

---

# *Some Questions About the Definition of Terrorism and the Fight Against Its Financing*

Jean-Marc Sorel\*

## **Abstract**

*When the subject of terrorism is discussed in the context of international law, the issue inevitably arises of how to define 'terrorism'. A substantial number of international conventions have been agreed which deal with various aspects of terrorism, but in all these conventions terrorism is defined in a way that is specific to the subject-matter of the particular convention. No universal definition of terrorism can thus be discerned from them. This approach has proved adequate in the past, but recent events, and the reactions to those events in the context of international law, have made it necessary for a comprehensive definition to be agreed. The first part of the article discusses this issue generally, and suggests a tentative but comprehensive definition of terrorism. The second part of the article discusses the fight against the financing of terrorism. The article discusses the 1999 Convention for the Suppression of the Financing of Terrorism, and the work of the Financial Action Task Force of the OECD. The article concludes that, though much good work has been done, there is still a long way to go in the fight against the financing of terrorism.*

Since it is difficult to consider together all the aspects of this broad subject a choice must be made from amongst its themes. At first sight, it is apparent that there is a problem with the nature of the definition of terrorism in relation to international law. What is terrorism and what is international law in application to terrorism? We need to know what it is that we are fighting against and what it is that international law needs to encompass. It is therefore a precondition of any useful discussion of terrorism to define it. (Section 1).

In terms of the narrower field of the battle against the financing of terrorism, it seems that the instruments have not been adapted. The problem of the laundering of 'dirty' money is a big problem which has yet to be solved, quite simply because this money (analogous to the 'speculative bubble') is now intimately connected with the economic survival of people and even entire States (Section 2).

\* Professor of International Law, University of Paris 1 — Panthéon Sorbonne.

These two different aspects will be considered — the first one general and more theoretical, the second one essentially practical and focused.

But, first, it is necessary to be more precise about the way the subject will be considered. What is interesting (from US and European perspectives) is not the point of view of a European about the problems facing Europe (for example, the legal mutual assistance between US and Europe), but the point of view of a European about terrorism in general. Do we think in the same way about this general phenomenon? So this paper does not deal primarily with questions about Europe, but rather with questions about Terrorism and International Law today and how the US and Europe can push the margins of International Law (which is different to how the International Community can push the margins of International Law). To summarise, it is preferable to contrast ideas rather than compare laws—which has been done to a considerable extent already.

## 1 Which Definition for Which Terrorism?<sup>1</sup>

Although this is the first question which generally arises (and is the first question which should arise), it is shrouded in a mist of legal ambiguity.

### A *The Ambiguity of Terrorism*

The expressions *Terrorism* and *Terrorist* (except under the ‘reign of Terror’ during the French revolution) have always had a pejorative connotation. In other words, these expressions are used in order to oppose someone or something and to justify this opposition. This does not mean that the terrorist will be a terrorist for ever. If they win, they will become liberators. During the Occupation in France those who were called ‘terrorists’ by the German occupying army suddenly became the heroes of liberation, the Resistance fighters. Only the will of the victor could give the brief appearance of a conclusion. If this does not seem surprising when people have to resist what is characterised as ‘oppression’, it becomes trickier to evaluate within a democracy. Moreover, whatever is characterized as oppression must be objectively identifiable (in contrast to an ideal order) since people are prone to justify terrorism whenever a situation of domination occurs.

Historical events tend to demonstrate that terrorism has never ceased; it sails on the crest of ambiguity and appears in various forms.<sup>2</sup> In place of a single definition in political science we find expressions of varying degrees of generality (the ‘riposte of the weak to the strong’, the ‘atomic bomb of the poor’, ‘indirect strategy’ and so on). No

<sup>1</sup> This study partly re-uses our contribution at the Conference of the CEDIN Paris 1 of 14 January 2002 entitled: ‘Existe-t-il une définition universelle du terrorisme?’ (Does there exist a universal definition of terrorism?), *Le Droit international face au terrorisme* (2002), at 35–68.

<sup>2</sup> See our study: ‘Le système onusien et le terrorisme ou l’histoire d’une ambiguïté volontaire’ (‘The United Nations system and terrorism, the story of a voluntary ambiguity’), *L’Observateur des Nations Unies*, (1999) 6, at 32–33.

doubt the end of ideology, but not the end of History,<sup>3</sup> would suggest the possibility of isolating a phenomenon which was previously enveloped in the flame of revolutionary struggle. But despite the 'myth' of terrorism having given room to a cruel reality, the border between resistance and terrorism remains subjective and contested. The aphorism persists: 'one man's terrorist is another man's freedom fighter'. As X. Crettiez remarks: '*S'il est toujours possible de condamner sur le plan éthique une action terroriste, il est bien plus délicat de le faire sur le plan politique, lorsqu'elle reçoit un soutien populaire*'.<sup>4</sup> Democratic countries do not escape from this predicament.

It is difficult to navigate between the different forms of terrorism and terrorists, from those whose aims are relatively well defined, such as obtaining independence, autonomy or the recognition of minority or group rights — to those with more obscure outlines, such as civilizational struggle (religious, cultural or political) — to those which resemble private groups of criminals. The refusal to differentiate between these different forms of terrorism will make definition all more difficult.<sup>5</sup>

Terrorism remains a meaningful and multi-faceted phenomenon<sup>6</sup> which unfortunately fulfils the need for a certain fantasy, of polemic heroes toppling the established order, and which explains some of the empathy for these movements. The media attention now obtainable through terrorist action is tremendous, as we witnessed by the events of September 11, 2001. Whilst that attack might be interpreted at some level as an attack on modernity or modern values the tools of modern life became its weapons.

<sup>3</sup> See Fukuyama, 'Nous sommes toujours à la fin de l'histoire' ('We are always at the end of History'), *Le Monde*, 18 October 2001, which renews his famous (but very disputed) thesis on the end of History. This has also been illuminated by the discussion surrounding the 'clash of civilizations' thesis, developed by Samuel Huntington.

<sup>4</sup> 'If you can always condemn terrorist action in the field of ethics, it is much harder to do so in the field of politics, when it has popular support'; Foreword of 'Terrorisme, violence et politique', *PPS*, 29 June 2001 (859), at 4. This compilation of texts illustrates the most fatal attacks from 1973 to 1998 (the maximum of 477 having then died) and mentions an unknown person, named Bin Laden, as implied in the attacks against the American embassies in 1998. This addition would nowadays be useless.

<sup>5</sup> For an illustration, see the remarks of the President of the Spanish Government, J-M. Aznar, who assimilates Ben Laden to ETA and declares: 'Je ne fais aucune différence entre les terroristes. En faire, c'est commencer à perdre la lutte' (I do not make any difference between the terrorists. Making differences is to start losing the fight), *Le Monde*, 17 January 2002.

<sup>6</sup> The full list would be long and tiresome (and subjective), but it would include: terrorism with revolutionary claims (the Italian Red Brigades, the German Red Army Fraction, Action Directe in France, Communist Cells fighting in Belgium, the GRAPO in Spain), terrorism with nationalist or independence claims (IRA — at least until 1998 — in Ireland, the FNLC in Corsica (France), ETA in the Basque Country, the LTTE of Tamouls in Sri Lanka), fundamentalist terrorism ( Hamas, the Algerian GIA, Al-Qaeda, Kach in Israel) or terrorism of the far right (OAS in France, the American Patriots which represent nearly 500 groups through the United States) and those which are more or less criminalized (but this also relates to certain movements quoted previously) like in Colombia, the Luminous Path in Peru or the MTA in Burma. If the link between drug trafficking and terrorism is well known, we now have 'ecological terrorism' (Theodore Kaczynski, alias Unabomber), and 'Mega-terrorism' ('Hyperterrorisme') (according to the expression of F. Heisbourg in *Le Monde*, 13 September 2001, and the title of his book, *Hyperterrorisme: la nouvelle guerre* (2001)). The evolution of methods is also on the agenda e.g. chemical and biological weapons, nuclear power, weapons of mass destruction, cyberterrorism.

## B *The Difficult Definition of Terrorism*

At the level of international law the hijacking will highlight the use of conventions to fight against terrorism — until they have expanded in accordance with the problems to be solved and appear locally in a more precise and synthetic way. The technique is the same: the law is adapted to the predominant form of terrorist action at any given time. The problem facing a 'global' definition is the difficulty in taking account of special circumstances according to the type of action committed (e.g. hijacking), the nature of the victims (e.g. hostage-taking incidents) or the type of method of the terrorist action (e.g. explosives, financing). For all these reasons, the so-called universal conventions are negotiated and signed in specific frameworks depending on the appropriate field (ICAO, IMO, IAEA or the General Assembly of the United Nations for the cross-disciplinary themes).

Although it is noticeable that the framework of conventions is relatively well developed in terrorist matters,<sup>7</sup> this is not matched by a corresponding efficiency in the law itself. To the extent that definitions of terrorism do appear they are enumerative, descriptive, not to say a confused mix. Would it not be better to refer to the *approaches* of terrorism? The exclusion clauses included in some conventions aimed at specific cases (such as precisions peculiar to each regional convention) turn this dense framework into a relatively insipid one. It is noticeable that if clauses of depoliticization (regardless of motive) and extradition are able systematically to acquire a customary value, and particular clauses mentioned are found in almost the same identical framework in nearly all the treaties, the same is not true for terrorism itself.

Globally, in different international conventions, the identifiable criteria must be delimited. A distinction can be made between: *how* the act was undertaken and its consequences (the approach which has been preferred until now by Western countries); *by whom* the act was perpetrated; and the reasons *why* the act was committed (which looks to the motivation or legitimation for the act and to a preventive approach—which had been the leitmotif for a long time in Southern countries).

However, if people seem to agree on the method used in terrorism (indiscriminate use of violence) and on the qualification of the act (rather than the more precise question of its qualification as a crime and its penalty), on its consequences (serious public or private material or human damage), and on its aim (to spread terror by dissociating victim and target), the disagreement on its causes, its motivation and its legitimation and therefore also on the qualification of its perpetrators, still exists.<sup>8</sup>

In this respect, the project of a General Convention on Terrorism reflects an awareness of the aforementioned shortcomings. This project is founded upon the twelve universal conventions which are evoked in its preamble. It categorises as

<sup>7</sup> And is supplemented frequently since three regional conventions were adopted between June and July 1999.

<sup>8</sup> From the political point of view, the invariants seem to be: the indiscriminate use of violence, disjunction between the victim and the target, use of a kind of scenography, like the systematic opposition with the State; See Crettiez, Foreword of 'Terrorisme, violence et politique', at 5, *supra* note 4.

'criminal and unjustifiable' all actions, methods and terrorist practices wherever they occur and whoever the perpetrators are, and includes those which are committed directly or supported indirectly by states. According to a standard technique the first Article repeats the definition of the main words used in the convention but doesn't give a definition of terrorism or of terrorist acts.<sup>9</sup> The second Article, in contrast, describes terrorist acts and returns to the enumerative technique which has been mentioned. The project of the convention continues according to a well-known development: first by qualifying terrorist acts as criminal offences under domestic law (Article 4); followed by the clause of non justification or of depoliticization<sup>10</sup> (Articles 5 and 14, widening the twelve previous conventions) which, however, is re-politicised by Article 15 which excludes an obligation to extradite for racial, religious, national, ethnical or political considerations. Then there is a clause on the establishment of the jurisdiction of the state and mutual legal assistance (Articles 6 and 13); the exclusion of terrorists from using the right of asylum (Article 7), legal entities (Article 9); international human rights law (Articles 10 and 12); the exclusion of the armed forces in case of armed conflict and the famous clause : *aut dedere, aut judicare*, which treats the extradition or prosecution of nationals (Article 11) and of which one notices (Article 17) that a legal right is included in the existing or forthcoming treaties and the convention itself-allowing it to stand as an extradition treaty if necessary. The settlement of disputes concerning the application or the interpretation of the convention also reiterates the previous system; it involves the arbitration and the submission of the case to the Court (ICJ) within six months by one of the parties if the previous proceedings fail.<sup>11</sup> It is noticeable that this disposition is the only one that seems to be subject to a reservation (Article 23). Twenty-two ratifications will be necessary for its entry into force.<sup>12</sup>

### ***C Do We Need Any Definition of Terrorism?***

The Security Council discussed this question during the adoption of Resolution 1373 in September 2001. One shouldn't try to define terrorism in order to reach a quick agreement; to do so runs the risk of getting into deeper and deeper water. It is a temptation that should be avoided, in the way — neatly summarized by F. Rachline — that advancing the provocative behaviour of a woman who has been raped instead of studying the behaviour of the rapist should be avoided.<sup>13</sup>

The redundancy of a definition has some support, in a somewhat different manner,

<sup>9</sup> A/C.6/55/L.2, Report of 19 October 2000, at 38, §34.

<sup>10</sup> These acts can in no circumstance be justified by considerations of political, philosophical, ideological, racial, ethnic, religious nature or others similar reasons (Art. 5).

<sup>11</sup> This is, in particular, the system which exists in the Convention of Montreal of 1971 on which the Court had to decide in the Lockerbie cases.

<sup>12</sup> The Convention is supplemented by three appendices relating to the exclusion of the political character of the offence aimed at Article 14 (Appendix 1), on mutual legal assistance aimed at Article 13 (Appendix 2), and to extradition aimed at Article 17 (Appendix 3).

<sup>13</sup> 'Le terrorisme est un totalitarisme' (Terrorism is a totalitarianism), *Le Monde*, 6 Novembre 2001.

in the doctrine of International Law. R. Higgins provides a good illustration of it. To introduce her study on terrorism and international law, she asks:

*'Does the theme of 'terrorism' really constitute a distinct topic of international law? (...) Is there an international law of terrorism; or merely international law about terrorism? Is our study about terrorism the study of a substantive topic, or rather the study of the application of international law to a contemporary problem?'*<sup>14</sup>

She notices the great problems that are raised by the definition of terrorism, a comparison with the difficulty facing those who were to define the concepts of 'minority', 'people' or 'aggression'. She finally deduces that terrorism is a *term of convenience* that has no particular juridical meaning but that it is just a *convenient way* to describe some situations.<sup>15</sup>

These observations are correct as far as they go, but if one keeps searching for acts of terrorism without defining terrorism itself, then its denunciation is encouraged more than its understanding by confusing the reasons for an action with its explanation, definition and support. In place of proper definitions we have to cope with descriptions of terrorist behaviour, which is more a social judgment than the comprehension of a global phenomenon. The subject as a whole is based on an excessive, repetitive and sometimes meaningless terminology.

In spite of these hesitations, it is true that the will to define terrorism exists today. But the agreement on the need for a definition is not matched by an agreement on what its content should be. Without such agreement terrorism will be a feature of daily legal dispute, a phenomenon which is denounced as shameful and reprehensible by all but understood by none. Its legal value will be instrumental and incantatory, yet inefficient. As such a kind of *lex talionis* may develop due to the absence of even an approximate multilateral definition. One could rightfully denounce the idea that the United States has a natural right to create this law. It is surely necessary therefore to establish a definition in this area despite the many obstacle to achieving it, and international law should be pushed in that direction.

#### **D How to Define Terrorism?**

So, the definition of terrorism must be divorced from the notion of its legitimation. It can only be established in accordance with the perceived order of the international community as any given time. If the disparaged cause is later considered benign, the 'terrorism' remains an illicit act if the means of terror were used against a 'representative' public order — i.e. other than one based on a regime characterised as oppressive and illegitimate. Yet since this later aspect remains ambiguous, the risk is obvious; namely that the powerful countries set themselves up as guardians of an international order that they define in their own image. The aftermath of the events of September 11, 2001 illustrate the reality of this risk.

Moreover, the analysis of terrorism in political science often highlights the political

<sup>14</sup> 'The General International Law of Terrorism', in R. Higgins and M. Flory (eds), *Terrorism and International Law* (1997) at 13.

<sup>15</sup> *Ibid.*, at 27–28.

reversibility of this public order depending on the (good-) will of the leading nations. In a somewhat contradictory sense, the analysis also fears the immutability of an order which would render any action more difficult-preventing the immediate qualification of any political violence as *terrorist*. If public order in international society is short-lived and politically reversible (Bin Laden was first a liberator then a terrorist, whereas Nelson Mandela has moved in the opposite direction), it is apparent that it is slowly moving towards a structure on the basis of values which must not be infringed, particularly through the emergence of *jus cogens* or the definition of international crime in which terrorism could be included.<sup>16</sup> The structure built on these restrictions is currently more a 'police state' which changes according to the perceived troubles, rather than a proper normative order.

For a satisfactory definition, one must distinguish the *attitude* of terrorism (in terms of an illicit attitude) from terrorist actions or *methods* (which will be qualified as terrorist if the aim is to spread terror). Only the impact of the act or method is to be taken into account because it conditions the terrorist *fact* and can be assimilated to a common law crime (whether it is e.g. a bomb attack, assassination, offence against property). This effect can also be characterized by a terror that inculcates and conditions a feeling of uncontrolled fear in the mind of the population, even inducing psychosis. It is necessary to define terrorism in contrast to a state of public order in order so as to avoid evoking the notion of terrorism vis-à-vis acts against an oppressive regime. It is also hypocritical and counterproductive to avoid discussion of the causes of terrorism—once established they can be excluded from the language of justification.

It does not seem useful to specify the type of political aim, the means used or to qualify the nature of the perpetrators (by country, group, individual); they are already qualified by their objective, which is to spread terror. The removal of redundant provisions in existing texts could be of great help for a more harmonious application of the concept in general.

Although it is clear that no perfect definition could be given, an attempt might be made along the following lines: International terrorism is an illicit act (irrespective of its perpetrator or its purpose) which creates a disturbance in the public order as defined by the international community, by using serious and indiscriminate violence (in whatever form, whether against people or public or private property) in order to generate an atmosphere of terror with the aim of influencing political action.

<sup>16</sup> About the concept of Public International Order, see the study of Combacau : 'le droit international : bric-à-brac ou système?', *Arch. Phi. Dr* (1986) at 85–105; or, more recently, the study of Ruiz Fabri : 'L'ordre public en droit international', in *L'ordre public : ordre public ou ordres publics, ordre publics et droits fondamentaux* (2001), at 85–108; D. Alland, 'De l'ordre juridique international', *Droits* (2002) 35, at 81–101.

## 2 The Difficult Fight against the Money Laundering of Terrorism

Whilst the Convention on the elimination of the financing of terrorism entered into force last April, the efficiency of its means is doubtful. Although emphasis should be placed on the work done by the Financial Action Task Force on Money Laundering (FATF), an intergovernmental organism close to the OECD,<sup>17</sup> which is at the heart of the matter in terms of the measures it recommends against the financing of terrorism, it is right to ask whether the laundering of the capital associated with terrorism has not become, as for other criminal aspects of laundering, a kind of necessary evil — so deeply is it rooted in the processes of globalization. As a result, the fight against the financing of terrorism seems affected by the same chronic ineffectiveness that prevails in this field more generally.

### *A The Basis: The International Convention for the Suppression of the Financing of Terrorism*

The Convention of 1999 to crack down on the financing of terrorism aims to complete the package of Conventions on terrorism. Its approach is rather classical and it benefits from the measures that have evolved to combat terrorism and which were mentioned above (the definition of terrorist acts, clauses of judicial cooperation, the principle *aut dedare, aut judicare*, the clause of depoliticization). This convention permits punishment of an offence as well as the intention to commit or complicity in an offence (Article 2). Like the previous conventions, it aims for ‘tight control’ of all the protagonists in every possible way so as to prevent them escaping from justice. Article 8 deals with the crux of the matter of financing — permitting the state to take all necessary measures in order to freeze, seize, and detect the origins of funds which could assist terrorism, and demanding that domestic legal principles be adapted to the framework of the Convention (more precise measures found in Article 18). Among other things, it is impossible to hide behind the rule of bank secrecy (Article 12(2)) or take refuge behind the simple fiscal offence of refusing mutual legal assistance or extradition (Article 13). What the Convention claims as priorities are ‘feasible measures’ (Article 18(2)(b)), of the identification of traders, cross-border transportation (which makes it unorthodox) and the conservation of archives. Nevertheless in Article 15 a clause can be found which enables a State *not* to act if it considers that the request for extradition for offences or for mutual legal assistance has been made for the purpose of prosecuting or punishing a person on account of this persons’ race, religion, nationality, ethnic origin or political opinion. Once again, the delicate political conception of terrorism is reintroduced and, without any clear and accepted definition, can be interpreted in various ways.

So the Convention must be considered as a framework convention which is to be

<sup>17</sup> The FATF includes 29 member States and two international organizations (represented by the European Commission and the Gulf Co-operation Council).



added to the 'collection' of the existing conventions on terrorism. Even if it aims at tackling the question of its financing in particular, few new measures are actually devoted to it specifically; it consists mainly in the reiteration of standardized clauses which can be found in all the conventions. For this reason, one must turn towards more specialized and operational organs to comprehend the reality of the movement against the financing of terrorism—at the heart of which is the FATF.

## **B *The Abundant Normative Production of the FATF***

The FATF has adopted a text including 40 recommendations to fight against the laundering of capital,<sup>18</sup> a text completed with some interpretative notes and, since the attacks of September 11, 2001, with the addition of a new text adopted on 31 October 2001 concerning eight special recommendations on terrorist financing.

The 40 recommendations established in 1990 are considered as a kind of Universal 'Guide' which enables the transcendence of distinctions between different judicial systems. They were established at a time when the fight against the laundering of capital essentially concerned the drug trade. Since then they have established a series of measures to confiscate property, identify customers, conserve documents, adopt appropriate legislation, and develop mutual legal assistance and international cooperation. All actors in the financial system are implied and the definition of the financial institutions concerned is very wide. Through the interpretative notes that have been added to the text, the FATF tries to refine its perception of the operations concerned, specifically concerning the activity of the foreign exchange offices.

The additional eight recommendations of October 2001 restate rather than innovate the most relevant measures expressed previously in the framework of terrorism. The first one of the eight recommendations simply demands the ratification of the Convention of 1999 on the financing of terrorism, providing for its entry into force and the respect of the terms of Resolution 1373 of the Security Council. The recommendations following ask the States to adopt various measures: to establish as a criminal offence the financing of terrorism, to freeze the funds associated with terrorism, to declare the use or transfer of suspected funds, to widen the mutual legal assistance (notably by facilitating extradition), to ensure that the 'middle-men' in the transfers of funds are properly subjected to the recommendations of the FATF and that

<sup>18</sup> In its first Report of 1990, the FATF defined laundering as 'the conversion or transfer of property, knowing that such property is derived from a criminal offence, for the purposes of concealing the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions; the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing at the time of receipt that such property was derived from a criminal offence or from an act of participation in such offence'. See [www1.oecd.org/fatf/pdf/ar1990-en.pdf](http://www1.oecd.org/fatf/pdf/ar1990-en.pdf). For the I.M.F.: 'Money laundering involves transforming the proceeds of crime into usable form and disguising then illegal origins. After the criminal proceeds are introduced to the financial system, they are hidden — laundered — through a variety of transactions and financial vehicles and finally invested in financial and related assets', see Aninat, Hardy, Johnston, 'Combating Money Laundering and The Financing of Terrorism' 39 *Finance and Development* (September 2002) 3, at 44.

the principles are clearly identified, and to supervise the vulnerable non-profit organizations.

The recommendations are backed up with a self-assessment questionnaire that the States must have returned not later than 1 May 2002 and which enables each State to examine its legislation and the efficiency of its own measures in the fight against the financing of terrorism. Evaluation consists in particular in the degree to which international instruments have been applied (Convention of 1999, Resolution 1373 and others), the degree to which the proscribed acts have been criminalized, the extent to which the means for the detection of organizations likely to harbour terrorists have been implemented, the extent of international mutual assistance or even control of non-profit organizations which are particularly vulnerable. The questionnaire brings into focus the current state of play in the application of measures and highlights those which will probably be taken by states in the future.

Moreover, the eight recommendations are backed up with guidance notes for the practical application of the special recommendations on terrorist financing as well as for the self-assessment questionnaire. These guidance notes are supposed to be pedagogical since they explain aspects such as in what the ratification of a treaty consists, and the distinction which must be established between freezing, seizure or confiscation of the 'incriminated' property. It also stresses that financial institutions include both the banking system and the non-banking system institutions. International cooperation is at least made explicit by reiterating that political motivation can not be an excuse to refuse the extradition of those suspected of terrorist acts.

If the whole framework of measures were applied correctly, it could be efficient but does not constitute an original mode of prescription; in comparison with what is already known in the international field there is little that is new. Furthermore, judging from what has already been realized about laundering, it seems that it will only ever be partially efficient.

Nevertheless, and only for the year 2002, the FATF seems to have been very active in the fight against the financing of terrorism, the laundering of capital and the Non-Cooperative Countries and Territories.<sup>19</sup> Since February 2002, the FATF has been engaged in an assessment exercise on the application of the recommendations adopted in October 2001, in particular through 'The self-assessment questionnaire' mentioned above. At first sight the mobilisation is global since the FATF works with the United Nations, the Member Countries of the G 20 Finance Ministers and with

<sup>19</sup> For detailed information see the site of the OECD: [www.oecd.org/](http://www.oecd.org/). Among the 19 Non-cooperative Countries and Territories on the list at the beginning of 2002, some were reinstated because of their fast progress (Hungary, Saint-Kitts and Nevis, Lebanon, Israel), whereas others remain on the list (in particular Nauru but also Guatemala, Philippines, Indonesia, Burma and Egypt). In June 2002, the NCCTs were still 15. Existence of Shell-Banks, a kind of empty shell, is one of the reasons to keep out some countries like Nauru. Among the States that satisfy the criteria perfectly, we find France and the Netherlands, followed by Belgium, Luxembourg, Canada, Spain, United Kingdom, Italia and Japan. The United States, Brazil, Denmark are slightly worse than Greece.

various international financial institutions.<sup>20</sup> The problem is that one may again encounter the same obstacles as in the fight against laundering in general.

### C *The Non-Distrainable Laundering of Dirty Money*

The laundering of capital is not a new phenomenon and its role in the financing of terrorism is only an illustration of it. The I.M.F. estimated the volume of laundered capital to be in a range of 2 to 5% of the World GDP which is a considerable amount even at the lower end of the spectrum.<sup>21</sup> It represents about 500 billions Dollars laundered per year.<sup>22</sup> Whatever it is precisely, the technique of laundering is tried and tested and well known. It is firstly a question of investment which consists in introducing illegally obtained benefits ('dirty' money) into the financial system. Then, the most simple method is to divide up large amounts of cash into many parts and to put them in different bank accounts in different banks and different places (but generally in the country in which the offence has been committed). After the investment, comes the question of 'stacking up' which aims to confuse the issue by moving the illegal funds away from their original source. The numerous sums invested before will be moved and converted — quickly, moving them to different accounts (by simple dummy entries) or by simulating a payment of goods or services (off-shore tax 'havens' are very useful for the launderers at that stage). To use this 'clean' money, a final stage is necessary: to integrate these funds into legal economic activities. At that stage, the unstable or developing economies are preferred because they are less finicky and greedier for capital.

To summarise: 'Cash is introduced into the banking system by people far removed from the predicate criminal activity (the activities that give rise to the cash or other valuables to be laundered); layering is achieved by splitting the funds among many small, seemingly innocuous agents (known as "smurfs"), creating a misleading paper trail, and getting funds abroad as soon as possible.'<sup>23</sup>

What is most striking in the activity of laundering and what, as a consequence, renders the fight against it very difficult, impossible even, is the sheer variety of actors and instruments which are involved. Bankers and the financial consultants are the first professionals to whom appeal is made in this operation, professionals who, in accordance with the recommendations of the FATF, must have the possibility of identifying their customers and checking the integrity of the businesses they have to

<sup>20</sup> A Work programs prepared by the I.M.F. was endorsed by the International Monetary and Financial Committee in its November 2001 Meeting. The I.M.F., the World Bank, the FATF, and other Standard setters (The Egmont Group, the Basel Committee on Banking Supervision and the International Association of Insurance Supervisors) are preparing a common comprehensive assessment methodology for a global standard. It can be thought of as a detailed exposition of the specific steps needed to implement the FAFT 40 (+8) recommendations.

<sup>21</sup> *I.M.F. Survey*, 5 August 1996, at 246.

<sup>22</sup> These data are approximate and vary according to studies. Some estimate that the annual figure would rather be located around 1500 billion dollars (*Financial Times*, 24 September 1999, or the web-site: [www.transnationle.org](http://www.transnationle.org)).

<sup>23</sup> Aninat *et al.*: 'Combating Money Laundering and the Financing of Terrorism', at 44, *supra* note 18.

deal with. Quite simply, one has only to separate the invested sums in order to escape from the minimum required by the obligation to declare.

Moreover, the activity of ‘property management’, which is often used to diversify the investments at the second stage, benefits from more wholesale discretion. Other actors less susceptible to control intervene: e.g. security, stocks and shares brokers or raw materials brokers who sometimes work outside of any financial institution. In a similar way, money remittance companies are sometimes used: e.g. the case of the Hawala/Hundi system that has a strong foothold in Central Asia (India, Pakistan).<sup>24</sup> Finally, foreign exchange offices, frequently aimed at by the FATF, are still a ‘weak link’ of the chain in terms of control.<sup>25</sup>

To the financial and banking systems can be added the insurance professionals who, thanks to the numerous contracts of adjustment, have a quite wide range of means to launder money (e.g. unique bonus contracts, capitalisation vouchers with bearer shares easily negotiable). In the non-financial professional activities, lawyers, notaries, accountants and estate agents are also much sought-after covers. These professions widely use ‘client confidentiality’ and still work discreetly in spite of more restrictive legislation.<sup>26</sup> In addition there is the phenomenon of corruption in the administrative or political institutions in some countries.

To complement this polyphony of actors, there is a large variety of instruments at their disposal. Those of the banking or financial sectors are well known: banking or credit operation, mandates, securities stocks and shares payable to bearers, credit transfers, bills of exchange; instruments, sometimes specific to certain countries, such as the trust company or the traditional dummy company, can also be found in addition to the technique of finding loopholes in legal proceedings.<sup>27</sup> But, above all, these instruments are used on the free market, and so largely escape from the control of states as well as from true international regulation (e.g. the share market, the derivatives market, foreign exchange markets).<sup>28</sup>

Whereas the instruments proposed in different texts (FATF, Convention of the United Nations, Resolutions) refer to the principle of territoriality and widely recommend cooperation and increasing mutual assistance to avoid this obstacle, the

<sup>24</sup> This system, which has existed since the Ottoman Empire, allows asking a middleman to furnish funds in a Country which will be paid back without any effective transfer. Often, the transaction is coded and localisation is impossible. In this system: ‘My word is my bond’.

<sup>25</sup> See in particular the *Report of the FATF on typologies 1997–98*, items 30 to 32.

<sup>26</sup> This is the case in Europe where Directive 91/308/CEE of the Council relating to the Prevention and the use of the financial system for the purposes of the laundering of capital imposes from now on the obligation on these professions to declare suspicious activity (article 2a). Nevertheless, the FATF thinks that discretion will remain the rule for a long time, see *Annual report on the typologies 2001–2002*, at 26.

<sup>27</sup> The Tax Paradise is of course the ideal place. The FAFT counted approximately 25 of them this year (which shows a reduction because they were 50 in 1995), but this figure masks a technique which is increasing in scale: the use of offshore companies of which there are about 300.000 world-wide, see P. Broyer, *L’argent sale* (2000) at 246.

<sup>28</sup> See our study, ‘Les Etats face aux marchés financiers’ (States Facing the Financial Markets), *Souveraineté étatique et marchés internationaux à la fin du 20<sup>ème</sup> siècle, Mélanges en l’honneur de Philippe Kahn* (2000), at 507–543.

money itself falls through a gap created by the inability of the judicial framework to keep abreast with economic reality. It should not be forgotten that — before September 11, 2001 — the United States and the United Kingdom were strongly against some of the proposals which aimed at giving special competence to the future International Criminal Court in this field.<sup>29</sup>

This is not the place to undertake an exhaustive study on laundering and its possibilities. Put simply, it is noticeable that the diversity of actors, intermediary protagonists, instruments and places make its comprehension a very delicate task. New restrictions are followed by new ‘inventions’ to escape from the original restriction.<sup>30</sup> At the end of the chain, entire sectors of the economy (as in Russia),<sup>31</sup> indeed entire countries, are pervaded by this type of ‘dirty’ money, in such a way that the equilibrium becomes precarious and, like ‘floating capital’, such money is said to be indispensable to the economy. The price of globalization is that even if a reaction to terrorism was to increase the measures against this tendency, this would not change the general trend towards a more and more fluid circulation of capital and financial products.

### ***D An Observation of the FATF with Mixed Results***

The observation established by the FATF at the end of June 2002 is quite clear: if the fight against laundering in general is on the right track — which does not mean that the measures are completely efficient — its application to the financing of terrorism still seems to be in its infancy.<sup>32</sup> It is true that the Countries which could be denounced as ‘bad students’ (Saudi Arabia, Yemen, Pakistan or the Emirates) are also those which, nevertheless, make an effort to cooperate by notifying the movement of suspicious funds, and keeping an eye on the charity activities of non-profit organizations or the ‘Hawalas’. In any case, it seems that the terrorists’ financial machinery has countless resources. To put it plainly, the way their behaviour is able to adapt to and abuse legislation within the framework of laundering in general renders such legislation somewhat redundant, especially in the face of financial and economic globalisation. It is apparent that States have often hesitated to equip themselves with restrictive financial legislation because the law can become an obstacle to the free flow of capital, capital which is indispensable to the economy. This reality remains true today—in the fight against financing terrorism it is difficult to persuade states that can ill afford to lose vital income.

<sup>29</sup> See C. Cutajar, *Le blanchiment des profits illicites* (2000), at 6 ( Foreword of Mireille Delmas-Marty).

<sup>30</sup> Just as the by-products on financial markets appeared following the regulation suggested by the Cooke Ratio which obliged the banks to have a minimum of its own capital stocks in their credit policy.

<sup>31</sup> Of which one estimates that 40% of its economy could be controlled by doubtful capital. In 1998, the I.M.F recommended the closing of 1500 banks, which would undoubtedly have been suicidal for the Russian economy (even if realistic).

<sup>32</sup> For example, the FATF has removed Russia from the list of ‘Rough Countries’ at the beginning of October 2002, just because Russia made some investigations but with no results! So, if it is only necessary for a country to have legislation against laundering and to make some investigations about that in order to be off the list, the problem remains the same.

As Aninat remarks: ‘... Money laundering is intrinsically global. If one Country or Jurisdiction tightens its regulation on money laundering and the financing of terrorism, these activities will quickly shift to a less regulated environment.’<sup>33</sup>

According to the Expert Report (Directed by Michael Chandler, President of the Group in charge of the application of the sanctions of the United Nations) addressed to the Security Council at the beginning of September 2002, terrorist organizations will have succeeded in transferring most of their funds towards countries where the legislation is more flexible, in Africa, in Asia, and in the Middle-East.<sup>34</sup> For instance, although most of the 112 million dollars which are supposedly owned by the Al-Qaeda organization was frozen just after September 11, banks and the financial institutions seem quickly to have loosened their grip.<sup>35</sup> It is hard to make the distinction between the transfer of funds for charitable reasons and those that could be used for other financing. The distinction between capital used for current payments and capital for a profit-making purpose is also difficult to make.

So, concerning the fight against the financing of terrorism, we seem to be confronted with the same limits as those encountered in the laundering of capital in general. And it is not clear that a legal answer is sufficient.

\*

To conclude, we can find a common point between the problem of the definition of terrorism and the problem of the fight against the financing of Terrorism: in both cases, we are confronted with a reality more determined than any legal framework. To illustrate the limits of any legal framework: the law, which can provide only a snapshot of reality, can only be effective if society as a whole adapts and its legal mechanisms evolve. This conclusion is rather pessimistic and could be understood as an acknowledgement of defeat. It is certainly easier to ask the questions than to answer them.

In terms of adapting to the circumstances it is very difficult for the International Community as a whole to push the margins of International Law. So unless you believe that international law can be represented by one state alone, little may be changed. This is perhaps how the United States thinks today.<sup>36</sup>

<sup>33</sup> Aninat *et al.*: ‘Combating Money Laundering and the Financing of Terrorism’, at 44, *supra* note 18; and they remark: ‘In a globalizing world, it can be quite difficult to distinguish when a foreign business is entirely honest and when it is involved in a scam to launder money’, *Ibid.*, at 45.

<sup>34</sup> The Press release carries the title: ‘Un expert de l’ONU prévient qu’Al-Qaida dispose des ressources nécessaires pour financer d’autres attaques terroristes’ (Al-Qaeda has necessary resources to finance other terrorist attacks) ([www.un.org/french/newscentre](http://www.un.org/french/newscentre)).

<sup>35</sup> Switzerland, Germany, Luxembourg are aimed at in particular, which seems to contradict the Report of the FATF (see above).

<sup>36</sup> This remark refers to numerous discussions during the Symposium about the war against Iraq. This was a topical subject but was not directly part of the subject proposed by the symposium-unless we consider that weapons of mass destruction in Iraq can be used by terrorists, which is possible but not proven.