. In the hypothetical discussed in Part III, Section A, X gave the New York hawala operator US \$5000 in cash. Because the hawala operator not only performs remittance services but also operates a business, it is a routine matter for her to make periodic bank deposits consisting of cash and checks. Although she might prefer that no reports be filed by the banks for large cash transactions, her business provides her with more than sufficient justification for cash deposits. At the same time, she might also use the cash received from X and other hawala clients to reinvest in her business or meet business expenses, thus decreasing the need to make cash deposits in banks.

In the layering stage, the money launderer attempts to make illicit funds appear legitimate, often by transferring money from one account to another.

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155. See Jones, *supra* note 112 (noting that post-September 11 investigations have brought the hawala system to the attention of U.S. investigators).

156. Carroll, *Interpol Report*, *supra* note 17, at 16. Invoice manipulation may be used to generate hard currency “by conjuring documentation for non-existent shipments in order to obtain foreign exchange releases.” The invoice manipulation component in a hawala transaction violates customs regulations in India, for example, while the currency speculation or currency dealings at other than the official exchange rate violate India’s Foreign Exchange Regulation Act. *Id.*

157. Carroll states that:

[M]oney associated with the drug trade is laundered through ARSs in Hong Kong, China, India, Indonesia, Nepal, Pakistan, the People’s Republic of China, the Republic of the Philippines, Sri Lanka, Thailand, Turkey, and Vietnam. Remittance systems in India, Sri Lanka, and Turkey encounter profits from smuggling. The Indian system also launders funds from smuggled gold and precious stones, terrorism, and corruption . . . . The ethnic banking systems of Hong Kong, China, Indonesia, Japan, and the Republic of the Philippines are used to launder illegal gambling profits, and the proceeds of human traffic, including alien smuggling and ransom, are washed through alternative remittances in India, Japan, the People’s Republic of China, the Republic of the Philippines, Vietnam.

Carroll, *Interpol Report*, *supra* note 17, at 22-23.

158. *Id.* at 6.

159. The discussion on the use of hawala in the three phases of money laundering is drawn from Jost & Sandhu, *supra* note 98, at 7-8, unless otherwise indicated.

Layering via the formal banking system presents several problems for the money launderer. If deemed suspicious, the transaction would be reported as such to the relevant authorities. Conventional banking also leaves a paper trail and could lead investigators to the sources of the illicit proceeds. By contrast, "[h]awala transfers leave a sparse or confusing paper trail if any. Even when invoice manipulation is used, the mixture of legal goods and illegal money, confusion about 'valid' prices and a possibly complex international shipping network create a trail much more complicated than a simple wire transfer."<sup>160</sup> In fact, even basic, routine hawala transfers can be difficult to unravel and trace. If, on the other hand, they were used for layering purposes, for example, by structuring the transaction so that several hawala brokers in several countries are used, and by breaking up the transfers over a period of time, they would pose an additional challenge to law enforcement authorities.

In the last stage of money laundering, money is integrated by the launderer who uses the funds to invest in other assets or in other illegal activities. "[H]awala techniques are capable of transforming money into almost any form, offering many possibilities for establishing an appearance of legitimacy."<sup>161</sup> Because hawala transactions are routinely embedded in preexisting businesses, money can be easily reinvested in the business. In our hypothetical, the New York hawala operator could easily have money transferred from the United States to Pakistan, then back to the United States, as part of an investment in a business in New York. In other words, "integration is accomplished again through the business front; as investment or disguised in the invoicing of imports and exports."<sup>162</sup>

As previously noted in Part III, there are numerous efforts in the United States and internationally to combat money laundering. It is clear that such efforts are ineffectual in many countries where enforcement of existing laws is lax.<sup>163</sup> It is also clear that such efforts are aimed at regulating the formal financial sector and have, until recently, neglected the alternative or informal sector. In many countries, however, ARSs may already be criminal "where exchange controls exist to regulate the flow of currency across their borders."<sup>164</sup> Yet, even in those countries where ARSs are illegal, the cultural norms rooted in these age-old, traditional systems nonetheless prevail over the more recently enacted state restrictions and controls. As a result, ARSs become "accepted and

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160. *Id.* at 9-10.

161. *Id.*

162. Carroll, *Interpol Report*, *supra* note 17, at 9.

163. See Behar, *supra* note 116 (describing how the government of Pakistan lacks the enforcement capability to address the problem. As of August 2001, Pakistan's provincial police did not have the authority to demand records from banks, much less from hawala operators. As one official said, "We have laws on the books, but there is no practical enforcement in Pakistan. Where are the task forces on money laundering, organized crime, or terrorism? We don't have a criminal database like the FBI. People are afraid to do investigations.").

164. Carroll, *Interpol Report*, *supra* note 17, at 22. Exchange controls are in place in countries such as Bahrain, India, Indonesia, Kuwait, Malaysia, Nepal, Oman, Pakistan, Thailand, Turkey, and Vietnam. *Id.*

embraced within society,"<sup>165</sup> and indeed, even used by government officials and business people.<sup>166</sup> In this high-tech, global age, it is increasingly clear that hawala, described as a "[c]enturies old . . . low-tech Western Union,"<sup>167</sup> represents a serious obstacle to national and international anti-money laundering efforts. Even as, and perhaps precisely because, national and international efforts to curb money laundering multiply, by increasing state oversight and regulation of the international banking system, ARSs have become an even more significant alternative for money launderers.<sup>168</sup>

There are a variety of approaches adopted by different countries faced with the widespread use of ARSs. Singapore, for example, attempts to regulate the system by requiring registration of all hawala brokers.<sup>169</sup> But given the internalization of hawala norms—trust, common ethnic ties, flexibility and informality—Singapore has also discovered that most brokers adopt a "don't-ask-don't-tell approach to business,"<sup>170</sup> thus making the job of law enforcement authorities exceedingly difficult.

Other countries such as Saudi Arabia have focused on creating a more appealing alternative to ARSs.<sup>171</sup> Since the 1970s oil boom, Saudi Arabia has attracted a large number of expatriate workers drawn from lesser developed, emerging market countries where ARSs have deep and ancient roots. These workers use hawala to transmit money from Saudi Arabia back to their home countries. But hawala has also been used as a conduit for transmitting illegally-derived funds, as discovered in recent years by the Saudi Arabian Monetary Agency ("SAMA").<sup>172</sup> To counteract the proliferation of hawala in ethnic and expatriate communities, SAMA has prodded Saudi banks to compete effectively with hawala operators for transmittance business by following the hawala model: speed, efficiency, and cost effectiveness.<sup>173</sup> Saudi banks have begun to open specialized centers that are aimed at specifically meeting the needs of expatriate workers.<sup>174</sup> The funds transmitted through these centers, like those transmitted via hawala, are delivered in cash or by check to the homes of benefi-

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165. *Id.*

166. *Id.*

167. Cottle, *supra* note 109.

168. *Id.* A warning was sounded more than a decade ago that "law enforcement agencies believe the success of new Western laws enabling the confiscation of assets and prosecution for money-laundering have greatly accelerated hawala use by international organised crime. . . ." *Id.* As the United States has taken action to clamp down on Colombian drug cartels, the cartels have turned to the black-market peso exchange, a money transfer system similar to hawala. *Id.*

169. *Id.*

170. *Id.* As one Singapore-based hawaladar remarked, "'My company does not question the amount or the purpose of sending the money. They trust us, and I don't ask questions. Why should I, when I have a license to operate?'"

171. Al-Suhaimi, *supra* note 100.

172. *Id.*

173. *Id.*; see also Behar, *supra* note 116 (noting that Pakistan is also exploring the possibility of incorporating hundi [hawala] principles into the national banking system to encourage Pakistanis living abroad to send money through the formal banking system).

174. These centers are open at times convenient to expatriate workers, for example, and provide help desks for customers as well as high-speed transfer systems between Saudi Arabia and countries with large numbers of expatriate workers. Al-Suhaimi, *supra* note 100.

ciaries within 24 to 48 hours. The centers charge low fees and offer competitive exchange rates. For law enforcement authorities, the key factor is the fact that transmitters and beneficiaries are not anonymous but clearly identified.<sup>175</sup>

The United States' approach is similar to Singapore's, that is, formalization<sup>176</sup> of what has been a wholly informal, alternative system. In 1993, the U.S. Congress enacted a law that required United States-based hawala operators to be registered with the government and to file suspicious activity reports similar to those already required to be filed by banks.<sup>177</sup> Efforts to introduce this law, however, were delayed twice due to concerns about the amount of paperwork that would be involved.<sup>178</sup> Since September 11, 2001, however, ARSs have attracted the attention of top government officials such as the then Secretary of Treasury Paul O'Neill who traveled to Dubai, deemed, along with Pakistan and India, to be part of the hawala triangle, to see for himself the workings of hawala.<sup>179</sup> Lawmakers have responded to the post-September 11 world by amending existing statutes and enacting new anti-money laundering laws. On October 26, 2001, Congress passed the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 ("2001 Money Laundering Act") as Title III of the USA Patriot Act.<sup>180</sup> In enacting the 2001 Money Lau-

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175. *Id.*

176. HERNANDO DE SOTO, *THE OTHER PATH* (1989) (generally proposing that the informal economy in developing countries, such as Peru, be formalized and informal property rights held by the poor in unrecorded, unlicensed form be subject to formal registration so wealth for the poor could be created).

177. Bruce Zagaris, *U.S. Congress Hearings Advance U.S. International Money Laundering Efforts*, 17 NO. 1 INT'L ENFORCEMENT LAW REP. 11 (2001) (stating that although the 1993 Annunzio-Wiley Act required the United States to make money services business ("MSB"), which would include hawalas, register, the Executive branch has not implemented this requirement) (quoting Jonathan Winer, former deputy assistant Secretary of State for Law Enforcement in the Clinton Administration). The Annunzio-Wiley Act is codified at 31 U.S.C. § 5318 (2003). The law requires that financial institutions or non-financial trades or businesses maintain record keeping, verification, identification and reporting procedures. The Annunzio-Wiley Act is noted for providing a safe harbor provision for institutions that voluntarily report suspicious behavior. 31 U.S.C. § 5318(g)(3) (2003).

178. Ryder, *supra* note 153, at 18; Cottle, *supra* note 109 (The 1993 law, which was twice delayed because of concerns about the volume of paperwork, first by the Clinton, then the Bush administration, has been fast-tracked. At a September 26, 2001 Senate hearing, the Treasury Under Secretary for Enforcement, Jimmy Gurule, assured Senate members that the administration will require hawaladars to be registered and to file suspicious activity reports similar to those already required of banks.). The United States is pushing other countries towards this approach as well. See Phillips, *supra* note 114 (describing pressure exerted by the Bush Administration on the government of Afghan President Karzai to require hawalas to keep records and report suspicious transactions).

179. Baldwin, *supra* note 153, at 16.

180. Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, tit. III, Pub. L. 107-56, 115 Stat. 272 (2001). Specifically, Title III of the 2001 Money Laundering Act deals with requirements and laws concerning money laundering and regulation of banking institutions. The new regulations relate to financial institutions such as domestic and foreign banks, broker-dealers, securities and commodities dealers as well as travel agencies, dealers in precious gems and currency exchanges. Under the PATRIOT Act, banks must engage in greater due diligence in their relationships with customers and other banks. The Act expands federal authority to obtain foreign bank records and broadens the list of entities required to file currency transaction reports. *Id.*; see also Nicole M. Healy, *The Impact of September 11th on Anti-Money Laundering Efforts, in the European Union and Commonwealth Gatekeeper Initiatives*, 36 INT'L LAW. 733 (2002). Essentially, the PATRIOT Act builds upon ex-

dering Act, Congress recognized the need to take additional measures to combat domestic and international money laundering.<sup>181</sup>

The 2001 Money Laundering Act remains focused on financial institutions and requires that they take “special measures” when dealing with foreign institutions and jurisdictions that are of “primary money laundering concern,” and that they strictly monitor the relationships between United States financial institutions and foreign banks.<sup>182</sup> The Act increases civil and criminal penalties imposed on financial institutions involved in money laundering—up to twice the amount of the transaction or up to a maximum penalty of one million dollars.<sup>183</sup> It also provides the government with enhanced enforcement powers over financial institutions.<sup>184</sup>

For the first time, these amendments also systematically address certain activities connected to the informal financial sector.<sup>185</sup> The USA PATRIOT Act requires, as far as ARSs are concerned, that money remitters, including hawala operators, register as “money services businesses” or “MSBs.”<sup>186</sup> A

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isting laws enacted through the Bank Secrecy Act (BSA). The Act grants authority to the US Secretary of Treasury to create regulations requiring financial institutions to keep records, create and file reports of transactions to the government and to implement counter-money laundering programs. These regulations are found as codified at 31 C.F.R. § 103. The reports filed by the financial institutions are reviewed by the U.S. Department of Treasury’s Financial Crimes Enforcement Network (FINCEN). This agency assists in coordinating investigative efforts and provides Congress with analysis and statistics useful in the creation of new anti-money laundering legislation.

181. In its findings, for example, Congress noted that the International Monetary Fund (“IMF”) had estimated that money laundering constitutes about two to five percent of the annual global gross domestic product, approximately \$600 billion each year. Money Laundering Act, Pub. L. 107-56, § 302(a)(1), 115 Stat. 272 (2001). Congress was also concerned that lax regulatory regimes in foreign jurisdictions facilitated the movement of funds that are derived either from criminal activities or are being used to commit criminal activities such as narcotics and arms trafficking, terrorism, financial fraud, and trafficking in human beings. Pub. L. 107-56, § 302(a)(4), 115 Stat. 272 (2001); see also Financial Action Task Force on Money Laundering, *Combating the Abuse of Alternative Remittance Systems: International Best Practices*, at 2 (June 20, 2003), available at [http://www1.oecd.org/fatf/pdf/SR6-BPP\\_en.pdf](http://www1.oecd.org/fatf/pdf/SR6-BPP_en.pdf). [hereinafter FATF, *Abuses of ARSs*] (The FATF noted that “the principal criminal activities engaged in by those who utilise MVT services are the illicit trafficking in narcotic drugs and psychotropic substances, illicit arms trafficking, corruption, evasion of government taxes and duties, trafficking in human beings and migrant smuggling.”).

182. 31 U.S.C. § 5318A (2001); John Gibeaut, *Show Them the Money: The Anti-Terrorism Laws Target Money Laundering, Forcing Banks to be More Vigilant and Compliance Officers to Take On More Tasks*, 88 A.B.A.J. 46, 47-48 (2002). The Act imposes on banks the duty to conduct enhanced due diligence for private banking and correspondent accounts, 31 U.S.C. § 5318(i) (2001), and prohibits U.S. banks from maintaining correspondent accounts with foreign “shell banks.” 31 U.S.C. § 5318(j) (2001). Shell banks are possible due to the age of the internet; they have no physical presence and are not subject to any country’s regulatory ambit.

183. 31 U.S.C. §§ 5321, 5322 (2001).

184. The Attorney General or the Secretary of the Treasury may issue a summons or subpoena to obtain foreign bank records even if maintained overseas, by serving the financial institution’s representative in the United States. 31 U.S.C. § 5318(k) (2001). The government may seek the forfeiture of funds deposited in a foreign bank by filing a civil action against the equivalent amount deposited in a U.S. bank account. 18 U.S.C. § 981(k) (2001).

185. 18 U.S.C. § 1960 (2001) (dealing with the illicit transmission of funds).

186. USA PATRIOT Act, PL 107-56, § 373, 115 Stat. 272 (2001) (amending 18 U.S.C. § 1960 to encompass the prohibition of an unlicensed money transmitting business, which is defined to mean a “money transmitting business which affects interstate or foreign commerce in any manner or degree and (A) is operated without an appropriate money transmitting license. . .”; “(B) fails to comply with the money transmitting business registration requirements under section 5330 of Title

MSB must comply with BSA requirements already applicable to financial institutions<sup>187</sup> and must also meet MSB registration requirements—registration with the Department of the Treasury by December 31, 2001<sup>188</sup> and maintenance of a list of its agents.<sup>189</sup> This registration requirement subjects MSBs to existing money laundering and terrorist financing regulations, including the requirement to maintain certain records,<sup>190</sup> file Currency Transaction Reports (“CTRs”) and

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31, United States Code, or regulations prescribed under such section.”). The United States Code defines money transmitting business as any business other than the United States Postal Service which:

provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers’ checks, and other similar instruments or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system.

31 U.S.C. § 5330(d)(1)(A) (2003); *see also* 31 C.F.R. § 103.11(uu)(1) through (uu)(6) (defining MSBs); *see* [www.msb.gov](http://www.msb.gov) for a definition of MSBs.

187. *See* <http://www.msb.gov/msb/index.html>. The following is a summary of BSA requirements for MSBs: MSBs must register and maintain a list of agents; if an MSB knows or suspects a transaction is suspicious and involves funds of \$2000 or more (\$5000 or more if identified by issuers from a review of clearance records), it must file a SAR; MSBs must develop an Anti-Money Laundering compliance program; if an MSB provides either a cash-in or cash-out transaction of more than \$10000 with the same customer in a day, it must file a currency transaction report (CTR); if an MSB provides money orders or traveler’s check for cash of \$3000-\$10,000 to the same customer in a day, it must maintain a record of the transaction; if an MSB provides money transfers of \$3000 or more to the same customer in a day, regardless of the method of payment, it must keep a record; if an MSB provides currency exchanges of more than \$1000 to the same customer in a day, it must keep a record.

The BSA requires financial institutions to create paper trails by keeping records and filing reports of certain transactions. The reports are submitted to the Department of Treasury’s Financial Crimes Enforcement Network (FinCen), which analyzes information submitted and supports law enforcement investigative efforts. The BSA requirements applicable to conventional financial institutions are now applicable to MSBs. *See* [http://www.msb.gov/pdf/bsa\\_quickrefguide.pdf](http://www.msb.gov/pdf/bsa_quickrefguide.pdf).

188. *See* [http://www.msb.gov/guidance/msb\\_registration.html](http://www.msb.gov/guidance/msb_registration.html). A copy of the filed registration and supporting documentation must be retained at a location in the United States (such as the address of the MSB reported on the form) for five years.

189. The registration rules also require that each registered MSB prepare a list of its agents. The agent list must be maintained at a location in the United States. The list must contain the name of every agent and certain information about the agent, such as name, address, telephone number, and a listing of the months in the twelve months preceding the date of the agent list whereby the gross transaction amount of the agent exceeded \$100,000. The initial agent list must be prepared by January 1, 2002. The list and each revised list must be retained for a period of five years. Civil and criminal penalties may be imposed for violations of the registration rules. *See* [http://www.msb.gov/guidance/msb\\_agent.html](http://www.msb.gov/guidance/msb_agent.html); *see also* 31 C.F.R. § 103.41.

190. MSBs are required to file a CTR within 15 days whenever a transaction or series of transactions involves more than \$10,000 in either cash-in or cash-out and is conducted by or on behalf of the same person on the same business day. MSBs that sell money orders or traveler’s checks must record cash purchases of \$3000 to \$10,000. MSBs that provide money transfer services must keep a record of each money transfer of \$3000 or more, regardless of the method of payment (for example, verify customer’s ID, record customer and transaction information; sender is also to provide certain information to the receiving MSB or financial institution); currency exchangers must keep a record of each exchange of more than \$1000 in domestic or foreign currency. *See* [http://www.msb.gov/pdf/bsa\\_quickrefguide.pdf](http://www.msb.gov/pdf/bsa_quickrefguide.pdf).

Suspicious Activity Reports ("SARs").<sup>191</sup> Failure to meet these requirements can result in civil and criminal sanctions.<sup>192</sup>

On the multilateral front, recognizing that money launderers may rely on the informal sector to escape the regulatory strictures of the formal financial sector,<sup>193</sup> the FATF, in 2003, published an updated version of its Forty Recommendations. Originally published in 1990, the set of Forty Recommendations was conceived as a framework that nations could adopt to stop money laundering. However, the 2003 version has a broad definition of what countries should consider a "financial institution." It defines "financial institution" as "any person that transfers money or value."<sup>194</sup> Additionally, the 2003 version specifies that informal banking systems may be considered financial institutions.<sup>195</sup> Classifying informal banking systems as financial institutions will allow countries to require such businesses to register and be held to the reporting standards required of banks.

The recommendations put forth by FATF are similar to those required under the USA Patriot Act, including those requirements dealing with registration, record keeping, and filing. Jurisdictions should have in place a system of civil, criminal, or administrative sanctions in cases of non-compliance.<sup>196</sup> However, because the FATF recognizes the value of these informal transfer systems, especially in providing services when access to the formal financial sector is

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191. Zagaris, *supra* note 177; see also [www.msb.gov](http://www.msb.gov). MSBs are required to report "suspicious activity involving any transaction or pattern of transactions at or above a certain amount: \$2000 or more; \$5000 or more for issuers reviewing clearance records." Bank Secrecy Act Requirements: A Quick Reference Guide for Money Services, Businesses, available at [http://www.msb.gov/pdf/bsa\\_quickrefguide.pdf](http://www.msb.gov/pdf/bsa_quickrefguide.pdf). Suspicious activity is defined in the Quick Reference Guide as:

any conducted or attempted transaction or pattern of transactions that you know, suspect, or have reason to suspect meets any of the following conditions: involves money from criminal activity; is designed to evade Bank Secrecy Act requirements, whether through structuring or other means; appears to serve no business or other legal purpose and for which available facts provide no reasonable explanation; involves use of the money services business to facilitate criminal activity.

*Id.* Examples of suspicious activity include the following: when a customer uses fake ID or multiple IDs. Structuring is defined as "[d]esigning a transaction to evade triggering a reporting or record keeping requirement." *Id.* Structuring is itself a federal crime and must be reported by the filing of a SAR. Examples of structuring include the following: breaking up a large transaction (which itself would meet the threshold for reporting of the transaction by the MSB) into smaller transactions. *Id.*; see also USA PATRIOT Act, § 352, 31 U.S.C. § 5318 (2003); 31 C.F.R. § 103.125 (2002). The MSB has 30 days after becoming aware of a suspicious transaction to file a SAR. A copy of the form filed along with supporting documentation must be retained for five years from the date of filing. Violation of the SAR filing requirement results in civil and criminal penalties. See Bank Secrecy Act Requirements: A Quick Reference Guide for Money Services, Businesses, available at [http://www.msb.gov/pdf/bsa\\_quickrefguide.pdf](http://www.msb.gov/pdf/bsa_quickrefguide.pdf)

192. Penalties that can be applied for the failure of these money transmitting services to register with the government or maintain appropriate records carry a civil penalty of \$5000 for each violation. 31 U.S.C. § 5330(e). Criminal penalties are also provided under the law. 31 U.S.C. § 5321 (2003), as amended by USA PATRIOT Act § 353(a) (2001).

193. See FATF, *Abuses of ARSs*, *supra* note 181, at 4.

194. *The Forty Recommendations*, FATF 15 (2003), available at [www.fatf-gafi.org/pdf/40Reccs-2003\\_en.pdf](http://www.fatf-gafi.org/pdf/40Reccs-2003_en.pdf).

195. *Id.* at 15, n.8.

196. FATF, *Abuses of ARSs*, *supra* note 181, at 8.



expensive, difficult or nonexistent,<sup>197</sup> the FATF recommends that government oversight be "flexible, effective, and proportional to the risk of abuse."<sup>198</sup> This means that the burden of compliance should not be so great as to drive these businesses further underground and thus make abuses even more difficult to detect.<sup>199</sup>

With respect to registration or licensing, FATF Special Recommendation VI states that every country should take measures to ensure that persons engaged in the transmission of money or value through a money or value transfer service (MVT service),<sup>200</sup> whether or not through alternative remittance networks, be licensed or registered and subject to the existing recommendations already applicable to financial institutions.<sup>201</sup> Registration is "likely to be a relatively cost effective approach when compared with the significant resources required for licensing."<sup>202</sup> The FATF, like the USA PATRIOT Act, also recommends that registration or licensing apply to agents as well, which means that the business must maintain a list of agents to be provided to the relevant authorities.<sup>203</sup> There are also suggestions on identification strategies for law enforcement to uncover informal, unregistered MVT services, by reviewing, for example, community media outlets such as newspapers, radio, or internet for advertising of such services, monitoring neighborhoods where MVT services are suspected to thrive, and, because many MVT businesses maintain bank accounts connected with their other business operations, enlisting the help of banks to crosscheck certain accounts against a register of MVT operators.<sup>204</sup>

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197. *Id.* at 2.

198. *Id.* at 3.

199. *Id.*

200. According to the FATF:

[An MVT service] refers to a financial service that accepts cash, cheques, other monetary instruments or other stores of value in one location and pays a corresponding sum in cash or other form to a beneficiary in another location by means of a communication, message, transfer or through a clearing network to which the MVT service belongs. Transactions performed by such services can involve one or more intermediaries and a third party final payment.

*Id.* at 1. The FATF further notes that MVT services are also referred to as ARSs with ties to certain geographic regions and may also go by various names, such as hawala, hundi, fei-chien, and the black market peso exchange. *Id.*

201. *Id.* Involved in both licensing and registration is the fact that law enforcement is aware of the existence of the MVT business. But licensing implies inspection and sanction by some authority whereas registration merely means the entry and recording of the MVT business into the regulator's list. *Id.* at 3.

202. *Id.*

203. *Id.* at 3.

204. *Id.* at 5; see also Jost & Sandhu, *supra* note 98, at 8 (noting that "[o]ne of the most consistent and valid indicators of hawala activity in investigations conducted in the United States is seen in bank accounts." A hawala bank account usually reveals significant cash and check deposits, usually from ethnic communities known to use the hawala system. Upon examination, these checks may have notations, such as the name of the person receiving the transmission, or something indicating what had been bought with the money. In one case, investigators noted that many checks, for even dollar amounts, had the word 'bangle' written on them, presumably to create the appearance that the checks had been written to purchase jewelry. Another indicator that a bank account is a hawala bank account is that it will show many outgoing transfers to financial centers known to be involved in hawala, such as Great Britain, Switzerland, and Dubai.).

In addition, KYC rules, considered the “backbone” of the anti-money laundering framework, would also be applicable to MVT systems. Recommendation 10 previously in place for financial institutions is now applied to MVT services, which means that the MVT operators must subject the client to an identification check, on the basis of official identifying documents such as identity cards, passports, driver’s licenses, or social security cards.<sup>205</sup> Failure on the client’s part to produce acceptable identification should result in the rejection of the client and if the circumstances are deemed to be suspicious, the filing of a suspicious transaction report.<sup>206</sup>

With respect to record keeping, the FATF recommends that national jurisdictions require MVT services to maintain accurate and complete records to enable investigative agencies to retrace transactions if necessary. FATF Recommendation 12, as applied to MVT services, would mean that such services would be required, for at least five years, to maintain records in a form that is “intelligible and retrievable.”<sup>207</sup>

In general, these recommendations address a particular goal: the enhancement of the integrity and transparency of informal value transfer systems internationally by requiring that countries register or license informal value transfer businesses and subject them to all of the FATF Recommendations that apply to banks and non-bank financial institutions.<sup>208</sup> Commentators have noted the need for an even more comprehensive and stringent approach, particularly in the use of ARSs in criminal and terrorist cases. Suggestions include the adoption of a regime that is “globalized, harmonized, standardized, and . . . multi-sectoral,”<sup>209</sup> exerting international pressure, through the FATF and other agencies, on underregulated countries such as Pakistan, the United Arab Emirates,

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205. FATF, *Abuses of ARSs*, *supra* note 181, at 7. Identification of the customer is required whether the relationship is short- or long-term. Thus, transactions conducted via fax or phone or internet should proceed only after customer identification has been made, for example, as a result of a previous business relationship.

206. *Id.* The FATF recommends that national jurisdictions impose requirements that are in line with their current reporting requirements for the formal financial sector. The FATF also notes that one of the factors to be considered in determining whether a transaction appears suspicious and thus to be reported to a competent authority is the lack of complete originator information. *Id.* at 8.

207. *Id.*

208. The European Union has followed the recommendations set by FATF and changed some of its money laundering legislation to include a more comprehensive definition of what is to be considered a financial institution. In December 2001, Directive 91/308/EEC(4), used to combat money laundering, was amended and the definition of what constituted a financial institution was defined as, “these [financial institutions] include the activities of currency exchange offices (bureaux de change) and of money transmission/remittance offices. . . .” European Parliament and Council Directive 2001/97/EC of 4 December 2001 Amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, art. 1, 2001 O.J. (L 344). By classifying alternative remittance systems as financial institutions, the EU subjects alternative remittance systems to the same anti-money laundering regulations that govern banks and other more traditional financial institutions. For example, all financial institutions (including the alternative remittance systems) are required to identify their customers before entering into a transaction with them, *id.* at art. 3, § 1, inform authorities of any situations that may indicate money laundering is occurring, *id.* at art. 4, § 1(a), and refrain from processing transactions that are known to be related to money laundering until the authorities have been contacted. *Id.* at art. 7.

209. Zagaris, *supra* note 177 (quoting Jonathan Winer, former deputy assistant Secretary of State for Law Enforcement in the Clinton Administration).

and the Gulf States that still lack adequate financial regulatory and enforcement systems. This new, proposed regime would emphasize accountability and the tracing of assets, establish a terrorist finance database, support presidential use of emergency economic powers, begin on-site inspections of registered MSBs, with an emphasis on those that have Middle East connections, and vigorously prosecute unregistered MSBs for their failure to register.<sup>210</sup>

It remains to be seen whether this approach, treating ARSs as though they were formal financial institutions, subjecting them to similar laws and pushing for a system of increased international cooperation,<sup>211</sup> will produce the desired results. To the extent that ARSs are deeply embedded in certain ethnic communities, identified and accepted by their members as an ancient, cultural practice, and to the extent that ARSs are practiced routinely in countries with an overall inadequate regulatory regime, it will not be easy to subject them to state-imposed control, whether in the United States or elsewhere. In many ways, a registration requirement for ARSs is intrinsically different from state regulation of conventional businesses. To require ARSs to be registered or licensed and maintain records sufficiently transparent to allow regulators to follow an audit trail if needed is to require ARSs to be, from the point of view of their clients, what they are not: formal when they are in essence informal. ARSs would have to shed the very features, informality, flexibility, anonymity, that make them appealing to ethnic communities to begin with. In other words, formalization requirements are themselves at odds with and in opposition to the deeply embedded norms of ARSs.

It may very well be that ARSs are “too fluid to control with conventional banking laws, too insular and too diffuse to easily infiltrate, and too enmeshed in South Asian culture to abolish outright (other nations have tried).”<sup>212</sup> A study by Interpol on hawala concluded that there was “[n]o evidence . . . to support the conceptualization of alternative remittance systems as organized, hierarchical networks; indeed, each expert surveyed reiterated the foundation of trust and ethnic networking that underlies these systems.”<sup>213</sup> ARSs are essentially flexible and non-hierarchical, with rules that are not imposed in a top-down fashion by a central ARS regulator but rather internalized as a customary norm embedded in the very social fabric of many societies. It will be difficult for law enforcement to decree changes in such diffuse and deeply internalized cultural norms. In this case, formal state law and social norms may exist in largely parallel and separate domains, so that the latter is maintained by community practice essentially in ignorance of the rules and requirements of the former.<sup>214</sup>

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210. *Id.*

211. See Financial Action Task Force on Money Laundering, *Special Recommendations on Terrorist Financing*, Oct. 31, 2001. Recommendation V states that “[e]ach country should afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations . . . .” *Id.*

212. Cottle, *supra* note 109.

213. Carroll, *Interpol Report*, *supra* note 17, at 25.

214. Robert Ellickson describes how the norms of Shasta County operate separately from the universe of state law. See ROBERT ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE*

Where norms are different from or antithetical to state-enacted laws and regulations, it will be far more difficult for the latter to be accepted and obeyed.<sup>215</sup>

At the same time, ARSs are popular in many regions of the world that do not have in place a system that promotes transparency or accountability. Thus, to call, as the FATF does, for the adoption of laws that are designed to create a transparent remittance system in countries that are themselves characterized overall by non-transparency is unlikely to produce the transparency desired. Take Pakistan, as an example, where hawala is popular and efforts are underway to reform one sector of the economy, the securities market. The Securities and Exchange Commission, launched in 1999, is still struggling to introduce basic disclosure and governance rules for public companies.<sup>216</sup> Massive corruption and stock manipulation are commonplace.<sup>217</sup> As the Securities and Exchange Commission Chairman Khalid Mirza noted, "[N]obody is supporting it. It's like the Greek myth of Ajax battling the elements. Transparent? Accountability? Who wants it?"<sup>218</sup> Mirza's reform efforts have led to street protests by brokers who accuse him of being an "American agent."<sup>219</sup>

Although the Commission has issued rules and regulations to ensure transparency, due process, and accountability, Mirza recently acknowledged that the Commission is constrained in its enforcement efforts by an economic and cultural environment that does not value transparency. According to Mirza:

[e]xcept for the legal framework, none of the essential elements are present in Pakistan in any substantial sense. Hence the ground is not fertile for corporate governance to develop firm and deep roots. Thus, so far, corporate governance is either confined to a few corporates or it is really superficial or it is not sustainable.<sup>220</sup>

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DISPUTES 137-55 (1991) (discussing how formal rules that governed property regimes in Shasta county had minimal effect on the way neighboring ranchers resolved disputes because the ranchers were guided by prevailing norms rather than legal rules); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694-95 (1996) (describing a more synthetic relationship in which state law is not separate from but reflects social norms).

215. See, e.g., Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 840 (1987) ("There is no doubt that the law possesses a specific efficacy . . . . Nevertheless, this efficacy, defined by its opposition both to pure and simple impotence and to effectiveness based only on naked force, is exercised only to the extent that the law is socially recognized and meets with agreement, even if only tacit and partial . . . .").

216. Behar, *supra* note 116.

217. At the time reform began, most of the trading was in just 30 stocks as the other 375 companies were listed primarily for tax advantages. The Karachi Stock Exchange was run by six brokers. It was commonplace for commercial banks to lend to crooked brokers, who then loaned the money at 20% interest rates to their client-investors whom the crooked brokers would subsequently ambush and devour in a practice called "cornering." Shareholder meetings were often not held. According to Pakistan's Securities and Exchange Commission Chairman, who took the job in March 2000, "[t]here are vested interests." Although newly enacted exchange regulations prevent brokers from managing the exchange, they still control 60% of the board. And only recently was the Commission authorized to regulate accountants. The penalty for manipulating the books, however, is only \$30 per offense.

218. Behar, *supra* note 116.

219. *Id.*

220. *Conditions Not Suitable for Corporate Governance*, THE NATION (PAKISTAN), NOV. 29, 2002, available at LEXIS, News Library, Global Newswire.

In this respect, Pakistan is not much different from other countries in South and East Asia or the Middle East where ARSs are an economic, social, and cultural fact of life.

Furthermore, in a country like Pakistan where the “black-market economy, which includes everything from underground banking to narcotics to the smuggling of consumer goods, ranges up to 100% of the so-called formal sector,”<sup>221</sup> it will be difficult to reform the banking sector, especially the parallel informal one, given the country’s overall predilection favoring the informal market, a cash economy and general resistance to centralized state control. A fraud expert hired by the United Nations to prepare a report on Pakistan’s money-laundering problems observed the following: “The whole economy is predicated on avoiding taxes,”<sup>222</sup> with eighty-five percent of all transactions in cash (compared to 3% in North America).<sup>223</sup> In terms of roots, it is the informal sector, not the state regulated sector, which has taken hold. In such an environment, state laws would be subject to the contextual constraint posed by norms existing outside the legal regime.<sup>224</sup>

Of course, state law may, in some instances, be used as an instrument for the reshaping of social norms.<sup>225</sup> In this sense, although formal laws and social norms may exist as two separately constituted realms, they may also influence each other. Norms may influence, or in our case, impede the effectiveness of laws and laws may also influence norms. In other words, government actions carry certain expressive dimensions and impart “cultural consequences” as well as “instrumental consequences.”<sup>226</sup> Overtime, everyday behavior may in fact be guided by formal rules and the interaction between such rules and preexisting social norms, thereby allowing for the successful modification of norms by state law. For example, rather than only requiring the informal ARS to comply with formal banking requirements, it may also make sense to encourage, as Saudi Arabia has, the formal banking system to adopt some informal ARS-type norms that make ARSs appealing to their clients. State attempt to regulate an area already infused with deeply ingrained norms is more likely to succeed if the state is aware rather than ignorant of the existence of such norms and how these norms shape the social, cultural, and economic order.

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221. Behar, *supra* note 116.

222. *Id.*

223. *Id.*

224. For a discussion of norms and their relationship to law, see Cao, *supra* note 104, at 867-68.

225. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1065-85 (1995) (describing how the passage of the Civil Rights Act of 1964 facilitated the erosion of the social norm that had kept white business owners from serving or hiring blacks for fear of social stigma); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2034-35 (1996) (“[L]aw might attempt to express a judgment about the underlying activity in such a way as to alter social norms . . . . Through time, place, and manner restrictions or flat bans, for example, the law might attempt to portray behavior like smoking, using drugs, or engaging in unsafe sex as a sign of individual weakness.”).

226. Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 938 (1991).

Additionally, in developing countries such as Pakistan, the reform process will undoubtedly require more than the enactment of laws or procedures to fight money laundering, whether in the formal or informal financial sector. While some governments may be corrupt or may not take the problem seriously or invest sufficient resources, the stark fact is also that many other governments do not have the law-enforcement capability to address the problem. As the head of one of Pakistan's corporate investigative agencies explained, "[w]e have laws on the books, but there is no practical enforcement in Pakistan. Where are the task forces on money laundering, organized crime, or terrorism? We don't have a criminal database like the FBI. People are afraid to do investigations."<sup>227</sup>

Clearly, many laws have been enacted at the international as well as national levels. The problem, however, lies in many areas that are multi-varied and complex. Enforcement of the enacted laws might be sporadic, inadequate or wholly absent because of insufficient resources, lack of political commitment and lack of political or cultural norms needed to make laws work. To the extent that national and international attention remains essentially focused on the enactment of laws to the exclusion of other crucial and related issues—insufficient resources due to underdevelopment, the relationship between weak laws against ARSs and strong norms favoring ARSs, law per se is unlikely to be effective.

#### IV.

#### CONCLUSION

Scholars who span a host of academic disciplines have noted the erosion of state power, especially in the economic sphere.<sup>228</sup> Global capitalism—the mobility of capital and technology, the explosive growth of foreign direct and portfolio investment—transcends territorial demarcations, causing the state, that “coldest of cold monsters,”<sup>229</sup> to loosen its control over many of its traditional domains, i.e. capital flows, currencies, interest rates and foreign investment. In broad terms, markets are generally acknowledged—even by nominally Communist countries such as China and Vietnam—to be superior to state control.

But the rise of global markets has not only meant a parallel rise of conventional markets for the exchange of goods, technology, or ideas, but has also induced the rise in markets of violence or markets in crime. Criminal activities have always presented a challenge to state authority, but in the new world of globalization, fueled by new communications networks, the market in transnational crime has grown in an unprecedented and uncontrolled manner.

Alongside the move towards transnationalization, there is also a counter-movement towards particularism and sub-nationalization, that is, “the widespread assertion of substate identities that challenge the central authority of the

227. *Id.*

228. See MATTHEW HORSMAN & ANDREW MARSHALL, *AFTER THE NATION-STATE* (1994); KENICHI OHMAE, *THE END OF THE NATION STATE* (1995); WALTER WRISTON, *THE TWILIGHT OF SOVEREIGNTY* (1992).

229. F.W. NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 48 (W. Kauffmann, trans. 1978).

juridical state.”<sup>230</sup> This form of particularist identification may be based on commonalities of language, culture, religion, ethnicity, or history. It may also be allied with transnational forces, such as the transnational market in crime or trafficking in persons, to concoct a hybrid of the transnational and the sub-national. Hence one can see the rise in transnational networks of affinity-based criminal activities that are forged on the basis of sub-national identities, such as the Russian mafia, the Chinese triads or the Japanese Yakuza. “[A] growing part of humanity is seeking community with others based on commonalities that are neither genetic nor territorial,”<sup>231</sup> and this fact is equally applicable to criminal organizations.

The growth of transnational crime and the enormous profits it generates have also meant an increased need to disguise the illicit origin of such proceeds, hence the concomitant rise in international money laundering. The measurable shift in the decline of state power and the lack of coordinated multilateral responses have made it increasingly difficult for states to forge effective responses to this problem. The difficulty is compounded by a number of factors. First, as governments have directed their regulatory and enforcement efforts at preventing money laundering through financial institutions, by imposing strict requirements, such as record keeping and KYC rules, money launderers have turned elsewhere. They have carved out a niche within the informal economy by engaging in both transnational and sub-national alliances, that is relying on alternative, traditional remittance systems founded on sub-national ties of ethnicity that are, in the global age, also transnational. In other words, transnational migration has produced expatriate and ethnic communities all over the world, and money launderers have managed to leverage diaspora bonds for their own ends. In this parallel, informal sector, transactions are conducted on the basis of community norms, custom, and trust. There is little, if any, paper record to be unraveled by law enforcement. Laws enacted by the state, transposed into this cultural universe where the informal economy is governed by norms favoring anonymity and flexibility, are directly at odds with community norms and unlikely to be effective in the short term. In cases where community norms are self-sustaining, it will be difficult for state enacted laws to alter them where norms are self-enforcing and laws are not. Laws therefore will require third-party or judicial enforcement to take root and be effective. Enforcement of law, then, is a crucial next step. In the alternative, or as a supplement, norm change may also be necessary, that is, transforming cultural norms favoring ARSs into ones that favor the formal financial system. This is difficult to accomplish and is likely to be a slow and gradual process.

Second, only recently have governments recognized the existence of this form of ethnic underground banking. The United States in particular has responded by imposing a formalization framework on ARSs, such as subjecting them to registration, record-keeping and other similar requirements already ap-

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230. Oscar Schachter, *The Decline of the Nation State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 15 (1997).

231. Franck, *supra* note 16, at 382.

plicable to the formal financial sector. Yet, formalization requirements are, again, antithetical to ARSs, which are fluid, informal, and flexible by their very nature. Because such requirements are at odds with the cultural norms of ARSs, which are widely accepted by ARS operators, clients and those in the relevant ethnic communities, it is unlikely that they will be readily obeyed. Where resistance to state-enacted, top-down laws is likely to be strong, so that the level of compliance will probably be low, enforcement efforts will likely face additional difficulties that they would not be faced with were there no cultural clashes among the parties.<sup>232</sup>

Furthermore, although the formalization requirements may be a viable first and necessary step, it is also important to understand the realities faced by many countries, especially those where ARSs are popular and formal banking channels are weak or ineffective. Many of these countries may be plagued by endemic corruption, political strife, economic instability and violence. In these volatile environments, the rule of law and transparent governance have not taken hold.<sup>233</sup> ARSs are among the few things that do in fact work in such places.

In other words, the relationship between laws, which govern the formal financial regime, and norms, which guide the informal, alternative regime, needs to be more fully considered. The enactment of laws governing money laundering is important, of course, but laws must be considered against a contextual background of culture, understanding, and expectations. As Robert Cover observed, “[n]o set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning.”<sup>234</sup>

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232. For example, law enforcement will likely face difficulty locating and identifying hawala operators if members of the community where they operate are unwilling to expose them. Cottle, *supra* note 109 (stating that although the new regulations will “provide additional leverage for prosecuting hawaladar suspected of shady deals, law enforcement will still need to know whom and what sorts of activity to investigate - a task for which they are sorely unprepared. If you can even find a hawala broker to interview, one former Clinton Treasury official joked . . . ‘you’ll be doing better than the FBI.’”).

233. Behar, *supra* note 116 (discussing the sentiment in Pakistan that despite President Musharraf’s efforts to institute an array of reforms, “Nothing’s going to change here. Musharraf will go eventually, and it will be back to business as usual. Just an endless cycle of cancer.”).

234. Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 94 HARV. L. REV. 4, 4 (1983).