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A War Developing Countries Cannot (Afford To) Win

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Introduction

David Aufhauser, the General Counsel of the U.S. Treasury Department from 2001 to 2004, opined that "[t]error traffics in three forms of currency: hate, counterfeit religion and money."[1] Since September 11, 2001 (9/11), the United States has led an international regime to counter global terrorism. One of the primary objectives of this regime has been to disrupt the cash flow of foreign terrorist organizations. Efforts to combat the financing of terrorism have borrowed heavily from anti-money laundering[2] (AML) legislation used to combat drug cartels and enterprise crime in the late twentieth century. These efforts, however, fundamentally misunderstand terrorist finance and the evolving nature of the global terrorist threat, which has increasingly relied on "lone wolf" attacks.[3] This brand of terror differs from organized crime in that it does not

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1. Press Release, U.S. Dep't of the Treasury, Senate Banking Committee Hearing on Terrorist Financing Opening Statement David D. Aufhauser General Counsel Department of the Treasury (Sept. 25, 2003), http://www.treasury.gov/press-center/press-releases/Pages/js761.aspx [http://perma.cc/B9WY-6V3A].

2. "Anti-money laundering" encompasses laws and policies designed to counter money laundering—"the process of making illegally-gained proceeds (i.e., 'dirty money') appear legal (i.e., 'clean')." *See History of Anti-Money Laundering Laws*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/history-anti-money-laundering-laws [http://perma.cc/94G9-Q46B]. In the United States, financial institutions are required to "establish anti-money laundering programs, including, at a minimum—(A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs." 31 U.S.C. § 5318(h)(1) (2012).

3. Most scholars agree that "lone-wolf terrorism" encompasses "an individual terrorist who is not *directed* by a terrorist organization, regardless of inspiration from or minor connections to an organization." *See* Brian J. Phillips, *Deadlier in the U.S.? On Lone Wolves, Terrorist Groups, and Attack Lethality*, 29 TERRORISM &

require a steady cash flow to achieve its objectives. Furthermore, AML strategies fare poorly against the tactics that terrorists now use to make and move money, from self-financing to the *hawala* system.[4]

Unfortunately, this failed approach has been imposed by the high-income countries on the rest of the world through the Financial Action Task Force (FATF), an intergovernmental organization that sets standards and promotes policies designed to combat money laundering and terrorist financing.[5] The result has been particularly burdensome for developing countries, which cannot spare the resources to implement AML but also cannot afford *not to* for fear of being blacklisted by the FATF. It is time for the world's high-income countries, specifically the FATF's member jurisdictions,[6] to acknowledge AML's inability to counter terrorist finance and stop imposing a failed model on the world's least developed countries, which have far more pressing concerns.

I. Terrorism as Distinct from Organized Crime

Terrorist groups and criminal networks share many of the same characteristics, including methods and sources of finance. Yury Fedotov, the Executive Director of the United Nations Office on Drugs and Crime, recently remarked that criminal profits from drug trafficking, transnational organized crime, and money laundering represent an increasing share of terrorist finance.[7] Yet governments have tended to treat terrorism differently from organized crime. Historically, this was due to the "political offense exception" to extradition dating back to the nineteenth century.[8] Following the French Revolution, and the

POL. VIOLENCE 533, 535 (2017). I adopt other scholars' slightly more expansive definition, which includes "small group[s] of similarly minded terrorists who lack a formal connection to an established terrorist group." *Id.*

4. *Hawala* is a means of "transferring money without actually moving it" by using a network of brokers who rely on the honor system to settle their debts. *See* Patrick M. Jost & Harjit Singh Sandhu, *Hawala: The Hawala Alternative Remittance System and its Role in Money Laundering*, FIN. CRIMES ENFORCEMENT NETWORK & INTERPOL/FOPAC 5–8, http://www.int-comp.org/media/1960/hawala-money-laundering.pdf [http://perma.cc/4B5Q-QFWT].

5. *Who We Are*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/about/ [http://perma.cc/7B68-YRRH].

6. There are thirty-five FATF member jurisdictions. *FATF Members and Observers*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/about/membersandobservers/ [http://perma.cc/67SF-V5T7]. They are responsible for funding the FATF and setting its AML standards. *See infra* notes 107–08.

7. Press Release, U.N. Info. Serv., UNODC Brings Victims and Criminal Connections to the Fore of the Fight Against Terrorism, U.N. Press Release UNIS/CP/641 (Mar. 16, 2011), http://www.unis.unvienna.org/unis/pressrels/2011/uniscp641.html [http://perma.cc/Q79Z-4V4C].

8. *See, e.g.*, Charles L. Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of*

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works of writers such as John Locke and John Stuart Mill, there was an increasing acceptance among governments that individual rights and liberties—including the right to dissent—should be protected, and that non-interference in other states' internal political affairs is conducive to world order.[9] Political offenses thus began to be seen as distinct from other crimes. As a result, extradition treaties typically exempt political offenders.[10] The influence of the political offense exception can be found in INTERPOL's constitution, which restricts its mandate to "ordinary law crimes" and explicitly forbids "any intervention or activities of a political . . . character."[11]

Such expansive protection for political offenses later proved problematic for many countries' counterterrorism efforts,[12] as terrorist attacks are often politically motivated.[13] In response, governments began to treat terrorism similarly to other crimes. Beginning in the 1980s, countries like the United States and United Kingdom signed bilateral treaties limiting the scope of political exemption to exclude acts of terror.[14] Building on the 1978 European Convention on the Suppression of Terrorism, the 1985 U.S.-U.K. Supplementary Treaty "effec-

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Ireland, 60 MARQ. L. REV. 777, 782–83 (1977); James J. Kinneally III, *The Political Offense Exception: Is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End?*, 2 AM. U. J. INT'L L. & POL'Y 203, 205–07 (1987).

9. *See* Cantrell, *supra* note 8, at 782–83; Kinneally, *supra* note 8, at 205–07.

10. *See, e.g.*, United Kingdom International Extradition Treaty with the United States, U.K.-U.S., art. 4, Mar. 31, 2003, T.I.A.S. 07-426; India International Extradition Treaty with the United States, India-U.S., art. 4, June 25, 1997, T.I.A.S. 12873; Germany International Extradition Treaty with the United States, Ger.-U.S., art. 4, June 20, 1978, 32 U.S.T. 1485; *see also* M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 793 (3d ed. 2008) ("[T]he 'political offense exception is now a standard clause in almost all extradition treaties of the world . . . .'").

11. CONST. OF THE ICPO-INTERPOL 1956, art. 3.

12. *See, e.g.*, Rabia Anne Cebeci, *International Extradition Law and the Political Offense Exception: The Traditional Incidence Test as a Workable Reality*, 10 LOY. L.A. INT'L & COMP. L. REV. 629, 630 (1988) (discussing the 1985 case of a Palestinian who escaped extradition after hijacking a ship and killing one of its passengers); John Patrick Groarke, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515, 1515–16 (1988) (discussing cases of Irish Republican Army militants who escaped extradition); Christine Van Den Wijngaert, *The Political Offence Exception to Extradition: Defining the Issues and Searching a Feasible Alternative*, 20 REVUE BELGE DE DROIT INTERNATIONAL 741, 749 (1983) (discussing the 1965 case of a Spanish national who escaped extradition for the attempted bombing of a civilian aircraft).

13. *See generally* ROBERT A. PAPE, DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM (2005).

14. Cantrell, *supra* note 8, at 777–78; Kinneally, *supra* note 8, at 204, 219–20.

tively abolish[ed] the political offense exception."[15] Despite the evolution of extradition treaties in relation to terrorist acts, it was only after 9/11 that terrorist financing began to be treated similarly to organized crime.[16]

Before 9/11, the U.S. government simply did not know how to fight terrorist finance. The Federal Bureau of Investigation would pursue terrorist finance cases "with little hope that they would be able to make a criminal case or otherwise disrupt an operation," as the money tended to move overseas and the United States often lacked Mutual Legal Assistance Treaties (MLATs)[17] with the countries that had the financial records needed to build a case.[18] When the Central Intelligence Agency was criticized for its lack of information on Al-Qaeda's finances pre-9/11, it responded that "terrorist financing [is] an extraordinarily hard target."[19] The 2001 National Money Laundering Strategy, issued by the Treasury Department just ten days before 9/11, was primarily concerned with drug trafficking and high-level international fraud, and did not address terrorist financing in any of its fifty pages.[20]

Because of the pressure on the Bush Administration to take action after 9/11, it resorted to using a "hastily assembled" version of existing AML legislation from the 1980s and 1990s originally intended to fight drug cartels and enterprise crime.[21] The result was Title III of the USA PATRIOT Act,[22] which is

15. Antje C. Petersen, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767, 767, 779–83 (1992).

16. Louise I. Shelley et al., *Methods and Motives: Exploring Links Between Transnational Organized Crime & International Terrorism*, U.S. DEP'T JUST. 5–12 (2005), http://www.ncjrs.gov/pdffiles1/nij/grants/211207.pdf [http://perma.cc/QH25-XC8S].

17. MLATs are one "mechanism by which states request and obtain evidence and assistance for criminal investigations and prosecutions." Dan E. Stigall, *Countering Convergence: 'Central Authorities' and the Global Network To Combat Transnational Crime and Terrorism*, 2016 AIR & SPACE POWER J. - AFRIQUE & FRANCOPHONIE 48, 50 (2016). Through an MLAT, a country can compel a foreign government to produce evidence and information related to criminal proceedings, including "[b]ank records, business records, the contents of e-mails, tax documents, [and] witness statements." *Id.*

18. John Roth, Douglas Greenburg & Serena Wille, *Monograph on Terrorist Financing: Staff Report to the Commission*, NAT'L COMMISSION ON TERRORIST ATTACKS UPON U.S. 30–32 (2004), http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf [http://perma.cc/R92K-G2NZ].

19. *Id.* at 35.

20. *Id.* at 38 n.28.

21. Richard J. Maiman, *Lobbying for Rights During the "War on Terror": The American Civil Liberties Union After 9/11*, *in* STRATEGIC VISIONS FOR HUMAN RIGHTS: ESSAYS IN HONOUR OF PROFESSOR KEVIN BOYLE 126–40 (Geoff Gilbert, Francoise Hampson & Clara Sandoval eds., 2010).

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concerned with combating terrorist finance and consists primarily of amendments to the Bank Secrecy Act of 1970[23] and the Money Laundering Control Act of 1986.[24] The amendments' chief objective was "to bring terrorist financing . . . within the range of activities punishable under the federal money laundering laws."[25] Similarly, the FATF's Eight Special Recommendations were quickly tacked onto the original FATF Forty Recommendations from 1990.[26] FATF Recommendations function as a set of principles intended to be implemented at the national level through "laws, regulations, enforcement and other measures."[27] Like the Bank Secrecy Act and the Money Laundering Control Act before it, the FATF's Forty Recommendations were originally intended to "combat the misuse of financial systems by persons laundering drug money."[28] But as with the PATRIOT Act, the FATF took the approach of expanding its provisions against money laundering to encompass terrorist finance, as the two were seen as "analogous."[29] It did so by adopting the Eight Special Recommendations, which, other than emphasizing a few "issues that are more relevant to combating the financing of terrorism," largely mimic the original Forty Recommendations.[30] As a result, "AML agencies [use] almost identical policies to

22. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered titles of the U.S.C.).

23. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 12 U.S.C. §§ 1724, 1813 (2012) and 15 U.S.C. § 78(a) (2012)).

24. Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of 18 U.S.C.).

25. MARTIN A. WEISS, CONG. RESEARCH SERV., RL33020, TERRORIST FINANCING: U.S. AGENCY EFFORTS AND INTER-AGENCY COORDINATION 6 (2005), http://fas.org/sgp/crs/terror/RL33020.pdf [http://perma.cc/4HNG-GCMT].

26. PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 140 (2004) (describing the Eight Special Recommendations as "hastily assembled" after 9/11 and "based on the model of the original FATF Forty Recommendations").

27. *FATF Guidance: National Money Laundering and Terrorist Financing Risk Assessment*, FIN. ACTION TASK FORCE 4 (2013), http://www.fatf-gafi.org/media/fatf/content/images/National_ML_TF_Risk_Assessment.pdf [http://perma.cc/ZKM8-H9SN].

28. *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*, FIN. ACTION TASK FORCE 7 (2016), http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf [http://perma.cc/X9UW-5U79].

29. REUTER & TRUMAN, *supra* note 26, at 140–41.

30. *Id.*

tackle both threats."[31] Because the same policies are used to combat both money laundering and terrorist finance, the policies can aptly be referred to as the "global AML regime."[32]

II. The Traditional "AML" Model of Countering Illicit Finance

Under the global AML regime, financial institutions are to require formal customer identification in exchange for their services, keep financial records, monitor and report suspicious transactions, hire licensed compliance officers, and "create a culture of compliance" by training staff.[33] The use of pre-9/11 AML legislation to combat terrorist finance is problematic, especially because it has not worked in the past.[34] Part of the problem has been fundamental misunderstandings of the means by which terrorists obtain financing.

First, the logic of applying the same AML strategy used to fight organized crime to combat the financing of terrorism is backwards. Money laundering is the process of disguising criminally-sourced finance as legitimately obtained. However, terrorists are more likely to use "reverse money laundering"—the process of using legitimately-obtained finance to conduct criminal acts.[35] The most common crimes associated with money laundering are fraud and drug trafficking,[36] yet "[n]o persuasive evidence exists that al Qaeda relied on the drug trade as an important source of revenue," nor was fraud a primary source of its funding.[37] Instead, terrorists obtain the majority of their financing from "donations, charities and legitimate businesses."[38] As a result, "[b]ankers, experts and industry advocates say that unlike money laundering . . . terrorist cash

31. J.C. Sharman, The Global Anti-Money Laundering Regime and Developing Countries: Damned if They Do, Damned if They Don't? 2 (Mar. 22, 2006) (unpublished manuscript), http://www.u4.no/recommended-reading/the-global-anti-money-laundering-regime-and-developing-countries-damned-if-they-do-damned-if-they-dont/downloadasset/2000 [http://perma.cc/B8S5-DJ2B].

32. *Id.* at 2–3.

33. *FATF Guidance: Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion*, FIN. ACTION TASK FORCE 6–7, 25–46 (2013), http://www.fatf-gafi.org/media/fatf/documents/reports/AML_CFT_Measures_and_Financial_Inclusion_2013.pdf [http://perma.cc/LK5T-NGAL].

34. Roth, Greenburg & Wille, *supra* note 18, at 3.

35. ARABINDA ACHARYA, TARGETING TERRORIST FINANCING: INTERNATIONAL COOPERATION AND NEW REGIMES 36 (2009); REUTER & TRUMAN, *supra* note 26, at 3.

36. *National Money Laundering Risk Assessment*, U.S. DEP'T TREASURY 2 (2015), http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/National%20Money%20Laundering%20Risk%20Assessment%20%E2%80%93%2006-12-2015.pdf [http://perma.cc/7WLW-AXX4].

37. Roth, Greenburg & Wille, *supra* note 18, at 3–4, 19.

38. ACHARYA, *supra* note 35, at 38.

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flow has no unique characteristics that would help banks spot, track or avoid it."[39]

Second, the very nature of terrorism has changed since 9/11. The greatest threat to Western societies from terrorism is no longer complex, large-scale operations, but rather grassroots, localized terror such as the 2013 Boston Marathon bombing, the November 2015 Paris attacks, and the 2017 Westminster attack.[40] The frequency of lone-wolf terrorist attacks in the West, and particularly in the United States, has increased since 9/11.[41] Meanwhile, the resources required to carry out such attacks have decreased. Unlike organized crime syndicates, which must "regularly and frequently manage large sums of cash,"[42] the kind of lone-wolf terror the West is most at risk for does not need substantial or continuing funds to achieve its objectives. According to one study on the financing of forty terrorist cells in Europe between 1994 and 2013, 75% of their planned attacks cost less than $10,000.[43] While 9/11 was a half-a-million-dollar enterprise,[44] the attacks in Boston and Paris required little more than homemade pressure cooker bombs and AK-47s.[45] As one former Treasury Depart-

39. Daniel J. Mitchell, *Fighting Terror and Defending Freedom: The Role of Cost-Benefit Analysis*, 25 PACE L. REV. 219, 226 (2005).

40. Elliot Balch, *Myth Busting: Robert Pape on ISIS, Suicide Terrorism, and U.S. Foreign Policy*, CHI. POL'Y REV. (May 5, 2015), http://chicagopolicyreview.org/2015/05/05/myth-busting-robert-pape-on-isis-suicide-terrorism-and-u-s-foreign-policy [http://perma.cc/BDE4-EN8T]; Victoria Bekiempis, *Terrorism After 9/11: Dealing with Lone Wolves*, NEWSWEEK (Sept. 13, 2015), http://www.newsweek.com/september-11-lone-wolf-terrorist-terrorism-nypd-isis-isil-371216 [http://perma.cc/VMX4-Y53R].

41. Phillips, *supra* note 3, 534–35; Sec. Studies Program, *Report: Lone Wolf Terrorism*, GEO. NAT'L CRITICAL ISSUE TASK FORCE 1, 10–15 (2015), http://georgetownsecuritystudiesreview.org/wp-content/uploads/2015/08/NCITF-Final-Paper.pdf [http://perma.cc/X67B-LKNY].

42. REUTER & TRUMAN, *supra* note 26, at 41.

43. Emilie Oftedal, *The Financing of Jihadi Terrorist Cells in Europe*, FORSVARETS FORSKNINGS INSTITUTT 7 (2014), http://www.ffi.no/no/Rapporter/14-02234.pdf [http://perma.cc/R78D-VX7G].

44. Roth, Greenburg & Wille, *supra* note 18, at 3.

45. *See* Jessica Rinaldi, *Adding Up the Financial Costs of the Boston Bombings*, NBC NEWS (Apr. 30, 2013, 2:44 AM), http://usnews.nbcnews.com/_news/2013/04/30/17975443-adding-up-the-financial-costs-of-the-boston-bombings [http://perma.cc/P7M4-T5UQ]; Robert Windrem, *Terror on a Shoestring: Paris Attacks Likely Cost $10,000 or Less*, NBC NEWS (Nov. 18, 2015, 4:42 PM), http://www.nbcnews.com/storyline/paris-terror-attacks/terror-shoestring-paris-attacks-likely-cost-10-000-or-less-n465711 [http://perma.cc/YZ6V-8M3J]; *FATF Report: Emerging Terrorist Financing Risks*, FIN. ACTION TASK FORCE 11 (2015), http://www.fatf-gafi.org/media/fatf/documents/reports/Emerging-Terrorist-Financing-Risks.pdf [http://perma.cc/NV7F-EVSG].

ment official noted, "[t]errorism is not an expensive sport."[46] Consequently, the sums of money implicated in terrorist finance cases are usually far below that of traditional money laundering cases.[47]

Countering such small-scale laundering has been described as akin to "looking for a needle in a haystack."[48] The reasons for this are twofold. First, banks are only required by law to file "suspicious activity reports" (SARs) for any suspicious transaction or series of transactions that exceeds $5,000.[49] Most terrorist transactions, however, fall below that threshold.[50] Second, while banks are not penalized for overreporting,[51] they are heavily penalized for underreporting.[52] The result is that hundreds of thousands and sometimes millions of SARs are filed each year,[53] which may be impossible to adequately sift through, particularly for financial institutions in developing countries that lack the multi-million dollar budgets necessary to store and analyze large amounts of data.[54]

Third, there arises the problem of prosecuting terrorist finance cases. "[P]rosecution for money laundering requires proof that the property involved was proceeds of 'specified unlawful activity.'"[55] Under the United Nations Convention Against Transnational Organized Crime, these so-called "predicate offenses" encompass "all serious crime"—any "offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."[56] Because the majority of terrorist financing is legitimately sourced,[57] prosecution efforts are already tightly constrained. Yet, the terrorist financing derived from serious crimes is arguably more difficult to trace than other illicit finance. This is largely because AML customer due diligence regulations have made it harder for ter-

46. Windrem, *supra* note 45.

47. REUTER & TRUMAN, *supra* note 26, at 3.

48. *Id.*

49. 31 C.F.R. § 1020.320(a)(1) (2017); 12 C.F.R. § 208.62(c) (2017).

50. ACHARYA, *supra* note 35, at 8.

51. 31 U.S.C. § 5318(g)(3) (2012) (limiting liability for "voluntary disclosure[s] of any possible violation of law or regulation to a government agency"); 31 C.F.R. § 1020.320(f).

52. 31 U.S.C. §§ 5320–22, 5324; 31 C.F.R. §§ 103.57(c), (e)–(f); 31 C.F.R. § 103.63.

53. *SAR Stats Technical Bulletin*, FIN. CRIMES ENFORCEMENT NETWORK 1–2 (2015), http://www.fincen.gov/sites/default/files/sar_report/SAR_Stats_2_FINAL.pdf [http://perma.cc/3WRD-A3BF].

54. J.C. SHARMAN, THE MONEY LAUNDRY: REGULATING CRIMINAL FINANCE IN THE GLOBAL ECONOMY 52 (2011).

55. R.E. Bell, *Abolishing the Concept of 'Predicate Offence'*, 6 J. MONEY LAUNDERING CONTROL 137 (2003).

56. U.N. Convention Against Transnational Organized Crime and the Protocols Thereto, art. 2(h), 6(2), Dec. 12, 2000, T.I.A.S. 13127, U.N.T.C. 39574.

57. ACHARYA, *supra* note 35, at 38.

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rorists to move money through legitimate channels like banks, causing them to resort to informal mechanisms of transporting funds such as the *hawala* system, which allows the movement of money without actually transferring it.[58] "[T]he fact that no paperwork is needed and no money physically crosses borders makes [*hawala*] a useful financial channel for terrorists."[59] Before 2007, 30% of terrorist finance moved through banks; the rest was transported physically through cash smuggling (22%) or via "money service businesses" (5%), which include *hawala*.[60] Since 2007, the share of terrorist finance flowing through banks has dropped to just 8%, while the share being transported physically and through money service businesses increased to 37% and 30%, respectively.[61] Because of terrorists' heavy use of these channels, "[t]errorist financing is extraordinarily difficult to prosecute in court."[62]

Lastly, the AML regime may encourage ethnic and religious profiling. More than 50% of terrorist finance derives from a combination of individual contributions (33%) and charitable donations (20%).[63] At one point, Al-Qaeda was making $30 million per year largely from Islamic charities and donors in the Gulf, some of whom were ill-intentioned but many of whom were unaware that their funds were being diverted to aid terrorists.[64] One study found that out of forty terrorist cells in Europe, none relied fully on external support; rather, most relied on salaries and savings from their members' legal employment.[65] As a result, there is "little that distinguishes [terrorists'] financial activities from the myriad of economic transactions taking place every day."[66] "Even though the September 2001 hijackers used the formal financial system extensively, none of the banks could have become suspicious, as there was nothing irregular or unusual about their transactions."[67] Because it is so difficult to distinguish terrorist

58. *Id.* at 38–39.

59. *Id*. at 76.

60. *National Terrorist Financing Risk Assessment*, U.S. DEP'T TREASURY 47 (2015), http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/National%20Terrorist%20Financing%20Risk%20Assessment%20%E2%80%93%2006-12-2015.pdf [http://perma.cc/W8UZ-CAEB].

61. *Id.*

62. Michael Jonsson, *Countering Terrorist Financing: Successes and Setbacks in the Years Since 9/11*, 3 CTC SENTINEL 18, 19 (July. 3, 2010), http://www.ctc.usma.edu/v2/wp-content/uploads/2010/08/CTCSentinel-Vol3Iss7-art71.pdf [http://perma.cc/4897-SCAW].

63. *National Terrorist Financing Risk Assessment*, *supra* note 60, at 35–45.

64. ACHARYA, *supra* note 35, at 38–39, 54–58; Roth, Greenburg & Wille, *supra* note 18, at 4.

65. Oftedal, *supra* note 43, at 7.

66. *Id.*

67. ACHARYA, *supra* note 35, at 36.

finance from legitimate transactions, "bank[s] may end up engaging in ethnic or religious profiling."[68] Regulations associated with FATF's Eight Special Recommendations, including "disproportionate accounting requirements, fear of possible consequences and reduced resources," have resulted in a decrease in NGO grants to internationally sensitive areas like Somalia.[69] In the United States, such regulations have been found to "make wrong assumptions about charitable activity by targeting particular regions or religious groups."[70] Specifically, the American Civil Liberties Union found that "the policies have produced a 'climate of fear' that chills American Muslims' 'free and full exercise of their religion through charitable giving . . . .'"[71]

III. How the Traditional Model Fares Against Terrorist Finance

The AML regime has had extremely limited success in countering both money laundering and terrorist finance. Consider the two countries with perhaps the greatest capability to implement an effective AML regime: the United States and the United Kingdom. According to the U.K.'s National Audit Office, "only about 26p in every £100 of criminal proceeds was actually confiscated in 2012–13."[72] Out of an estimated 8.5 million money launderers in the United Kingdom, only 673,000, or 8%, are convicted annually.[73] The AML model has performed comparably poorly in the United States, where total seizures and forfeitures of criminal proceeds amounted to just under $700 million in 2001.[74] While a large figure in itself, compared to the total money laundered (estimated at $300 billion), the confiscated funds represent only 23 cents of every $100 laundered.[75] Not much changed by 2014, when the Treasury Department seized just over $800 million in criminal proceeds out of $300 billion, or 27 cents of every $100 laundered.[76] Again, the odds of avoiding the consequences of legal

68. *Id.* at 36–37; *see also* REUTER & TRUMAN, *supra* note 26, at 102.

69. Ben Hayes, *Counter-Terrorism, 'Policy Laundering' and the FATF: Legalising Surveillance, Regulating Civil Society*, TRANSNAT'L INST. & STATEWATCH 7 (2012), http://www.statewatch.org/analyses/no-171-fafp-report.pdf [http://perma.cc/WW9D-VULU].

70. *Id.* at 30.

71. *Id.*

72. Comptroller & Auditor Gen., *Confiscation Orders: Progress Review*, NAT'L AUDIT OFF. 8 (2013) (UK), http://www.nao.org.uk/wp-content/uploads/2016/03/Confiscation-orders-progress-review.pdf [http://perma.cc/543V-7NEZ].

73. *Id.* at 14.

74. REUTER & TRUMAN, *supra* note 26, at 5, 113–14.

75. *National Money Laundering Risk Assessment*, *supra* note 36, at 2.

76. OFFICE OF INSPECTOR GEN., U.S. DEP'T TREASURY, OIG-15-019, TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT 10–11 (2014), http://www.treasury.gov/

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proceedings are fairly good for money launderers: they face only a 5% chance of conviction annually.[77] To the extent that the conviction rate tracks deterrence, the AML regime does not provide many incentives for would-be financiers of terrorism to refrain from such actions. Compared to the United Kingdom, whose figures are already quite low, the United States has historically fared worse both in terms of the proportion of illicit funds seized and criminals convicted. This is not to mention the even more abysmal results found in other industrialized nations.[78]

It should not be surprising that attempts to apply the same AML model to interdict terrorist finance have largely failed. A 2015 U.S. Treasury Department report on the financing of global terrorist organizations is revealing—only 24% of terrorist funds came from criminal activity such as smuggling, drug trafficking, and fraud.[79] Yet those are the very offenses that produce the vast majority of money that is laundered.[80] Given that between the United States and the United Kingdom AML disrupts roughly 0.25% of laundered funds, we can reasonably conclude that it will succeed in interdicting just 0.06% of terrorist finance—an exceptionally miniscule sum.[81] While disrupting cash flows has proven difficult, the prosecution side of the AML strategy appears to have been more successful, although the Treasury Department has a tendency to lump its data on actual convictions in with pending cases.[82] Since 2001, there have been 229 terrorist finance cases that "have *either* led to convictions *or* are still pending judgment against individuals."[83] While the United States has obtained 100 convictions in terrorist finance cases since 2010,[84] globally the picture is far more

about/organizational-structure/ig/Audit%20Reports%20and%20Testimonies/OIG15019.pdf [http://perma.cc/B5LL-KDKF].

77. REUTER & TRUMAN, *supra* note 26, at 5, 112–14.

78. The number of SARs filed by Australia, Japan, and Switzerland in 2001 was far below that of the United States, even when controlling for population. *See id.* at 115–19. Furthermore, Australia and Germany each have only managed to convict twenty people of money laundering per year, while the Netherlands has only managed to prosecute twenty such cases per year. *Id.*

79. *National Terrorist Financing Risk Assessment*, *supra* note 60, at 26; *see also* REUTER & TRUMAN, *supra* note 26, at 109–13 (discussing how smuggling, drug trafficking, and fraud comprise the majority of predicate offenses associated with money laundering convictions).

80. *National Money Laundering Risk Assessment*, *supra* note 36, at 11.

81. The calculation is as follows: (the percentage of all terrorist funds targeted by AML) x (the percentage of terrorist funds that are actually interdicted) = 0.24 x 0.0025 = 0.0006.

82. *National Terrorist Financing Risk Assessment*, *supra* note 60, at 21.

83. *Id.* (emphasis added).

troublesome. "Only 33 jurisdictions—17% of those surveyed—reported any convictions for terrorist financing (TF) offences."[85] The only country which outranks the United States in convictions is Saudi Arabia, a country that considers so much as a peaceful protest against the discriminatory and inhumane treatment of minorities an act of terror, with over 800.[86]

That is not to say all attempts to interdict terrorist finance have failed, or even that the small sums that are intercepted are not worth pursuing. Ramzi Yousef, the mastermind behind the 1993 World Trade Center bombing, once lamented to authorities that he and his co-conspirators could not build a bomb of sufficient strength due to a lack of funds.[87] AML also helped to prevent an attack on an Australian army base in Somalia in 2009,[88] suggesting that it may be useful in countering large-scale, internationally orchestrated attacks. Additionally, while AML may not do much to impede terrorists' low operational costs, it can do damage to their support infrastructure, including their recruitment, training, and logistics.[89] However, the ways in which terrorists make and move money have become much more difficult to counter, and the increasingly prominent threat of lone-wolf terror will not be abated through AML. Take, for example, the argument that AML can help to undermine the support infrastructure of major global terrorist organizations like ISIS. While that may be true, it is also true that ISIS does not require many resources to inspire lone-wolf attacks. Indeed, "the number one reason [attackers volunteer] is the propaganda narratives in the militant groups' videos, audiocassettes, and printed material," all of which are relatively cheap to produce and disseminate.[90]

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84. *Terrorist Financing: FATF Report to G20 Leaders: Actions Being Taken by the FATF*, FIN. ACTION TASK FORCE 4 (2015), http://www.fatf-gafi.org/media/fatf/documents/reports/Terrorist-financing-actions-taken-by-FATF.pdf [http://perma.cc/NBK9-5LZX].

85. *Id.*

86. *Id.*; Bill Law, *Saudi Arabia Executions: Kingdom To Behead 50 Men Convicted of Terrorism Offences Despite Shia Revolt Threat*, INDEP. (Nov. 26, 2015, 8:47 PM), http://www.independent.co.uk/news/world/middle-east/saudi-arabia-executions-kingdom-to-behead-50-men-convicted-of-terrorism-offences-despite-threat-of-a6750631.html [http://perma.cc/AD8W-8VSY].

87. ACHARYA, *supra* note 35, at 43.

88. *Australian Terror Suspects Sent Funds to Somalia To Support Terrorist Group*, AUSTRALIAN TRANSACTION REP. & ANALYSIS CTR. (2015) [hereinafter *Australian Terror Suspects*], http://www.austrac.gov.au/case-studies/australian-terror-suspects-sent-funds-somalia-support-terrorist-group [http://perma.cc/KS6Y-B8EA].

89. Thomas J. Biersteker & Sue E. Eckert, *Introduction: The Challenge of Terrorist Financing*, *in* COUNTERING THE FINANCING OF TERRORISM 6–8 (Thomas J. Biersteker & Sue E. Eckert eds., 2008).

90. Robert A. Pape, *Trump Is Making ISIS Great Again*, BOS. GLOBE (Jan. 30, 2017), http://www.bostonglobe.com/opinion/2017/01/30/trump-making-isis-great-again/x9ZG80DbA02sumVnehehkN/story.html [http://perma.cc/6W48-JUHT]; *see also*

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Since 9/11, the Treasury Department has blocked or frozen $147 million in terrorists' assets.[91] However, most of those assets were blocked in the aftermath of 9/11, when terrorist groups were "caught unprepared."[92] Since then, terrorists have adapted to the global AML regime. In 2005, only $13.8 million in terrorist assets were blocked in the United States, half of which is attributable to the recent targeting of Hamas.[93] As the West has become increasingly effective at countering certain forms of terrorist finance, particularly state sponsors of terror (in 2013, the U.S. government froze $2.3 billion in the assets of four such states)[94] and large financial transactions (new regulations require banks to file SARs on transactions over $5,000),[95] terrorists have become more adept at evading law enforcement. Terrorists have increasingly made use of hard-to-anticipate lone-wolf attacks,[96] hard-to-interdict self-financing and donations,[97] and hard-to-trace informal money transfer systems.[98] While one could argue that the global AML regime has made large-scale, high-casualty attacks more difficult for terrorists to achieve, there is little evidence that developing countries' AML regimes have helped to prevent such attacks. For instance, the planned attack on the Australian army base was prevented by Australia's transaction reporting requirements, *not* Somalia's.[99]

Robert Pape, *Orlando Shooting Shows How ISIS Calls the Shots*, BOS. GLOBE (June 14, 2016), http://www.bostonglobe.com/opinion/2016/06/13/orlando-shooting-shows-how-isis-calls-shots/MmOsqLlQ4dvZXOGRpA9WkO/story.html [http://perma.cc/8B3E-WW2V].

91. Biersteker & Eckert, *supra* note 89, at 12.

92. WALTER ENDERS & TODD SANDLER, THE POLITICAL ECONOMY OF TERRORISM 194–97 (2d ed. 2012).

93. Biersteker & Eckert, *supra* note 89, at 12–13.

94. Office of Foreign Assets Control, *Terrorist Assets Report: Calendar Year 2013*, U.S. DEP'T TREASURY 3 (2013), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2013.pdf [http://perma.cc/MQ4R-KKX5].

95. *FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions*, FIN. CRIMES ENFORCEMENT NETWORK 80 (2012), http://www.fincen.gov/sites/default/files/shared/FinCEN%20SAR%20ElectronicFilingInstructions%20Stand%20Alone%20doc.pdf [http://perma.cc/GQ9A-KJ8P].

96. Balch, *supra* note 40; Bekiempis, *supra* note 40.

97. *National Terrorist Financing Risk Assessment*, *supra* note 60, at 35–45.

98. *Id.* at 47.

99. Only "[t]he 'sender' of [funds] transmitted out of Australia, or the 'recipient' of [funds] transmitted into Australia, must report the [transaction] to AUSTRAC," *not* the senders or recipients in other countries. *International Funds Transfer Instructions (IFTIs)*, AUSTRALIAN TRANSACTION REP. & ANALYSIS CTR., http://www.austrac.gov.au/international-funds-transfer-instructions-iftis [http://perma.cc/FM73-BAAE]. In this case, the relevant reports were generated by Australia-based remittance service businesses, which the five suspects used to send "funds destined

IV. Imposing a Failed Approach on Developing Countries

After 9/11, President Bush famously declared to the rest of the world, "You're either with us or against us in the fight against terror."[100] In the case of terrorist finance, that meant developing countries' financial institutions would have to adopt the same stringent standards as those in high-income countries. Because countering terrorist finance was seen as a subset of the global AML regime, developing countries would have to implement their own AML regulations; it was not enough to simply target terrorist finance.[101] It is no wonder that developing nations have consistently been excluded from AML standard-setting: AML is expensive and it is doubtful that any low-income country would willingly adopt it without some level of coercion.[102]

AML provides at best dubious, unquantifiable benefits, and at worst is ineffective. Even the World Bank, one of AML's biggest proponents, admits that "[t]he magnitude of these adverse consequences [of money laundering and terrorist finance] is difficult to establish."[103] Many developing nations also lack the base conditions necessary to implement many AML standards, such as electronic banking, credit cards, and photo identification.[104] Yet, AML is imposed on the developing world by the FATF through blacklisting and other measures that imperil lenders' and investors' confidence in the countries' financial systems.[105] Furthermore, the FATF's membership policy, which privileges factors like GDP size and "[i]mpact on the global financial system,"[106] makes it near impossible for the world's least developed countries to have any real say in the AML prac-

for use by the Somalia-based terrorist group, al-Shabaab." *Australian Terror Suspects*, *supra* note 88.

100. *'You Are Either with Us or Against Us,'* CNN (Nov. 6, 2001, 10:13 PM), http://edition.cnn.com/2001/US/11/06/gen.attack.on.terror [http://perma.cc/Y6SY-RJH8].

101. Sharman, *supra* note 31, at 2.

102. *Id.*; Concepcion Verdugo Yepes, *Compliance with the AML/CFT International Standard: Lessons from a Cross-Country Analysis* 7–12 (Int'l Monetary Fund Working Paper No. 11/177, 2011), http://www.imf.org/external/pubs/ft/wp/2011/wp11177.pdf [http://perma.cc/6PLL-QV79].

103. Paul Allan Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, WORLD BANK II-2 (2006), http://siteresources.worldbank.org/EXTAML/Resources/396511-1146581427871/Reference_Guide_AMLCFT_2ndSupplement.pdf [http://perma.cc/BU4J-DDQX].

104. Sharman, *supra* note 31, at 11–13.

105. *Id.* at 14–21; *see also High-Risk and Non-Cooperative Jurisdictions*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/countries/#high-risk [http://perma.cc/WCV4-QLBL].

106. *FATF Membership Policy*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/about/membersandobservers/fatfmembershippolicy.html [http://perma.cc/37ES-GGLL].

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tices being forced on them. It should thus come as no surprise that the FATF's members, which fund it[107] and set its AML standards,[108] comprise thirty-five of the world's wealthiest nations (only four of which are from Latin America or Africa).[109]

Industrialized nations have everything to gain and seemingly little to lose from imposing AML on poorer countries. If it does not work, then they will have wasted few resources that amount to only a tiny fraction of their GDPs. If it does work, they will have dealt another blow in the global war on terror and made their citizens safer as a result. The direct costs of enforcing AML to U.S. and European financial institutions are an estimated $4–5 billion per year.[110] This amounts to only 0.03% of the U.S.'s GDP but almost 2% of Pakistan's.[111] A study of Barbados, Mauritius, and Vanuatu revealed that the costs of AML regulations there range from $1.6 million (in Vanuatu) to $11.4 million (in Barbados) per year between 2002 and 2005.[112] While overall costs are lower, the burden is still disproportionately higher for developing countries. For example, those costs comprised 0.4% of Vanuatu's GDP at the time.[113] The cost of compliance for small banks with less than one hundred employees—an important source of financing in developing economies[114]—is more than double that of large banks.[115] Annual aid from the IMF, at just $6.5 million per year spread

107. *General Questions*, FIN. ACTION TASK FORCE, http://www.fatf-gafi.org/faq/generalquestions/#d.en.3119 [http://perma.cc/WG3N-BDZK].

108. *Financial Action Task Force Mandate (2012–2020)*, FIN. ACTION TASK FORCE 5–8 (2012), http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf [http://perma.cc/8XPH-2ZZE].

109. *FATF Members and Observers*, *supra* note 6.

110. *See Coming Clean*, ECONOMIST (Oct. 14, 2004), http://www.economist.com/node/3292933 [http://perma.cc/2PXA-RJFA]; Laura Noonan, *Banks Face Pushback over Surging Compliance and Regulatory Costs*, FIN. TIMES (May 28, 2015), http://www.ft.com/cms/s/0/e1323e18-0478-11e5-95ad-00144feabdc0.html#axzz3xRNnWVet [http://perma.cc/A635-6SVZ].

111. *Data: Pakistan*, WORLD BANK, http://data.worldbank.org/country/pakistan [http://perma.cc/L6PP-ETXT].

112. J.C. SHARMAN & PERCY S. MISTRY, CONSIDERING THE CONSEQUENCES: THE DEVELOPMENT IMPLICATIONS OF INITIATIVES ON TAXATION, ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM 172–73 (2008).

113. *Data: Vanuatu*, WORLD BANK, http://data.worldbank.org/country/vanuatu [http://perma.cc/5CWK-UT9T].

114. Justin Lin, *Walk, Don't Run*, ECONOMIST (July 9, 2009), http://www.economist.com/node/13986299 [http://perma.cc/D6ZK-TJ8H].

115. Hans Geiger & Oliver Wuensch, *The Fight Against Money Laundering: An Economic Analysis of a Cost-Benefit Paradox*, 10 J. MONEY LAUNDERING CONTROL 91–95 (2007).

across over thirty countries (just over $200,000 per country), pales in comparison to these costs.[116]

There are also indirect costs that have made it harder for people in developing countries to open bank accounts, send or receive remittances, and donate to charity.[117] AML is "making banks reluctant to clear transfers to conflict- or crime-racked spots such as Somalia, which depends on remittances."[118] Westpac, one of Australia's largest banks, recently closed the accounts of money transfer operators serving Somalia due to such concerns.[119] There are also opportunity costs in implementing AML, such as "when African and Caribbean governments divert money from anti-AIDS programs to meet FATF standards."[120] Given that 15% of people in developing countries suffer from extreme poverty,[121] 13% are undernourished,[122] and 13% of women in developing countries lack access to life-saving post-natal care,[123] the opportunity costs are substantial. Part of the problem has been a lack of cost-benefit analysis on AML regulations in developing states. The aforementioned World Bank guide only discusses the "assumed" costs of money laundering and the benefits of AML; it does not balance its analysis against the costs of AML. One such analysis by J.C. Sharman found that in developing economies like Barbados, Mauritius, and Vanuatu, the costs of adopting AML measures far outweighed the benefits.[124] While more cost-benefit analyses of this sort must be done to determine the ef-

116. *International Monetary Fund Factsheet: The IMF and the Fight Against Money Laundering and the Financing of Terrorism*, INT'L MONETARY FUND 3 (2016), http://www.imf.org/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism?pdf=1 [http://perma.cc/5D4L-XSZR].

117. Sharman, *supra* note 31, at 8.

118. *A Tax on the Poor*, ECONOMIST (Sept. 3, 2015), http://www.economist.com/news/finance-and-economics/21663263-regulation-keeping-remittances-unnecessarily-expensive-tax-poor [http://perma.cc/6M44-2X92].

119. Sonia Plaza, *Remittance Markets: More Court Cases and Higher Costs Due to Anti Money Laundering and Countering Financing of Terrorism (AML/CFT) Regulations*, WORLD BANK: PEOPLE MOVE BLOG (Dec. 14, 2014), http://blogs.worldbank.org/peoplemove/remittance-markets-more-court-cases-and-higher-costs-due-anti-money-laundering-and-countering [http://perma.cc/8PH5-335V].

120. Sharman, *supra* note 31, at 7–8.

121. *Poverty Forecasts*, WORLD BANK, http://www.worldbank.org/en/publication/global-monitoring-report/poverty-forecasts-2015 [http://perma.cc/EFT8-3JXT].

122. *Zero Hunger*, WORLD FOOD PROGRAMME, http://www.wfp.org/hunger/stats [http://perma.cc/C963-ZHMW].

123. *Newborns: Reducing Mortality*, WORLD HEALTH ORG. (Jan. 2016), http://www.who.int/mediacentre/factsheets/fs333/en/ [http://perma.cc/PZ29-4HQC].

124. SHARMAN & MISTRY, *supra* note 112, at 17–19, 31–32, 39, 94–95, 152–53.

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ficacy of AML regulations on a macro-level, all of the available evidence supports Sharman's findings.

Conclusion

AML is, overall, incredibly ineffective at interdicting both money laundering and terrorist finance. In both absolute and proportional figures, the funds captured are small and the rates of conviction low. This is due to both the mistaken assumption that terrorists make and move money similarly to other criminals, and the evolution of terrorist tactics after 9/11. Terrorists increasingly rely on donations and self-financing and make an effort to avoid the formal financial institutions most affected by AML legislation. While countering terrorist finance has proven to be a grossly ineffective enterprise, there have been rare instances in which such actions have helped to prevent large-scale, internationally orchestrated attacks.[125] However, such cases are few and far between, and consist almost exclusively of planned attacks on high-income nations, prevented by AML in high-income nations. The reason for this is that developing countries lack many of the basic conditions necessary for an even remotely effective AML system. Most also have a scarcity of financial and human capital to commit to such an expensive regime. Given these facts, it is entirely sensible for wealthy Western states to maintain an AML system that has shown some success in blunting terrorism. However, it is precisely the increasingly "homegrown" nature of modern-day terrorism that should give policymakers pause over the value of a *global* AML regime. Ultimately, developing countries are in the best position to decide whether AML is worth the investment. Given their limited resources and myriad other challenges, it is likely that for most it is not.

There are several paths forward that would make the global AML regime more just and possibly even more effective. The FATF's member states could simply increase the amount of aid to developing countries to cover a greater share of the costs of compliance. Relatedly, as an alternative to the current practice of blacklisting, the FATF could provide developing countries with more positive incentives to achieve greater compliance. For example, member states could pay developing country governments "bonuses" for every terrorist attack prevented through the use of AML. Sufficiently high bonuses would incentivize them to adopt AML policies when, and only when, they are effective, as opposed to their current incentives to adopt "functionally useless but symbolically useful [AML policies] to reassure outsiders."[126] Lastly, the FATF could pursue institutional democratization, shifting its membership criteria away from privileging economically powerful countries, which has made it into an exclusive club of the world's wealthiest nations, toward favoring countries for whom the costs of AML regulations, and the terrorism and organized crime they are de-

125. *See, e.g.*, *Australian Terror Suspects*, *supra* note 88 (noting that Australia's AML policies helped to prevent an attack on an Australian army base in Somalia).

126. SHARMAN, *supra* note 54, at 8.

signed to prevent, are highest. By giving developing countries' a greater role in the FATF, its recommendations may be more appropriately tailored to the needs of a greater diversity of countries, beyond those with large budgets and sophisticated financial and legal sectors. Whatever path forward the FATF chooses, it is clear that its current practices cannot be sustained.