INTERNATIONAL MONEY LAUNDERING: THE NEED FOR ICC INVESTIGATIVE AND ADJUDICATIVE JURISDICTION

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INTRODUCTION

On September 11, 2001, terrorists from the organization Al-Qaeda managed to hijack airplanes in mid-air and reroute them, flying them into the World Trade Center in New York City and into The Pentagon, just outside Washington, D.C. These terrorists were able to accomplish this feat through years of planning and sophisticated, expensive flight training. One of Al-Qaeda’s primary sources of funding is heroin trafficking, however, one cannot simply spend tens of thousands of dollars in cash without going unnoticed.\(^1\) Instead, they laundered their cash proceeds through less-than-legitimate banks, including Al Rajhi Bank, known as one of Osama Bin Laden’s primary financiers.\(^2\) Al Rajhi lacked the ability to launder the money around the world, cleaning it of its original source, so it turned to a global financial institution, with whom they had laundered money for decades: HSBC (Hong Kong and Shanghai Banking Corporation).\(^3\) HSBC, after converting the money into more stable currency, returned the money to Al Rajhi, which then allow their customers to spend it in legitimate markets without appearing suspicious.\(^4\) With this “clean” and stable currency, Al-Qaeda is able to purchase weapons, fund training, and execute terrorist attacks against people around the world, including the September 11 attacks. And the only way they are able to do this is because they are now able to spend their heroin profits in legitimate markets, all courtesy of HSBC. This is the problem countries around the world face. The US can punish HSBC for allowing this money laundering to happen within our borders, however, they lack the power to stop the problem at the source; they cannot prosecute the terrorists who ultimately benefit from the money laundering or the smaller banks who act as benefactors for these terrorist organizations.

One of today’s most pressing issues in international financial crimes is the need to stop the funding of terrorism. One of the most effective means of doing so is to combat the money laundering tactics used by these terrorist groups to funnel their money into legitimate banks. International money laundering, however, can have effects far greater than simply the financing of terrorism. It affects the stability and integrity of international financial institutions, which can result in destabilization of national economies.\(^5\)

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3. Id.
4. Id.
Because of the complex nature of money laundering investigations, criminal organizations tend to target jurisdictions with ineffective control over their financial systems, further exploiting these financially unstable nations. This exploitation forces international organizations such as the Financial Action Task Force, the International Monetary Fund, and the United Nations Global Program against Money-Laundering to monitor the financial activities within these nations in attempt to prevent money laundering from occurring. While these international non-governmental organizations have established peer-monitoring and supervisory programs within its member states, they lack the proper jurisdiction to thoroughly investigate and prosecute international criminal organizations engaging in money laundering. In order for a nation to prosecute a suspected money launderer, their laundering activities must fall within the nations jurisdiction. This often requires money going to, through, or from that nation, which limits the prosecutorial jurisdiction significantly, especially since most laundering takes place in nations that lack the significant resources needed to properly investigate and prosecute these crimes. The result is the exploitation of these systems because they lack of resources available to properly prevent laundering from taking place. On an international scale, the result is far greater than just the exploitation of unregulated economic systems. The result is a constant source of seemingly legitimate funding that the laundering activities provide for international criminal and terrorist organizations.

This paper proposes that the International Criminal Court (hereinafter “ICC”) adopt a money laundering statute, making such crimes illegal within the international criminal law system. This statute should include provisions that punish criminals engaging in laundering money by identifying activities that lead to illicit funds, as well as provisions that protect whistleblowers from prosecution. The international statute should also include regulatory measures used to punish financial institutions involved in laundering activities, forcing them to utilize the risk-based approach when investigating suspicious clients, as well as more thorough due diligence provisions.

In addition, this paper argues that the ICC is the appropriate international body for investigating and prosecuting crimes of this nature because of its far
reaching jurisdiction, as well as its established structure and availability of resources to investigate and adjudicate this type of crime. Codifying an effective international money laundering statute and giving the ICC investigative and adjudicative powers greatly benefit the global effort to combat money laundering.

In order to provide context and relevant background knowledge, Part I of this article includes a brief explanation of money laundering, along with relevant current international proposals for preventing money laundering, current tactics used by international organizations to prevent money laundering, and information on the International Criminal Court’s jurisdiction and investigative powers. It also includes a brief explanation of the problems international money laundering creates. Part II proposes model international statute against money laundering. It also lists and explains the necessary criminal and regulatory provisions. Part III explains why the International Criminal Court should investigate and adjudicate criminal offenses of this nature, describing its adjudicatory and organizational strengths, as well as presenting reasons why the ICC is a preferable venue for such cases to International Court of Justice (hereinafter “ICJ”) and the Panel of Recognised International Market Experts in Finance (hereinafter “PRIME”).

I. BACKGROUND

A. What is Money Laundering?

International criminal organizations often operate on large budgets that fund their criminal activity. The problem these organizations encounter is that most of their funding is the result of cash-intensive illicit activity, with a primary source being narcotics trafficking. These illegal proceeds must be disguised as legitimate sources of capital, so the organizations engage in a series of steps that effectively disguise the money, and this series of steps, when taken as a whole, is known as money laundering.

There are three primary stages in the process of laundering money: placement, layering, and integration.

The placement stage involves the criminal organizations depositing their illegal cash proceeds into some legitimate enterprise, often a legitimate banking

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\text{\textsuperscript{15}} \text{Anna Driggers, } \textit{Money Laundering,} 48 \textit{AM. CRIM. L. REV.} 929, 930 (2011) (describing the basic tenets, process and stages involved in money laundering).}
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institution or corporation. Upon successful “placement” of funds, the launderers move onto the second stage of laundering, which is known as layering. Layering is the process in which the launderer moves the money through a series of transactions, thus creating “layers” of transactions. These layers normally are made up of fund transfers through multiple offshore banks, effectively disguising the original source of the money, making it more difficult for investigators to trace it to the original source.

The final stage involved in money laundering is known as “integration.” In this stage, the launderers integrate the laundered money into the “legitimate financial world.” The source of the money is often only recognizable by the leaders of the criminal organizations because it ultimately takes the form of some sort of legitimate financial instrument.

B. Problems Created by International Money Laundering

Several problems arise from international money laundering, but two issues worth noting are (1) the effect money laundering has on financial institutions, and (2) the effect money laundering has on national economies. Money laundering intertwines these two effects because it destabilizes financial systems and institutions in not only the country where it takes place, but also around the world. It also is counterproductive to these nations’ goals of combating these international criminal organizations. If a financial institution engages in money laundering, they run the risk of damaging their institutional integrity. A financial institution’s success depends heavily on the public perception of its integrity, so as money laundering damages its reputation for integrity, it also damages its ability to do business with other institutions. In regions that effectively monitor financial crimes, financial institutions also run the risk of non-compliance with anti money laundering statutes and related regulations. If caught engaging in money laundering practices, a financial

17 Id. at 537.
19 See ADAMS, supra note 16, at 537.
20 Id. at 538.
22 Id.
24 Id.
institution can face a range of penalties from the governing regulatory board. These penalties can range from fines, to in-house monitoring, to the removal of their banking or financial practice license. Essentially, financial institutions engaging in money laundering can potentially encounter problems with both the financial success of the institution, as well as through legal sanctions they may face from various financial regulatory bodies, all of which can be crippling to a financial institution’s credit rating and integrity.

The second issue includes the countless effects of money laundering on a nation’s economy; however, some have greater impacts than others. The first issue occurs on a microeconomic level, and involves money launderers using legitimate businesses as fronts for their money laundering activities. Many money launderers open “legitimate” businesses that offer some sort of service, such as a restaurant, and then launder their illicit funds through that business. Because running these businesses simply operates as a laundering mechanism, the launderers’ goal is to create “clean” money, rather than operate at a high profit margin. This allows launderers to undercut legitimate businesses operating for higher profits, destroying fair market mechanisms, resulting “in further negative macroeconomic effects.” Money laundering can also result in a loss of economic policy control, as it can affect supply and demand of currencies, volatility of markets, and exchange rates around the world, since the money moves through financial institutions very quickly, changing form and currency as it moves. It also creates instability within financial systems because the launderers are rarely concerned with producing profit from their investments, but are more concerned with protecting their investments. As a result, launderers often “invest” in “activities that are not necessarily beneficial to the country where the funds are located.” As a result, the problems money laundering creates are diverse in nature, and manage to disrupt the stability and integrity of national economies on both micro and macroeconomic scales.

C. Financial Action Task Force Proposals

The Financial Action Task Force (hereinafter FATF) is an inter-

26 Id.
27 Id.
29 Id.
30 Id. at 3.
31 Id.
32 Id. at 3-4.
33 Id. at 4.
governmental organization whose primary goal is to propose and promote international standards aimed at combating the crimes of money laundering and terrorism financing, amongst other financial crimes. There are thirty-four member states, along with 2 regional organizations that currently make up the FATF.\textsuperscript{34} The 1988 G-7 Summit in Paris established the FATF, with the primary objective of “examining and develop[ing] measures to combat money laundering.”\textsuperscript{35} In 1990, the FATF published its first report, titled \textit{Forty Recommendations}, which established a comprehensive plan for its member states and organizations to combat money laundering by criminal organizations.\textsuperscript{36} The FATF most recently revised their Forty Recommendations for preventing money laundering in 2012.\textsuperscript{37}

The FATF revised recommendations advise countries to codify money laundering statutes, as well as other statutes relating to activities involved in money laundering.\textsuperscript{38} Among these recommendations, the FATF encourages countries to impose financial sanctions for banking institutions that do not perform “customer due diligence,” which allows money launderers to use false identities to transfer money to foreign banking institutions.\textsuperscript{39} The recommendations also call for codifying requirements for financial institutions to report suspect activities to the nation’s financial intelligence unit.\textsuperscript{40} The recommendations also lay out prescribed actions nations should take to increase their cooperative efforts to prevent international money laundering.\textsuperscript{41}

\textbf{D. United Nations Global Program against Money-Laundering Resolutions}

The United Nations Office on Drugs and Crime established a key branch of its office designated for combating money laundering and terrorism financing, the Global Program against Money-Laundering (hereinafter

\begin{itemize}
  \item \textsuperscript{34} FATF, \textit{FATF Annual Report 2010-2011}, at 14 (Sept., 2011) (the two regional organizations currently holding member status are the European Commission and the Gulf Co-operation Council; there are currently 25 international organizations, primarily regional non-governmental organizations, that maintain “observer” status)
  \item \textsuperscript{35} FATF, \textit{20 Years of the FATF Recommendations}, at 4-5 (June 2010).
  \item \textsuperscript{36} FATF, \textit{The Forty Recommendations of the Financial Action Task Force on Money Laundering} (1990) (while only 6 pages long, the report established a set of recommended definitions of money laundering, a series of guidelines dealing with domestic financial systems and institutions, as well as how to deal with nations lacking established anti-money laundering statutes).
  \item \textsuperscript{38} FATF Recommendations, \textit{supra} note 37, at 12.
  \item \textsuperscript{39} FATF Recommendations, \textit{supra} note 37, at 14-15.
  \item \textsuperscript{40} FATF Recommendations, \textit{supra} note 37, at 19.
  \item \textsuperscript{41} FATF Recommendations, \textit{supra} note 37, at 27-30.
\end{itemize}
This program came about to assist member states in codifying money laundering statutes, as well as assisting in the establishment of domestic financial crimes investigative units within its member states. The GPML relies on several legal instruments established by UN Conventions addressing the issues surrounding global money laundering.

One of the most important aspects of the FATF’s recommendations is the source of the model statutes they advise nations to codify. The FATF draws from the model statutes established by both the Vienna Convention of 1988, which was the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Palermo Convention of 2001, which was the UN Convention Against Transnational Organized Crime. The more recent model statutes found in the Palermo Convention provide a broad basis for criminalizing money laundering, as well as require all signing nations to implement certain measures to prevent money laundering. Article Six of the Palermo Convention resolution makes it illegal for anyone to disguise or attempt to disguise money that is the proceeds of crime for the purpose of disguising the illicit origin of the money. The model statute advises signatory nations to proscribe the broadest range possible of crimes that qualify as an illicit origin of said money. Article Seven requires all signing nations to establish regulatory and supervisory financial bodies, and that these financial bodies willingly and effectively cooperate with other sovereign financial bodies when investigating money laundering offenses at the international level.

E. International Criminal Court Statutes and Jurisdiction

The International Criminal Court is the primary international court for adjudicating serious crimes that affect the international community. The ICC

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47 Id. at 6.
48 Id.
50 INT’L CRIMINAL COURT, Understanding the International Criminal Court, INTERNATIONAL CRIMINAL COURT, 3 (Oct. 5, 2011), http://www.icc-
is the creation of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in Rome, Italy.\textsuperscript{51} This conference took place in 1998 and resulted in the international treaty known as the Rome Statute.\textsuperscript{52} The Rome Statute went into effect and created the ICC after 60 nations signed it in 2002.\textsuperscript{53} The ICC currently has jurisdiction over a specific set of crimes, including: genocide, crimes against humanity, and war crimes.\textsuperscript{54} The court holds jurisdiction over individuals accused of either directly or indirectly participating in such crimes.\textsuperscript{55}

The court does not, however, posit universal jurisdiction. The accused individual must be a citizen of a state who is a party to the Rome Statute, and the crime must have taken place within the territory of a nation who is a party to the Rome Statute, or the UN Security Council must have referred the offense to the prosecutor of the ICC.\textsuperscript{56} The ICC acts as the judicial authority and the prosecuting authority in all cases, with the prosecutor initiating investigations on his own or from referral of nation within the court’s jurisdiction.\textsuperscript{57} If convicted, the Court has the power to sentence the accused, in general, to a term of years not to exceed thirty years.\textsuperscript{58} Special situations and aggravating circumstances, however, can allow the court to sentence an individual for as long as life in prison, should the circumstances of his crime be so grave.\textsuperscript{59}

\section*{F. The International Problem of Money Laundering}

Money laundering is one of the primary methods to successfully fund terrorism and criminal activity around the world. While most states currently recognize money laundering as a crime, many do not have the resources or wherewithal to combat these large organizations’ money laundering activities. Money launderers tend to target nations that fail to effectively enforce their money laundering statutes, have not made significant progress in developing anti-money laundering statutes, lack the resources necessary to implement strong financial intelligence units, or even harbor money launderers and their laundering activities. The FATF issues yearly reports on the status’s of nations

cpi.int/icc/docs/PIDS/publications/UICCEng.pdf.
\textsuperscript{51} Id. at 1.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 8 (the ICC will also hold jurisdiction over prosecuting the crime of “wars of aggression” beginning in 2017).
\textsuperscript{55} Id. at 4.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 7-8.
\textsuperscript{58} Id. at 31.
\textsuperscript{59} Id.
that they regard as either high risk or non-cooperative.\textsuperscript{60} Within its annual report, they advise these specific nations of the areas needing improvement, as well as how member nations should interact with these high risk and non-cooperative countries.\textsuperscript{61}

Money launderers simply target the nations that have not effectively implemented said laws, or moved their laundering activities towards the nations that act as harbors for international criminal organizations attempting to launder money. According to the 2012 FATF report on high risk and non-cooperative nations, the FATF identifies Iran and the Democratic People’s Republic of Korea as the two least cooperating nations in the world, and recommend that all member states “apply counter measures to protect the international financial system.”\textsuperscript{62} Because these two nations choose not to cooperate with international efforts to combat money laundering, money launderers open accounts in these nations, then launder the money through international banking institutions, through their branches around the world. The problem is that a nation only holds jurisdiction over the banks involved in laundering when they make transfers into branches within the prosecuting nation’s territory or the deposits are in the prosecuting nation’s currency.\textsuperscript{63} Because some nations with strong financial intelligence units, such as the United States, are so versed in prosecuting banks that engage in money laundering, launderers and financial institutions engaged in money laundering simply avoid transactions with their United States’ branches, or disguise the transactions so that the original source of the funds is untraceable.\textsuperscript{64}

II. THE NEED FOR AN INTERNATIONAL STATUTE AGAINST MONEY LAUNDERING

Because money laundering is such a widespread international problem, there must be a mechanism to stop individual and institutional offenders. The most effective way to combat this international problem involves a two-prong

\textsuperscript{60} See Generally FATF, supra note 34.  
\textsuperscript{61} Id.  
approach. First, the international community must create a statute prohibiting money laundering activities, in order to allow international judicial bodies to prosecute such offenses. The next prong of the solution is to designate an international body the jurisdictional authority to adjudicate these offenses. The ideal body for adjudicating these offenses is the ICC because of its abundant resources and effective organizational structure.

A. The Foundation of an Effective Money Laundering Statute

The United Nations Palermo Convention created a model statute prohibiting money laundering activities. While the model statute was only intended to serve as a foundation for nations building their own domestic statutes, this model statute provides a good basis for creating a strong law prohibiting international money laundering. The Palermo Convention statute, however, could be improved upon prior to codifying with the purpose of internationalizing the crime of money laundering. The Palermo Convention statute reads as follows:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.

As evident, the Palermo Convention model provides a very strong foundation for creating a money laundering statute that could prove effective in the international criminal justice system. There are, however, some specific issues that require attention prior to codification, such as what constitutes “proceeds derived from criminal activity,” as well as other issues involved in crimes of money laundering. Some of the specifics needing attention include the regulatory issues involving customer due diligence and monitoring. While

66 Id.
67 Id. at 6.
the international community shall use the Palermo Convention model statute as a foundation for the international law against money laundering, it is not developed enough to target money laundering activities at both the launderer and financial institutional levels. It lacks the specifics necessary to effectively prosecute money launderers and financial institutions involved in money laundering. For this reason, the international community must draw on the legislation of nations who have enacted competent and effective money laundering statutes. It must look towards statutes that address the illegal activities of both the criminal organizations, as well as the financial institutions engaging in the laundering of illicit proceeds.

B. Criminal Provisions

One of the most important aspects of creating an effective money laundering statute is establishing a comprehensive list of what constitutes “unlawful activities.” It is necessary to determine what qualifies as an unlawful activity because an effective statute prohibits individuals and banks from engaging in financial transactions as a means to disguise the proceeds of said unlawful activities. Two comprehensive money laundering statutes are the United States’ statutes against money laundering; the Money Laundering Control Act of 1986, and its amended form as established by the PATRIOT Act of 2002.68 The Money Laundering Control Act of 1986 establishes a wide variety of activities as the requisite “specified unlawful activities” whose profits are deemed the proceeds of unlawful activities. This means any attempt to disguise these proceeds is considered money laundering under the statute. Some of these activities include: any act or threat involving murder, kidnapping, gambling, robbery, bribery, extortion, dealing in obscene matter or dealing in a controlled substance or chemical.69 Besides these basic tenants of criminal law, the statute also includes: counterfeiting, various fraudulent activities, illegal immigration and human trafficking activities, trafficking in stolen goods, terrorist activities including trafficking in arms and biological and nuclear weapons, and securities fraud and violations.70 The PATRIOT Act of 2002 expanded the activities qualifying as a “specified unlawful activity” by including activities relating to terrorism and foreign crimes including bribery and corruption of public officials.71 The United States’ legislative efforts against money laundering provide one of the most comprehensive lists in

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70 Id. at §§ (1)(A-G).
terms of establishing the predicate acts that qualify as “unlawful activities” required in money laundering. Establishing a concrete list of unlawful activities is crucial in effectively prosecuting money launderers. Without an exact definition of what constitutes an unlawful activity, prosecutors are unable to prove that the laundered money is the profit of criminal activity, the underlying requirement of money laundering. Because the US statutes are so exhaustive, they should be given thorough consideration when codifying an international money laundering statute.

While the US statutes provide a strong list of unlawful activities, an Israeli money laundering statute includes a noteworthy provision that increases prosecutorial efficiency. The Israeli statute allows prosecutors to charge criminal organizations involved in money laundering without convicting them of the predicate offense that led to the criminal proceeds. Inclusion of this provision would increase investigative and prosecutorial efficiency in an international system, something that is extremely important in maximizing the effort to combat money laundering.\(^\text{72}\)

The Canadian money laundering law, commonly referred to as the Proceeds of Crime (Money Laundering and Financing Terrorism) Act of 2011, includes a provision relating to immunity for “whistleblowers.”\(^\text{73}\) This provision gives immunity to people who voluntarily report suspicious activity or transactions to the investigative authorities.\(^\text{74}\) This type of provision could prove very useful in an internationalized system, and could also increase the efficiency of the investigatory process, encouraging people around the world to use the appropriate channels to report suspicious money laundering related activities.\(^\text{75}\)

C. Regulatory Provisions

While the aforementioned aspects of an international money laundering statute are critical to establishing criminal sanctions for criminal organizations involved in money laundering, they fail to include regulatory provisions aimed at preventing financial institutions from engaging in money laundering. The international money laundering problem involves not only criminal organizations, but also financial institutions that enable such activities to take place. For this reason, an effective international statute must include regulatory provisions that allow prosecutors to punish these offending financial


\(^\text{74}\) Id.

\(^\text{75}\) Id.
institutions. There are three regulatory components that are key to establishing an effective statute for preventing financial institutions from engaging in money laundering: (1) customer due diligence, (2) utilizing a risk-based approach, and (3) establishing a financial intelligence unit.

1. Customer Due Diligence

The first component of an institutional regulatory scheme is the necessity for banks to perform thorough customer due diligence. Due diligence requirements are important to include in an international statute because they require banks to be proactive in monitoring and preventing customers from completing transactions that may be involved in money laundering schemes. By requiring this, it holds financial institutions liable for the prevention of these crimes, and allows prosecutors to punish institutions that do not act accordingly. Under an effective due diligence requirement, banks and other financial institutions should be required to perform due diligence verifying the legitimacy of customers when their transactions: involve transfers from institutions foreign to the state in which the transaction is taking place, \(^{76}\) any occasional transactions involving currency in an amount greater than an internationally established threshold (such as $15,000 or €15,000), \(^{77}\) the transaction involves a bank or financial institution based out of an FATF non-cooperative state, \(^{78}\) or there are suspicions about the accuracy of previously obtained customer information and data. \(^{79}\)

2. Utilizing a Risk-Based Approach

The second regulatory component that is important to include in an

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\(^{76}\) See 31 C.F.R. § 1010.610 (2011) (US regulation requiring special, more thorough due diligence programs when dealing with transactions involving correspondent accounts for foreign financial institutions).

\(^{77}\) See 31 C.F.R. § 1010.330 (2012) (US regulation requiring parties to a transaction, generally banks or financial institutions, involving currency in excess of $10,000 file the requisite report detailing the course of the transaction and the parties involved; the regulation also requires parties, in certain circumstances, to file the report with the Financial Crimes Enforcement Network (FinCEN)), see also The Money Laundering Regulations, 2007, S.I. 2157, art. 13 (U.K.) (UK requirement that parties to an occasional transaction, including financial institutions and the individual party involved, report all transactions involving currency in an amount above the threshold amount of €15,000).

\(^{78}\) FINANCIAL ACTION TASK FORCE, supra note 62; see also 31 C.F.R. §§ 1010.651-670 (2011) (special measures banks must conform to in relation to dealing with specific countries and specific banks within said countries, which are thought to knowingly engage in money laundering activities and terrorist financing).

\(^{79}\) The Money Laundering Regulations, 2007, S.I. 2157, art. 7 (U.K.) (requirement for additional due diligence when the adequacy or veracity of previously obtained customer information is doubted).
international money laundering statute is one requiring financial institutions to use a risk-based approach for customer due diligence and monitoring. Many countries require their banks and financial institutions to utilize the risk-based approach, which allocates resources more efficiently towards higher risk clients and transactions. The FATF explains that a risk-based approach is more effective because it requires banks and financial institutions to evaluate the risk of all of their clients, allowing them to identify the clients who pose a bigger risk of laundering money. Once these higher risk clients are identified, the financial institutions must allocate more of their due diligence and monitoring resources towards them to ensure that their transactions and account activity are not the products of money laundering. This risk-based approach is utilized by several nations around the world in varying forms, but Hong Kong’s risk-based approach is so thorough it must be included in the international money laundering statute. The Hong Kong regulation requires banks to utilize this risk-based approach in performing an initial assessment of the risk a foreign client poses, then perform monitoring of transactions of these higher risk clients, including ongoing monitoring of these clients. The Hong Kong approach requires banks to evaluate a client’s risk based on two aspects: (1) the country the foreign client with which the client is connected or residing in, and (2) the attributes of the specific client, including employment and sources of assets and funds. By requiring all international banks to evaluate clients based on their personal attributes, as well as their national origin, it would increase the efficiency and effectiveness of investigating money laundering in an international system. The FATF recommends that member states utilize reports on high-risk nations and non-cooperating nations as the basis for evaluating the nationality risks a foreign client poses.

Another aspect of the risk-based approach that is important to include in an international money laundering statute is the inclusion of a “politically exposed persons” provision. Politically exposed persons are senior ranking officials, politicians, and other people who might have access to high value assets or financial resources. The FATF recommends that member states require financial institutions to perform enhanced due diligence on politically exposed persons and their associated entities.

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80 FINANCIAL ACTION TASK FORCE, supra note 37, at 14-19 (explaining the recommendation that countries implement a risk-based approach towards monitoring customers and transactions).

81 FINANCIAL ACTION TASK FORCE, supra note 37.

82 FINANCIAL ACTION TASK FORCE, supra note 62, at 11 (the first recommendation of the revised FATF Recommendations is that member nations implement a requirement that all financial institutions follow the risk-based approach towards monitoring higher risk clients).


84 Id. at § 3.5.

85 Id.

86 FINANCIAL ACTION TASK FORCE, supra note 62, at 11 (the annual reports on high-risk and non-cooperating nations explain what risks individual countries pose, allowing financial institutions to identify areas monitoring would be most effective).
officials of foreign governments, and are generally, more prone to involvement in bribery or corruption, and as a result, involved in money laundering schemes. A “politically exposed persons” provision is an extension of the risk-based approach model that requires banks to pay special attention to transactions and accounts involving said politically exposed persons. The United States has a regulation that requires banks and financial institutions to perform more thorough due diligence for senior ranking foreign officials who hold private bank accounts within the United States.\(^87\) This regulation requires banks to verify the identity of all parties involved in transactions with politically exposed persons, so long as the politically exposed person’s private account has at least $1,000,000 in assets and is maintained on the behalf of a non-citizen of the United States.\(^88\) This regulation is important to include in an internationalized money laundering statute, as these high ranking officials are more likely to be corrupt and involved in money laundering than lower ranking officials in governments.\(^89\) It will prove to be an effective preventive measure for financial institutions to combat international money laundering.

3. Establishing Financial Intelligence Units

The final regulatory provision in an international money laundering statute is one requiring nations to create financial intelligence units. This regulatory provision is one of the key components the FATF included in its 2012 revised set of Forty Recommendations to member states. The FATF recommends that all member nations create a financial intelligence unit that “serves as a national centre for the receipt and analysis of: (a) suspicious transactions reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis.”\(^90\)

Many countries have followed the FATF’s recommendations and successfully established financial intelligence units that primarily deal with investigating money laundering and other financial and securities crimes. Using some of the more developed financial intelligence units as a model, their ideal components can be identified, and should be required of all nations to ensure the international money laundering statute is effectively enforced. These units act as a central organ for reporting and investigating suspicious transactions

\(^87\) 31 C.F.R. § 1010.620 (2011).
\(^88\) Id. See also 31 C.F.R. § 1010.605 (2011).
\(^89\) FINANCIAL CRIMES ENFORCEMENT NETWORK, FACT SHEET: SECTION 312 OF THE USA PATRIOT ACT FINAL REGULATION AND NOTICE OF PROPOSED RULEMAKING (Dec. 2005).
\(^90\) FINANCIAL ACTION TASK FORCE, supra note 37, at 24 (recommendation 29 also recommends that the financial intelligence unit have access to reports and investigations of other enforcement and regulatory bodies established within the state that may provide useful information towards investigating money laundering activities).
and money laundering related activities. The United States has one of the most developed financial intelligence units, which is known as the Financial Crimes Enforcement Network, or FinCEN. FinCEN is a bureau of the United States Department of the Treasury and serves as an advisory authority for financial institutions regarding money laundering and financial crimes, as well as providing support to law enforcement agencies at the state level and to the financial crimes unit of the FBI. Cooperation between law enforcement and financial agencies is important for developing an effective financial intelligence unit, so all nations must utilize this type of structure. Nations around the world have followed the US lead in creating financial intelligence units, including the high-risk nation of Nigeria, which has a developing financial intelligence unit that follows a similar model to that of the United States. By requiring nations to create financial intelligence units, it will increase the efficiency of investigating and in turn, adjudicating international money laundering offenses.

### III. The Need for an International Judiciary for Financial Crimes

Once the international community codifies an international statute prohibiting money laundering, there must be a judicial body to prosecute and adjudicate subsequent offenses. Determining which body will adjudicate these crimes requires a look at the strengths and weaknesses of all serious candidates, then making a determination based on those factors. Money laundering offenses present a perfect opportunity for the ICC, as they require less testimony of victims involved in violent crimes, and deal more with document-oriented evidence. The ICC’s problems are the result of prosecuting such difficult, heinous crimes, requiring victim statements relating to reigns of terror within nations. Money laundering, however, is a completely different type of offense, involving financial transactions and relationships between criminal organizations and financial institutions. Because of the different nature of money laundering offenses, the ICC will not face similar problems it has in prosecuting other crimes, and will be more effective in adjudicating these cases.

#### A. The Adjudicatory Opportunity the ICC Presents

Since its origination in 1998, the ICC continues to prove itself as an effective body for adjudicating international crimes. It is one of the widest

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reaching international bodies, with 121 currently active members.\(^{94}\) It presently adjudicates crimes involving genocide, crimes against humanity, and war crimes. As effective as it is at adjudicating crimes, it possesses an equally strong organizational structure. Because of both its effectiveness in adjudicating international criminal offenses, as well as its strength as an organization, it is the ideal body to investigate and adjudicate international money laundering offenses.

The ICC is only able to currently hear cases involving a specified list of offenses, however, the types of offenses that it has the power to adjudicate are those that do not often occur. The court went into operation in 2002, and has issued twenty-two arrest warrants for these rare, generational offenses.\(^{95}\) While critics may argue this number is staggeringly low for ten years of operation, considering the types of severe and violent crimes the ICC has jurisdiction over, it is not as surprising as it appears.\(^{96}\) The crimes the ICC currently has authority over are crimes that do not occur on a regular basis, and are very complex and time consuming in investigating. Because of this, the ICC is not often presented with crimes it has jurisdiction over.

In terms of producing results and successfully adjudicating cases, the nature of the cases the ICC adjudicates has led to it failing to live up to some expectations.\(^{97}\) The Court recently concluded its first trial in a case involving Thomas Lubanga, the first person to be arrested and tried before the ICC.\(^{98}\) The Court is also in the process of adjudicating and investigating several other serious offenses, including six other active trials set, and seven ongoing investigations.\(^{99}\) Because money laundering investigations are far less time

\(^{94}\) INT'L CRIMINAL COURT, supra note 50, at 3.


\(^{96}\) Id.

\(^{97}\) While the ICC has failed to live up to some expectations, these shortcomings are easily avoidable when investigating and adjudicating money laundering offenses, because they are less laborious in terms of investigatory duties, and quick adjudicate since they are more common and involve far fewer witnesses and more document evidence than first hand accounts. See Jack Goldsmith, The Self-Defeating International criminal Court, 70 U. CHICAGO L. REV. 89 (Winter, 2003) (expressing how the ICC will continue to be a failure without the cooperation of the United States); Sonali B. Shah, The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court’s Definition of Genocide, 16 EMORY INT’L L. REV. 351 (Spring, 2002) (discussing the shortcomings of the ICC’s statutory definitions, focusing primarily on the Court’s definition of genocide); Lana Ljuboja, Justice in an Uncooperative World: ICTY and ICTR Foreshadow ICC Ineffectiveness, 32 HOUSTON J. INT’L L. 767 (Summer, 2010) (identifying several factors that have led to the ineffectiveness of the ICC, including procedural delays, ineffective witness protection, and state noncooperation in capturing accused individuals).

\(^{98}\) Id.

\(^{99}\) INT’L CRIMINAL COURT, supra note 95, at 2-3 (report lists the situations the ICC is currently investigating, along with the status of arrest warrants and ongoing trials involved in each of these situations; there are currently seven situations the ICC is investigating, all
International Money Laundering

consuming and imposing than the cases the ICC currently adjudicates, accepting jurisdiction over these cases would increase the court’s productivity and further legitimize it as an international judicial institution.

The ICC is one of the most able bodied organizations from an organizational structure standpoint. It possesses the resources and structure to efficiently and effectively investigate and adjudicate money laundering offenses from initial investigation all the way through the appellate process. It currently employs over 700 employees, and operates on a $140 million annual budget.\textsuperscript{100} With such a strong work force, taking on the additional offense of money laundering should only increase the ICC’s productivity.

The ICC occasionally faces criticism for its lack of productivity, however, this criticism is largely the result of its very limited scope of crimes over which it holds jurisdiction.\textsuperscript{101} One solution to increasing productivity within the ICC is to expand the types of crimes the court is able to hear to include international money laundering offenses. The ICC possesses the resources and wherewithal to investigate international money laundering offenses, and is the ideal structure for adjudicating such offenses.

B. The Institutional Strength of the ICC

Institutionally, the ICC possesses a very well-developed structure has the ability to act as a very efficient and effective investigative and adjudicative body, however, it is severely limited as to the types of crimes over which it has jurisdiction to adjudicate. Because of its strong investigative and adjudicative structure and sheer size of the organization, it is an ideal fit for hearing international money laundering offenses.

In terms of the investigative powers, the ICC has resources beyond those of any individual state. The Office of the Prosecutor is responsible for initiating investigations into potential international offenses.\textsuperscript{102} The Office of the Prosecutor can initiate a preliminary investigation if they have received information that there may be an offense.\textsuperscript{103} Many of the referrals of information come from the United Nation’s Security Council; however, they are able to come from any organization or individual with useful

\textsuperscript{100} INT’L CRIMINAL COURT, supra note 95, at 1 (the fact sheet lists the 2012 fiscal year budget as € 108.8 million, which is approximately $140-150 million depending on foreign currency market exchange rates; see MARKET DATA CENTER, Currencies, WALL ST. J. (Oct. 2, 2012), http://online.wsj.com/mdc/public/page/mdc_currencies.html.).

\textsuperscript{101} See INT’L CRIMINAL COURT, supra note 50.


\textsuperscript{103} Id.
information. With an international money laundering offense that regulates banking and financial institutions so thoroughly, it is likely that most of the investigative referrals would stem from these types of institutions.

The ICC is so structurally sound that it has an established system of checks and balances in place to control prosecutorial abuse throughout the process of an investigation. Upon receiving a referral, the prosecutor must perform a brief preliminary examination to determine whether there is a reasonable basis to open a formal investigation into the allegation. If the prosecutor believes there is a sufficient basis for an investigation, she must submit her findings to the pre-trial chamber of the judiciary branch, where a pre-trial judge will evaluate the findings and determine whether they will authorize a formal investigation. At this point, the prosecutor must notify states that would ordinarily exercise jurisdiction over the offense and discuss with them their options of prosecuting the offense domestically or deferring to the powers of the ICC. These procedures limit prosecutorial powers and ensure that all open investigations are based on legitimate merit.

The resources of the Office of the Prosecutor make the ICC an ideal location for adjudicating international money laundering offenses. The Office of the Prosecutor is able to open investigations of potential offenses in any of the 121 signatory nations to the Rome Statute. Because the Office of the Prosecutor is also the investigative body, their goal is to seek the truth. They are able to open preliminary investigations, and upon finding no legitimate merit to the reported offense, they can end their investigation at this point. The checks and balances within the structure also ensure that this takes place. The Office of the Prosecutor is broken up into highly specialized divisions, and these specialized divisions are able cooperate with domestic financial intelligence units to determine all sides of an issue, making it a highly effective investigative body.

The judicial organ of the ICC also has abundant resources available to adjudicate international money laundering offenses, should the ICC posit jurisdiction over such crimes. In all, the ICC employs eighteen full time judges,

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104 Id.
106 Id.
107 Id.
108 LANDRUM, supra note 106 at 7-8.
109 INT’L CRIMINAL COURT, supra note 50, at 1.
111 LANDRUM, supra note 106, at 7-8.
112 LANDRUM, supra note 106, at 7.
113 BENSOUĐA, supra note 114, at 2 (displaying the specialized investigative divisions of the Office of the Prosecutor in a flow chart type display).
who are divided into three different divisions.\textsuperscript{114} The pre-trial chamber, the trial chamber, and the appellate chamber make up the three separate divisions of the ICC judicial branch.\textsuperscript{115} These three chambers work in unison throughout the process of a trial, beginning with initial arraignment and pre-trial release conditions that take place in the pre-trial chamber.\textsuperscript{116} The trial chamber handles the trial itself, as well as evidentiary issues, and any pre-trial conferences that are deemed necessary after the initial arraignment and indictment.\textsuperscript{117} Once the trial chamber reaches a verdict, if the defendant is found guilty, they have the right to challenge their conviction in the appellate chamber, with the appellate chamber possessing the ability to reverse, affirm, or amend the sentence depending on various issues including proportionality.\textsuperscript{118}

Like the investigative process, the adjudicative process of the ICC includes several procedural safeguards to ensure a fair trial for the defendant.\textsuperscript{119} Many of the procedural requirements of the ICC mirror those in US courts, such as rights to a speedy trial, to counsel, to compel testimony of witness, and to remain silent.\textsuperscript{120} The ICC also enforces very similar evidentiary rules to the US Federal Rules of Evidence, importantly including discovery provisions requiring the prosecution to present the defendant with any exculpatory evidence it has against him.\textsuperscript{121} Because the ICC has such a strong adjudicative structure, coupled with its due process safeguards, it is a prime location for adjudicating international money laundering offenses.

\textbf{C. Alternatives to the ICC}

While the ICC presents itself as a strong candidate for taking jurisdiction over international money laundering offenses, there are other international adjudicative bodies that could potentially serve a similar role. The first of these bodies is the newly formed Panel of Recognized International Market Experts in Finance, or PRIME.\textsuperscript{122} PRIME, like the ICC, is also based in The Hague.\textsuperscript{123} PRIME’s mission is to “to assist judicial systems in the settlement of disputes on complex financial transactions.”\textsuperscript{124} PRIME began its operation in January

\begin{thebibliography}{99}
\bibitem{note1} INT'L CRIMINAL COURT, supra note 95.
\bibitem{note2} ROME STATUTE, supra note 109.
\bibitem{note3} Id. arts. 60-61.
\bibitem{note4} Id. art. 64.
\bibitem{note5} LANDRUM, supra note 106, at 10-11.
\bibitem{note6} Id. at 9.
\bibitem{note7} Id.; see also U.S. CONST. amend. VI.
\bibitem{note8} LANDRUM, supra note 106, at 10-11.
\bibitem{note10} Id.
\bibitem{note11} Prime Finance – About Us, http://www.primefinancedisputes.org/index.php/about-us
\end{thebibliography}
2012, making it one of the newest international bodies, and the newest international body to deal specifically with financial issues. Financial and market experts from around the world who serve to educate and train financial institutions and judiciaries on how to resolve complex financial transactional issues make up the organizational body of PRIME. PRIME also employs a board of experts who issue expert opinions meant to assist in resolving complex disputes between financial institutions.

PRIME appears to be the most knowledgeable international organization on the issue of complex money laundering offenses, however, it does not appear to be the ideal location for adjudicating such criminal offenses. PRIME lists arbitration and dispute resolution as two of the primary services it offers. It offers these services on a fee-based system, in which the two parties engaging in the arbitration or dispute resolution share the total costs. PRIME’s jurisdictional reach is entirely voluntary. Designed to serve private institutions as a mechanism for solving disputes involving complex transaction, its arbitration and dispute resolution services act as an alternative to domestic judicial systems. PRIME was not designed to adjudicate full trials, especially those of a criminal nature, which is necessary for properly adjudicating international money laundering offenses. The ICC, on the other hand, is meant to handle exactly this task. It is an international court system with the primary purpose of adjudicating criminal offenses.

Another downside to PRIME is the lack of an established structure for resolving such issues. Because it is such a new organization, it is untested and is unready to take on tasks beyond its original purpose. While it does offer arbitration and dispute resolution services, those are just two of the services it offers, and not its primary purpose. It is primarily an educational institution, designed to train judges and educate institutions on how to comply with domestic and international regulations. The ICC is staffed with competent judges whose primary role is to adjudicate actual offenses, not to educate the international community about legal issues. While PRIME could prove useful in training ICC judges to more effectively adjudicate money laundering cases,


126 PRIME, supra note 128.


128 PRIME, supra note 128.


adjudication of criminal activities is simply not within its structure. For the reasons stated above, PRIME would not serve as a superior alternative to adjudicating international money laundering offenses in the ICC.

The other international body that could potentially serve to adjudicate international money laundering offenses is the International Court of Justice, or ICJ. The ICJ is the judicial organ of the United Nations and serves to adjudicate violations of international law. The ICJ is also in The Hague, and has a well developed organizations structure and a solid record for successfully adjudicating violations of international law. While this seems like exactly what is necessary in order to properly try international money laundering offenses, the ICJ has a severe jurisdictional limit. As the judicial organ of the UN, the ICJ can only adjudicate issues in which both parties to the claim are states. This limitation means that the ICJ would be unable to hear cases involving charges brought against financial institutions or international criminal organizations engaging in money laundering. The ICC’s universal jurisdictional reach is what differentiates it from the ICJ, showing it is capable of properly serving the international community. While the ICJ would be an ideal location to adjudicate these offenses, the jurisdictional limitation undermines the entire concept of internationalizing the crime of money laundering, as states rarely actively engage in money laundering. The ICJ could serve to adjudicate disputes against states that harbor money launderers, however, it is not the ideal location to adjudicate international criminal money laundering offenses, as it lacks the jurisdictional authority to effectively do so.

While there are other international organizations that offer the potential to adjudicate international money laundering offenses, none offer the benefits that the ICC does. The ICC has very wide reaching jurisdiction, allowing it to hear cases involving citizens of nations around the world. It also offers a highly established and resource abundant investigative system. The ICC investigative system is one of the strongest in terms of its resources in the international realm. It also includes procedural safeguards that require prosecutors and investigators to show the judicial organ that there is a reasonable basis for pursuing the investigation. The judicial organ of the ICC is also rich in its resources and ability to hear cases. It offers three separate chambers that deal with each stage of the trial, including pre-trial disputes and appellate issues. Like the investigative organ, the judicial organ implements procedural safeguards intended to ensure fairness to the defendant, including a well-established set of evidentiary rules roughly based on the US Federal Rules.

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of Evidence. The cumulative effect of these resources and organizational structure is that no other international adjudicative body is as able to settle disputes involving international money laundering offenses as the ICC. For this reason, the ICC is the ideal international organization to investigate and adjudicate the internationalized crime of money laundering.

IV. CONCLUSION

As evident, international money laundering currently poses a major security threat to nations around the world. Its use by terrorist and criminal groups as a funding mechanism has become a global issue, and the need for international legislation and an international judiciary to adjudicate violations of such laws has never been more evident. In order to effectively combat international money laundering, the international community must codify a statute prohibiting the practice within the international system. The most effective international money laundering statute draws from domestic statutes that have proven effective in their respective nations, and includes regulatory provisions to punish financial institutions, as well. The international community must then enforce and adjudicate money laundering offenses in the international system. The most efficient body to adjudicate these offenses is the International Criminal Court because of its abundant resources and well-developed structure.